



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 330 OF 2019

ACQUALINE DISTRIBUTORS LTD.....PLAINTIFF/APPLICANT

-VERSUS-

COASTAL BOTTLERS LTD.....DEFENDANT/RESPONDENT

R U L I N G

1. By an application dated 28th August, 2019 brought under Order 51 Rule 1 of the Civil Procedure Rules, 2010 Sections, 1A, 1B, 18, 63(e) & 89 of the Civil Procedure Act, the Plaintiff/Applicant seeks orders for the withdrawal of the suit from the lower court and transfer to this court for hearing and determination.
2. The application is premised on grounds inter alia that; the Plaintiff/Applicant filed Civil Suit in the Magistrate Court, **CMCC NO. 418 of 2012 Msa, Acqualine Distributors Ltd-vs-Coastal Bottlers Ltd** in the chief magistrate's court which has become an inappropriate forum on account of the pecuniary jurisdiction of that had been outstripped by the further amendment of the plaint dated 19/7/2019) which pleads and prays for a sum of Kshs.54,088,307/= on account of that amendment, the applicant contends, this court is the proper forum to resolve the dispute and that the Respondent stands to suffer no prejudice if the orders sought are granted and lastly that the ends of justice will be served best by granting the orders sought.
3. The application is further supported by the affidavit sworn by **Hazel Koitaba**, the Applicant's director sworn on 28th August, 2019 in which he reiterates the grounds stated in the body of the application. The key ground in the affidavit is that there were irregularities on the pleadings filed by the Applicant's erstwhile advocates in reflecting the actual amount claimed necessitating the amendment of the Plaint. The amount of special damages now claimed exceeds the pecuniary jurisdiction of the Chief Magistrate's court hence the need to have the suit transferred to this court.
4. In response and opposition to the instant application, the Defendant/Respondent filed grounds of opposition dated 31st October, 2019. The grounds can be summarized to be that the Applicant by an application dated 29th August, 2019, before the lower court, sought and was allowed to amend its plaint. That amendment invited the application of the doctrine of relation back to the effect that, once amended, a pleading speaks from the date it was originally filed. Consequently, the respondent maintained that because the Plaint seeks special damages of Kshs. 54,088,307/=, way beyond the lower court's jurisdiction, the suit was *per se* a nullity. According to the Respondent, this court cannot purport to transfer a suit which is a nullity to itself and the premises of the prevailing circumstances dictate that the suit be dismissed with costs.
5. In response to the issues raised by the Defendant Respondent, the Plaintiff/Applicant filed a further affidavit sworn on 4th February, 2020 by its advocate on record, Benjamin Osundwa Amadi. He reiterates that the claim indeed exceeded the pecuniary jurisdiction vested on the chief magistrate's court pursuant to the amendment but his key contention is that the doctrine of relation back does not apply to the instant case. The counsel does no more than annexing to his affidavit the copies of the Plaint filed in the lower court and the subsequently amended copies thereto.
6. With the consent of the parties, this court on 12/11/2019 directed that the application be canvassed by way of written submissions which were later highlighted by respective counsels of the parties on 7th February, 2020. This court has had the benefit of considering those submissions which I summarise as below.

The Applicant's Submissions

7. In its submissions, the Applicant identifies three issues for determination which are; whether the Chief Magistrates Court has pecuniary jurisdiction, whether the high court has power to transfer the suit and lastly the import of the doctrine of relation back.

8. On whether the chief magistrate's court is vested with the requisite jurisdiction to determine the case filed before it, the counsel for the Applicant submitted in reliance to Section 7 (1)(a) of the Magistrates Court Act No. 26 of 2015 that the jurisdiction vested on the magistrate court doesn't exceed Kshs.20 million. Without jurisdiction, the court cannot do better than downing its tools. In support of the argument the counsel relied on the case of *Owners of Motor Vehicles "Lillian S"-vs-Caltex Oil Kenya Ltd (1989) KLR 1*.

9. The second issue is on the ability of this court to transfer the suit. On this issue, the applicant relies on Section 18(1) of the Civil Procedure Act which creates an avenue for the high court to transfer any case pending before it to any other court dressed with the competent jurisdiction for expeditious disposal of the or the vice versa as the case may be. Section 1A and 1B of the Civil Procedure Act which provides on the overriding object of the court to expeditiously dispose the matters before it is also relied on. The learned counsel for the Applicant further relied on the cases of *Magnate Ventures Ltd-vs-Kenya Ferry Services Limited (2016) KLR* and *Joseph Muthee Kamau & Another-vs-David Mwangi Gichuru & another [2013] eKLR*.

10. Lastly on the import of the doctrine of relation back, the counsel relies on the case of *Phoebe-vs-James Kamore Njomo* where the court cited with approval the case of *South British Insurance Co. ltd-vs-Samiullah [1967] EA 659*. The court therein held that; even if an amended plaint does relate back to the date of the original plaint for some purposes, such relation back cannot operate so as to preclude a Judge from taking note of the amendment if such date is material to the issues for decision.

The Respondent's submissions

11. The Respondent's submissions are straight forward and takes the view that a case filed before a court without jurisdiction is therefore a nullity, is dead and cannot be remedied by a transfer. To that counsel, the only recourse available to the applicant is to withdraw the suit and file a compliant one in the court seized of jurisdiction since in aiding its transfer this court will be perpetrating an illegality which cannot be whitewashed by invoking the oxygen principle or reliance on Article 159 of the constitution. In support of his submissions, the counsel for the Respondent relied on a plethora of judicial precedents including the cases of *Joseph Muthee Kamau & another -vs- David Mwangi Gichuru & Another [2013] eKLR*, *Thomas Owen Ondiek & another-vs-National Bank of Kenya Limited & another [2015] eKLR*, *Phoenix of E.A Assurance Company Limited-vs-S.M Thiga t/a Newspaper Service [2019] Eklr*, *Equity Bank Ltd-vs-Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR* and *Kenya Ports Authority-vs-Maison 425[2014] eKLR* in which the position was taken that a suit filed in a court without jurisdiction is a nullity and incapable of being transferred.

Analysis and Determination

12. After perusing the pleadings in this case and the written submissions filed by the parties herein, I find that the bone of contention and issue for determination between the parties in this instant application is whether or not this court should order the transfer this suit to itself for hearing and determination, or better still, whether the Plaintiff/Applicant has made out a case by providing this court with sufficient grounds to transfer the instant suit to itself.

13. Section 18 of the Civil Procedure Act which empowers this court to order transfer suits stipulates as follows:

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(a) ...

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same; or

(ii) ...

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

14. Under **Section 18** of the **Civil Procedure Act**, the High Court in its supervisory jurisdiction is empowered to withdraw or transfer to itself or to other courts subordinate to it for trial and final disposal suits instituted in the subordinate courts and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. When the transfer is at the instance of a party then the burden lies on the applicant to make out a strong case for the transfer.

15. In the case of **David Kabungu vs Zikarengu & 4 Others, Kampala HCCS No. 36 of 1995**, the court had the following to say on the circumstances under which the order to transfer suits may be granted.

“A mere balance of convenience in favour of the proceedings in another court is not sufficient ground thought it is a relevant consideration. As general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff leaving him to seek his remedy in another jurisdiction....it is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There

are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused”.

16. In the instant case, the Applicant has stated the amount claimed in the amended plaint is for Kshs. 54,088,307/= which sum is way beyond the pecuniary jurisdiction of the Chief Magistrate’s court hence the need to transfer the suit as vested under Section 7(1) of the **Magistrates Court Act** and capped not to exceed KShs.20 Million. That puts it beyond doubt that the suit claiming Kshs. 54,088,307/= filed before the magistrate’s court is before a court without jurisdiction. With such established position, the question that remains is if a suit filed in a court devoid of jurisdiction to try it can be transferred from such a court. In interrogating that question I bear in mind that when the suit was filed, the court was properly vested with jurisdiction to entertain it which situation was changed by the amendment.

17. On whether the Applicant has established a case for grant of transfer of suit to the High Court, the Respondent in its response avers that a suit filed without jurisdiction is a nullity in law and therefore there is nothing to be transferred to this Court, the Respondent further avers that by virtue of **Section 18 of the Civil Procedure Act**, power to transfer suits cannot be exercised in matters filed without jurisdiction. I have considered the authorities relied on by the Defendant/Respondent and fully appreciate the reasoning therein advanced. However, I would respectfully depart from the position taken on this question on the precedents cited. The explanation given by the applicant is that the filing of the suit before the lower court was by inadvertence by its erstwhile counsel in calculating the amount claimed for which the party should not be penalized. I do not wholly buy this argument of blaming the former advocate which appears to me to be the excuse that the reason. The copies of the plaint exhibited show that the former advocate never pleaded any sum as to put the claim beyond the jurisdiction of the lower court. In fact, by the time the current advocates came on record the matter was firmly within the pecuniary jurisdiction of the lower court. My view is that the current counsel ideally needed to prosecute the earlier application in Misc App No. 236 of 2018, citing the desire to amend then seeking the amendment before this court. In abandoning that application, going before that court and leading it to allow an amendment to deprive itself of jurisdiction and then using the same to reason to ground the current application is to me an inefficient way to employ judicial time. In fact, I doubt if it was indeed open to the lower court to allow an application that put the matter beyond its jurisdictional mandate.

18. That conduct however must be assigned to the advocate and not the litigant who relied on professional advice by counsel and should not blur the court’s vision on the dictates to do justice. If the court was to dismisses the application as sought by the Respondent will only escalate costs in that it will be compelled to file another suit at extra costs. That to me would defeat the purpose and overriding objective of the court to administer justice efficiently, fairly and at costs that do not compromise the right to access justice.

19. This court had earlier considered a similar circumstance in the case of *Crest Security Services Ltd v Multiple ICD Kenya Limited [2020] eKLR* and had the following to say;

“...This court takes the view that the concern that would militate against an order for withdrawal of a suit filed in a court without jurisdiction for trial before a court vested with jurisdiction is where a prejudice would be visited on the respondent. In the matter before me no prejudice has been alleged and I consider it in the interests of justice that an order be made for withdrawal of the matter from the magistrate’s court and transfer to this court for purposes of it being heard and determined...”

20. Owing to the fact that the issue keep coming up, this court’s latest taken a position is that demands for substantial justice dictate that a suit is transferred for the purpose to affording to the party the right to access justice. Inthe court had a chance to revisit the same question and it rendered itself as follow:-

“The question that bothers my mind is whether it is acceptable that a court of equal status or the High Court can decline jurisdiction, transfer a matter at the horizontal level of equal status, but the same courts cannot transfer a suit from one subordinate court to another or vertically from the subordinate courts, the courts which the superior court are obligated to supervise, to selves? Does the principle that jurisdiction is everything go on vacation when the issue is transfer of suit between court of equal status?

I hold the view that time has come, and look up to that time, for what I consider to be conflicting positions on the subject of transfer to be settled.

I am prepared to hold that it is untidy and may amount to unequal application of the law to have suits transferred between the High Court and courts of equal status yet it is not open to transfer a suit from a one subordinate court to another or even from the subordinate court to the High Court or Courts of equal status. While fully bound by the decisions of the Court of Appeal, I find myself with apparently two conflicting positions by that court. In those circumstances I chose to be guided by the position that I believe to meet the ends of justice, untrammled by procedural technicalities, and this court being mandated to supervise the subordinate courts, section 18, Civil Procedure Act should be interpreted to introduce nothing new beyond the inherent powers of the court to do justice and do so robustly and substantially. I reiterate that to refuse a transfer and leave a litigant with no prospects of being heard, save for his claim being dismissed on account of lack of jurisdiction, would not be in the interests of justice but meting out an injustice”.

21. In the instant case, this court is not convinced that any prejudice would be visited on the Respondent in the event that the present matter is transferred to the high court. Having established that the Chief Magistrates court lacks jurisdiction to determine the present matter I find that justice will only be served if the matter is transferred to the high court for efficient disposal. In doing so, this court will be furthering its obligation to give effect to the overriding objective considering that this matter can only be expedited before the high court. The court is also saying that when filed the suit was before a proper court but that situation was altered by the order for an amendment. In those circumstances I chose to follow the law set by the court of appeal in *Eastern Radio Services vs R J Patel (1962) EA 818* on the principal of law that not every time should an amended pleading be treated as if nothing ever existed before the amendment. I chose to consider the cause pleaded before the amendment and find in favour of sustaining the suit for hearing on the merits rather than leaning towards its defeat on account of

lack of jurisdiction.

22. In light of the above views, this court is inclined to allow the application to transfer the suit to the high court in terms of prayer (b) thereof. With regard to costs, even though the applicant has succeeded, it shall pay the costs of the application considering that it was its advocates fault in seeking the amendment before transfer that has led to this application.

23. That said, I allow the Applicant's application dated 28th August, 2019 in terms of prayer (b) thereof with costs to the Respondent.

24. It is so ordered.

Dated, delivered and signed at Mombasa this 29th day of May, 2020.

P. J. O. OTIENO

JUDGE