



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**

**MISCELLANEOUS APPLICATION NO. E606 OF 2019**

**PARAGON ELECTRONIC LIMITED.....APPLICANT**

**-VERSUS-**

**CEBIT CARGO LIMITED.....RESPONDENT**

**RULING**

1. Through the application dated 21<sup>st</sup> November 2019, the applicant herein, Paragon Electronics Limited, seeks the following orders: -

**1. Spent.**

**2. This honourable court be pleased to stay proceedings in Milimani CMCC No. 4738 of 2016 pending hearing and determination of this application.**

**3. This honourable court be pleased to transfer Milimani CMCC 4738 of 2016 from the subordinate court to the High Court for hearing and determination.**

**4. That the costs of this application be provided for.**

2. The application is supported by the affidavit of the applicant's representative **Mr. Clemence Wakio** and is premised on the grounds that: -

**a) The respondent instituted a suit, namely, Milimani CMCC No. 4738 of 2016 Cerbit Cargo Limited vs Paragon Electronics Limited against the applicant.**

**b) The applicant was consequently granted leave to file an Amended Defence and Counterclaim by an order of Honourable G. A. Mmasi (Mrs.) Senior Principal Magistrate of 21<sup>st</sup> August, 2019.**

**c) In the counterclaim, the applicant seeks a total sum of Kshs 104,749,311.4 from the respondent, which sum is beyond the pecuniary jurisdiction of the subordinate court.**

**d) Milimani CMCC No. 4738 of 2016 should be transferred to the High Court which has jurisdiction to hear and determine the matter.**

**e) The documents, records and transaction forming the subject matter of the dispute date back to 2012 and 2013.**

**f) There is a risk of loss and dissipation of evidence and a real risk of the counterclaim being time barred if this application is not heard and determined on a priority basis.**

**g) That unless this Honourable court stays the proceedings in Milimani CMCC No. 4738 of 2016, the subordinate court will proceed to hear and determine the suit.**

3. Through the replying affidavit of its Managing Director, **Mr. Kyalo Kathenge**, the respondent opposed the applicant's application on the basis that the mere fact that the alleged counterclaim exceeds the subordinate court's pecuniary jurisdiction does not mean that the counterclaim exists or is indeed over Kshs 50,000.

4. He avers that because the respondent filed the main suit in a court with jurisdiction, the applicant is duty bound to limit its claim to the jurisdiction of the trial court or file a separate suit in the High Court over the alleged counterclaim.

5. Parties canvassed the application by way of written submissions. I have considered the pleadings filed herein together with the submissions. Section 18 of the Civil Procedure Act (CPA) 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) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or***

***(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) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or***

***(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.***

6. A perusal of the counterclaim dated 7<sup>th</sup> October 2019 shows that the defendant seeks the following orders in the counter claim: -

***1. An order of accounts against the 1<sup>st</sup> defendant in the counterclaim.***

***2. Kshs 650,000 being duty paid for duty- exempt goods.***

***3. Kshs 419,311.40 being demurrage, excessive warehouse and other charges.***

***4. Kshs 51,840,000 being rent for 36 Apartments @ Kshs 120,000 for 12 months.***

***5. All monies claimed from the plaintiff in the counterclaim and allegedly paid to third parties by the defendants in the counterclaim.***

***6. An order of disgorgement (giving up) against the defendants of all benefits, monetary and /or otherwise, obtained through illegal and unethical acts to be paid to the plaintiff in the counterclaim.***

***7. Exemplary damages in the sum of Kshs 51,840,000.***

***8. Interest on all the above at commercial compounded rate.***

***9. Costs on full indemnity basis.***

***10. All other and further orders as the court may deem fit to grant.***

7. Section 7 (1) of the Magistrates Court Act, 2015 has enhanced the pecuniary jurisdiction of magistrate. It provides: -

***“Civil jurisdiction of a magistrate's court***

***(1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —***

***(a) twenty million shillings, where the court is presided over by a chief magistrate;***

***(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;***

***(c) ten million shillings, where the court is presided over by a principal magistrate;***

***(d) seven million shillings, where the court is presided over by a senior resident magistrate; or***

***(e) five million shillings, where the court is presided over by a resident magistrate”***

Having regard to the above cited provisions of **Section 7 (1) of the Magistrates Court Act**, I find that the prayers sought in the counterclaim exceed the Lower Court's jurisdiction. I am not persuaded by the Respondent's argument that the Applicant should file a separate suit in the High Court to pursue his claim as that would contravene the *res judicata* principle which frowns upon multiplicity of suits and requires that disputes arising from the same subject matter be dealt with in the one suit. My take is that Section 18 of the CPA grants this court wide discretion to transfer a suit at any stage, *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*, to withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter try or dispose of the same.

8. For the above reasons, I find that the application dated 21<sup>st</sup> November 2019 is merited and I therefore allow it as prayed with orders that costs shall abide the outcome of the main suit.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 17<sup>th</sup> day of September 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Miss Kaburu for Ataka for applicant.

No appearance for respondent.

Court Assistant: Sylvia