



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**COMMERCIAL DIVISION**

**CIVIL SUIT NO. 33 OF 2020**

**DAIKYO JAPAN MOTORS LTD.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**SAJJID KHAN.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**ZOEB HASSANALI GANIJEE.....3<sup>RD</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**FAIRUZ FEISAL YASIN.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KAZURI MWAROME CHIBO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff/Applicants filed an Application dated 5<sup>th</sup> June, 2020 contemporaneously with a Plaint to the main suit dated and filed on 5<sup>th</sup> June, 2020. The Application is brought under Sections 1A, 1B, 3A and 6 all of the Civil Procedure Act and seeks for the following orders:-

a) Spent.

b) *The court be Pleased to issue an Order for Stay of proceedings in Mombasa CMCC No.12 of 2020 between Kazuri Mwarome & Fairuz Feisal Yasin –versus- Farhan Ahmed Khan, Rizwan Younis & Daikyo Japan Motors Ltd; now pending in Mombasa Chief Magistrate’s Court pending hearing and determination of this suit.*

c) Prayer (2) above, be issued on temporary basis pending the hearing and determination of this application inter-parties.

d) Costs.

2. The application is based on 22 grounds on its face and further supported by an Affidavit of the 1<sup>st</sup> Plaintiff’s Director, *Farhan Ahmed Khan* sworn in support of the application.

3. It is deponed that the 1<sup>st</sup> Plaintiff/Applicant is a Company that trades in import of second hand or used motor vehicles from Japan and contracts various people to carry out direct marketing and sales and later on remit the sale proceeds to the Company. In that regard, the 1st Plaintiff/Applicant contracted the 2nd and 3rd Plaintiff/Applicants to market and sell the motor vehicles. For purposes of receiving the sale proceeds, the 1st Applicant instructed the 2nd and 3rd Applicants to open two accounts with **Equity Bank Ltd** in their names. Subsequently, the 2nd and 3rd Applicants opened the two accounts being *A/C No.0250268107507* in the name of *Zoeb Hassanali Rajbhai Ganijee* and *A/C No.1560276034850* in the name of *Sajid Khan*.

4. The 1<sup>st</sup> Plaintiff/Applicant then employed the 1<sup>st</sup> Defendant/Respondent as a Secretary and she was mandated with overall duty of overseeing all the clerical work in the offices, handling bank finance documents, in charge of hire purchase list, doing sale agreement and monitoring the deposits by clients in the two accounts among other roles.

5. It is averred that the 1<sup>st</sup> Defendant/Respondent operated the two bank accounts mentioned above, from **January 2018 to December 2019**

but fraudulently stole and transferred a total of **Kshs.71,700,245/=** from the said accounts using **Online Banking Apps**. The 2<sup>nd</sup> Defendant/Respondent is said to have aided in commission of the fraud and for avoidance of doubt, the money stolen in **A/C No.1560276034850** was **Kshs.31,715,587/=** while from **A/C No.0250268107507**, **Kshs.39,984,658/=** was stolen.

6. According to the Applicants, the Respondents then used the fraudulently obtained money to buy personal items including jewelry and motor vehicles as listed at **paragraph 18** of the **Supporting Affidavit**.

7. It is deponed that the Respondents had no authority to misappropriate the said monies to their personal use and have now filed in **Mombasa Chief Magistrates Court, Civil suit No.12 of 2020** which court is devoid of jurisdiction since the subject matter is of **Kshs.71,700,245/=**. There is therefore the risk of the Magistrates Court continuing with the matter in which it lacks jurisdiction and this court is hence invited to exercise its supervisory Jurisdiction by staying the proceedings before the Lower Court so that the issue in dispute can amicably be resolved.

8. The Respondents opposed the application by filing a **Notice of Preliminary Objection** dated **29<sup>th</sup> June, 2020** and a **Replying Affidavit** sworn on **21<sup>st</sup> September, 2020** by the 1<sup>st</sup> Defendant/

Respondent. The **Preliminary Objection** raises on **three grounds** namely:-

**a) That the Plaintiff's Suit and application are incompetent, bad in law, incurable/fatally defunctive and an abuse of the court process.**

**b) That the Plaintiffs suit and application do not comply with the provisions of Order 4, Rule 1(1) of the Civil Procedure Rules 2010.**

**c) That this Court cannot entertain defective proceedings. (Plaintiffs Suit and Application).**

9. In her **Replying Affidavit**, the 1<sup>st</sup> Defendant/Respondent deponed that the suit in the Lower Court only seeks damages which the Chief Magistrate's Court can award and she is stranger to allegation deponed in support of the application. She however concedes that she was employed by the 1<sup>st</sup> Plaintiff/Applicant as a Secretary, but denies being involved with the issues of accounts. It is her assertion that she does **uber business** which has expanded over time. As for the jewelry claimed by the Applicants, she depones that the same was gifted to her during her wedding and that she was in possession of the same even before being employed by the 1<sup>st</sup> Plaintiff/Applicant.

10. Having stated that the suit filed in the Lower Court seeks damages, the 1<sup>st</sup> Respondent is of the view that the Defendants could have raised a **Counter-claim** under **Order 7** of the **Civil Procedure Rules 2010**, rather than filing a new suit. That the Applicant's conduct of filing a **Counter-claim** in the Lower Court, and proceeding to file a fresh suit before this court thus amounts to forum shopping, hence an abuse of court process.

11. The deponent further avers that in any event, the suit filed in the Mmagistrate's court which was filed prior to the filing of the instant suit takes precedence and the correct procedure to cure the pecuniary dispute is for the Applicants to file a **Counter-claim** then seek to have the suit transferred to the High Court if the **Counter-claim** exceeds the pecuniary jurisdiction of the Magistrates Court.

12. The parties agreed to proceed with the application by way of written submissions which were highlighted on **29<sup>th</sup> September, 2020** with **Mr. Opullu** appearing for the Applicants whilst **Mr. Konde** appeared on behalf of the Defendants/Respondents.

#### **The Plaintiffs/Applicants' Submissions**

13. According to **Mr. Opullu**, Counsel for the Plaintiffs/Applicants there are only two issues for this court to determine namely:-

**a) Whether the court should stay the proceedings pending in the lower court which lacks necessary pecuniary jurisdiction to entertain the claim.**

**b) Whether a suit filed in a court without Jurisdiction can be transferred to a competent court.**

14. On the 1<sup>st</sup> issue, **Mr. Opullu** submitted that the ground raised in the **Preliminary Objection** under **Order 4 Rule 1** of the **Civil Procedure Rules** is misplaced because the Applicants have shown that although the suit filed before the Magistrate's court concerns the same subject matter as the suit herein, the Magistrates court lacks the requisite pecuniary jurisdiction and the same should be stayed. He submits that the value of the subject matter here is **Kshs.71,700,245/=** which is beyond the pecuniary jurisdiction of the Chief Magistrate's Court. He is however very critical to the Respondent's contention that the instant suit is *res-subjudice* thereby offending the provisions of **Section 6** of the **Civil Procedure Act**. He also submitted that the suit cannot be transferred having been filed in a court without jurisdiction and it is therefore a nullity *ab initio*. Therefore, the court cannot even invoke the principle of *res-subjudice* under **Section 6** of the **Civil Procedure Act** as a suit filed in the wrong court is a nullity. In support of his submissions, the Counsel relied on the cases of **Kagenyi...Vs.... Musiramo & Another [1968] E.A** and **Josiah M.R Karuri...Vs.... Simon Gichangi Kabugi [2017] eKLR.**

### Defendants/Respondents' Submissions

15. The Learned Counsel for the Respondents, **Mr. Konde** first submitted on whether the application is merited for grant of the orders sought. He reminded the court to take judicial notice to the fact that Stay of proceedings is a grave judicial action since it interferes with a litigant's right to conduct his litigation and also impedes on the right of a litigant to access justice, right to expeditious disposal of the dispute and the ultimately the right to fair trial. He asserted the view that there are no grounds that have been established by the Applicants to warrant the stay of proceedings in **Mombasa CMCC No.12 of 2020**. This line of argument is buttressed by excerpts from the cases of **Family Bank..Vs.. Martin Kimeu & Another [2016]eKLR** and **James Njau Njogu... Vs...Viodra Wairimu Ndambiri & Another [2020]eKLR**.

16. The second issue submitted on by the Learned Counsel for the Respondents that the present suit is an abuse of court process and amounts to multiplicity of suits, the Plaintiffs/Applicants having filed a **Counter-claim** in the suit filed in the Magistrate's Courts. He averred that in the two suits, the parties, the subject matter and the cause of action are the same and the safest way to go about it, would be to seek that the suit before the Lower Court be transferred to the **High Court** in accordance with provisions of **Section 18** of the **Civil Procedure Act Cap 21, Laws of Kenya**.

17. Thirdly, **Mr. Konde** Counsel for the Respondents submitted that the instant suit contravenes the provisions of **Section 6** of the **Civil Procedure Act**. The said provision provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties litigating under the same title where such suit is pending in the same or other court with jurisdiction to grant the relief. Good practice would be that the latter suit be stayed to allow the hearing and determination of the earlier suit. In support of his argument, the Learned Counsel borrowed from the case of **Heritage Insurance Company Limited...Vs...Patrick Kasina Kisilu [2015]eKLR**.

### Analysis and Determination

18. After perusing all the pleadings filed in this case and the various submissions made by the parties herein, I note that the main issue arising, and the only prayer pending for determination is whether the suit pending before the lower court should be stayed pending the outcome of the High Court case or better still, whether the Applicants herein have made out a valid case to warrant issuance of orders to stay the lower court case pending the outcome of this instant case.

19. Well, in this court's view, the answer to the above questions lie in the nature of the pleadings and the parties before the two courts.

20. In both cases, it is not in dispute that the cause of action and the subject matter in the two cases are the same. However, the contention by the Applicants is that the subject matter involves a value of **Kshs.71,700,245/=** which exceeds the pecuniary jurisdiction of the Magistrates Court.

21. It is clear that before the Lower Court, **Kazuri Mwarome & Fairuz Feisal Yasin** (the Defendants/Respondents herein) in their **Plaint** dated **9<sup>th</sup> January, 2020** sued **Farhan Ahmed Khan, Rizwan Younis & Daikyo Japan Motors Ltd** as Co-Defendants. **Farhan Ahmed Khan** and **Rizwan Younis** were sued in their position as directors of the 3<sup>rd</sup> Defendant **Daikyo Japan Motors Ltd**. In the said **Plaint**, the Plaintiffs avers that the 1<sup>st</sup> & 2<sup>nd</sup> Defendants raided their house on **2<sup>nd</sup> January, 2020** and accused the 2<sup>nd</sup> Plaintiff (**Fairuz Feisal Yasin**) of stealing by servant and seized, confiscated items belonging to the Plaintiffs namely; assorted gold ornamentals, and Motor Vehicles registration numbers; **KCU 550G TOYOTA HARRIER, KCT 996G BMW and KCW 998G, KCW 993G, KCW 312D, KCW 546J, KCW 068F all Toyota Vitz**. The Plaintiff thus sought for the following orders:-

- a) *A declaration that the seizure, confiscation, possession, retention and/or attachment of the Plaintiffs' assets/property was illegal and/or unwarranted.*
- b) *Special damages of Kshs.18,000/= a day from 2/1/2020 to the date of payment.*
- c) *Exemplary and/or compensatory damages for illegal seizure of the Plaintiffs assets/property.*
- d) *Aggravated damages for the Physical, psychological and/or mental torture/distress occasioned to the Plaintiffs.*
- e) *Costs of the suit.*
- f) *Interest on a,b,c,d and e above at Court Rates.*

22. It is note-worthy to state that in the said Lower Court case, the Defendants through the **Firm of M/s Magolo & Co. Advocates** filed a defence dated **4<sup>th</sup> February, 2020**. It was averred therein that **Zoeb Hassanali Raj bhai Ganijee** (the 3<sup>rd</sup> Plaintiff/Applicant herein) conspired with the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs (**Kazuri Mwarome & Fairuz Feisal Yasin**) to fraudulently withdraw funds totaling to **Kshs.84,386,483/=** and belonging to the 3<sup>rd</sup> Defendant (**Daikyo Japan Motors Ltd**). When the Plaintiffs realized that their fraudulent ways had been discovered, they proceeded to surrender the motor vehicles and gold as part compensation thereof. It was also averred that the 2<sup>nd</sup> Plaintiff (**Fairuz Feisal Yasin**) was charged for stealing **Kshs.84,386,483/=**

in **Criminal case No. 168 of 2020**. The Defendants further raised a counter claim and sought for refund of the sums fraudulently withdrawn by the 1st and 2nd Plaintiffs.

23. On the other hand, in the instant suit filed on 5<sup>th</sup> June, 2020, the Applicants have sued the Defendants seeking Judgment for:-

a) *Kshs.71,700,245/= (amount allegedly stolen by (Fairuz Feisal Yasin; 1<sup>st</sup> Defendant).*

b) *A declaration that all the properties purchased by the Defendants either directly in their names or third parties names between January 2018 to December, 2019 including the motor vehicles herein revealed were purchased fraudulently using money stolen from the Plaintiffs.*

c) *A permanent injunction order be issued restraining the Defendants or any other person whomsoever and whatsoever from alienating, removing or transferring, disposing off in any way dealing with the above stated motor vehicles or interfering with the same and those now in possession of the first Plaintiff.*

d) .....

e) .....

24. Upon perusal of the **Plaint** in **Mombasa CMCC No. 12 of 2020** this court opines that the Magistrate's court was not being asked to determine on the value of the subject matter i.e the motor vehicles. All that the court was invited to determine, are rights touching on the subject motor vehicle especially whether its seizure was warranted and any other damages following the seizure. To that extend, the Plaintiff did not at any point allude to prayer that surpass the pecuniary jurisdiction of the Magistrate's Court. Therefore, the original suit was filed in a court with pecuniary jurisdiction to hear it and is not *void ab initio* as suggested by the Applicants herein.

25. Tables seem to change when the Defendants in the Lower Court suit, raise a **Counter-claim** on the monies that were allegedly stolen by the 2<sup>nd</sup> Plaintiff (**Fairuz Feisal**) during the tenure of her employment with the 3<sup>rd</sup> Defendant (**Daikyo Japan Motors Ltd**). **Order 7 rule 8** of the **Civil Procedure Rules** gives the Defendants permission to raise a counterclaim against the Plaintiff together with any other persons. Any other persons give the Defendant a leeway to bring a counterclaim even against a person not already a party to the suit. He too may file a counterclaim against a Co-Defendant in the same suit. The provision (**Order 7 Rule 8**) states as follows;

*“Where a Defendant by his defence sets up any counterclaim which raises questions between himself and the Plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be Defendants to such cross-action, and shall deliver to the Court his defence for service on such of them as are parties to the action together with his defence for service on the Plaintiff within the period within which he is required to file his defence”.*

26. **Order 7 rule 3** of the **Civil Procedure Rules** which is pertinent to the foregoing states as follows:-

*“A Defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the Plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such setoff or counterclaim shall have the same effect as a cross-suit, so as to enable the Court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the Plaintiff before trial, if in the opinion of the Court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to Defendant to avail himself thereof”.*

27. In my considered view, the rationale of **Order 7 rule 8** is to avoid multiplicity of proceedings and claims based on the same or different causes of action as between the parties to the suit. The section did not contemplate a defendant filing an independent suit to a claim based on the same cause of action but rather envisaged the Defendant to proceed by way of counter-claim. I am also of the considered view that, the circumstances leading to the cross-action by way of Counter-claim and set off are so closely intertwined that the only thing which any reasonable Court would do is to rule that the original suit and the counterclaim should be heard as one suit. Separating the Counter-claim from the main suit will lead to a multiplicity of suits and extra costs hence defeat the objective of **Section 1A (1)** of the **Civil Procedure Act**.

28. Similarly, **Order 7 rule 3** of the **Civil Procedure Rules** as insinuating that a **Counter-claim** is to be treated as a cross suit with all the indicia of pleadings as a **Plaint**. Instead of relegating the defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter- claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a defendant can claim any right by way of a counter-claim in the same suit as a suit and cross suit and have them disposed of in the same trial.

29. Applying the principles established above to the circumstances of the instant suit. It is clear that the parties and cause of action are the same and the Defendants ought to have filed a Counter-claim other than filing a fresh suit. The question of concern is however, whether the Applicants herein could Counter-claim **Kshs.71,700,245/=** in the case before the Lower Court. Clearly therefore, and considering the fact the pecuniary jurisdiction of the Chief Magistrates' Court is limited to the sum of

**Kshs.20,000,000/=**, it goes without saying that the Applicants' Counterclaim is not capable of being heard before the Lower Court.

30. Having stated under **Paragraph 24** above that **CMCC. No.12 of 2020** was not a nullity ab initio, the inescapable verdict that one can make is that the matter be transferred to the High Court then the Applicant file their defence and cross suit so as to have them disposed of in the same trial. My support to this view is based on the overriding objectives of the **Civil Procedure Act** contained in **Sections 1A** and **1B** of the Act as well as the principles of exercising judicial authority as enshrined in **Article 159 (2)** of the **Constitution of Kenya**, which now enjoin this court to perform its duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities.

31. Also, in this Court's view, the Respondent has not shown why its grievances should be disposed of by way of an independent suit rather than in a counter claim. It has not been expressed that the issue in the counterclaim do not form part of the same transaction as pleaded in the **Plaint** in **CMCC. No.12 of 2020**.

32. Based on the foregoing, I find the Applicants' argument and position that the trial before the Lower Court should be stayed so that the instant suit be heard first to be missing the point or off the mark.

33. However, the issue here is not which case should be heard first, but rather if the Applicants are justified in staying proceedings in a suit that was initiated way before they initiated the instant suit and in which the parties in the same suits are the same. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.

34. In the circumstances of this instant suit, I find that the Applicants are not justified in seeking a stay of proceedings of the Lower Court case for the following reasons:-

*a) Firstly, the lower court case was filed much earlier than the instant case and Applicants have not shown to the satisfaction of this court that the amount claimed in the **Plaint** filed before the lower court has exceeded the pecuniary jurisdiction of the magistrate's court save for the counter claim raised.*

*b) Secondly, the Applicants can counter claim by way of counter suit since the parties and subject matter in both suits are the same and to avoid multiplicity of proceedings and claims based on the same cause of action.*

35. The upshot of my **Ruling** is that the instant suit and the suit before the Lower Court are similar, the subject matter and parties being the same. Trying both suits separately would amount to duplicity and multiplicity of suits which has the end result of obstructing due process of law. Since the original suit was filed in a court with pecuniary jurisdiction to hear it, it is my finding that the two suits should be heard simultaneously to avoid unnecessary costs and waste of judicial time.

36. For the reasons set out above, I hereby dismiss the **Notice of Motion** dated **5<sup>th</sup> June, 2020** and in the interest of justice make the following findings:

*a) By the provisions of **Sections 17 & 18** of the **Civil Procedure Act** this court has the power to withdraw a suit pending in a court subordinate to it and transfer the same to either the **High Court** itself or to another competent court subordinate to it for hearing and disposal, even in instances where the suit was filed in the subordinate court without jurisdiction to try the case depending on the merits of the case.*

*b) The Case filed before the Magistrate's Court being **CMCC. No.12 of 2020** to be transferred to the **High Court** and thereafter allocated a High Court case number to enable the Applicants herein file a Counter-claim and cross-suit claiming any right in the same, so as to have them disposed of in the same trial.*

*c) After compliance with the above directions, the instant suit **then stands struck out**.*

*d) The costs of this application shall abide the outcome of the main suit.*

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA on this 27<sup>th</sup> day of October, 2020.**

**D. O. CHEPKWONY**

**JUDGE**

**27/10/2020**

In view of the declaration of measures restricting court operations due to the **COVID-19** pandemic and in light of the directions issued by His Lordship the Chief Justice on **15<sup>th</sup> March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open Court.

**D. O. CHEPKWONY**

**JUDGE**

**27/10/2020**