



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISC. APPLICATION NO. E002 OF 2019

AO BASID LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

ASL CREDIT LIMITED.....DEFENDANT/APPLICANT

RULING

1. This ruling is in respect to the Notice of Motion dated 5th March 2019 in which the defendant applicant seeks the following orders:-

1. Spent

2. That pending hearing and determination of this application, the Honourable court be pleased to order stay of any further proceedings in Nairobi, CMCC NO. 4854 of 2018: A.O. Basid Limited vs. ASL Credit Limited.

3. That this application be heard inter-partes as a matter of urgency on such date and at such time as this honourable court may direct.

4. That the suit filed by the plaintiff/respondent against the defendant/applicant being Nairobi 4854 of 2018: A.O. Basid Limited vs. ASL Credit Limited be and is hereby withdrawn from Nairobi Chief Magistrates Court and transferred to the High Court at Milimani Commercial and Admiralty division, at Nairobi for hearing and final determination.

5. That the costs of this application be provided for.

2. The application is brought under Section 18(1) (b) and (2) of the Civil Procedure Act (CPA) and Order 51 Rule 1 of the Civil Procedure Rules.

3. The application is supported by the affidavit of applicant's Heads of Legal **Mr. Daniel Wandera** who deposes that the defendant intends to file a counter-claim to the plaintiff for a claim in the sum of kshs. 123,935,635/= which amount, exceeds the pecuniary jurisdiction of the Nairobi Chief. He attached a copy of the draft defence and counter claim as annexure marked "DW-1".

4. The respondent opposed the application through the replying affidavit of its director one **A.O. Basid** who avers that the applicant's claim is imaginary given that the respondent does not owe the applicant the alleged sum of money and that the applicant's preliminary objection before the Chief Magistrate's Court was unsuccessful.

5. He further avers that the Chief Magistrate has jurisdiction to entertain the matter and contends that the application is supported by a misleading affidavit. He further states that the applicant has not complied with an order issued by the lower court on 12th February 2019 directing the applicant to release certain log books to the respondent.

6. He further states that the applicant filed a similar suit being case No. E111 of 2018 seeking similar orders sought in this application. Parties filed written submissions to the application which I have carefully considered.

7. The main issue for determination is whether CMCC No. 4854 of 2018 should be transferred to the High Court. Section 18 of the Civil Procedure Act (CPA) which empowers this court to 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) 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.

8. 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.

“Section 18 (1) (b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though 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.....Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused....”

9. In the instant case, the applicant has stated, though a sworn affidavit, that it intends to file a counterclaim to the respondent's plaint in which the claim is for the sum of Kshs. 123,935,635/- which sum is way beyond the pecuniary jurisdiction of the Chief Magistrates Court that is limited to Kshs. 20,000,000. I have perused the applicant's annexure marked “**DW-1**” and I note that indeed it is a draft defence wherein a counterclaim is made for the sum of Kshs. 123,935,635/-. Clearly therefore, and considering the fact the pecuniary jurisdiction of the pecuniary jurisdiction of the Chief Magistrates Court is limited to the sum of Kshs. 20,000,000, it goes without saying that the applicant's counterclaim is not capable of being heard before the lower court and the inescapable verdict that one can make is that the matter be transferred to the High Court as requested by the applicant.

10. Consequently, I find that the application to transfer the suit to the High Court is merited and I therefore allow it as prayed. I further find that the respondents claim that the applicant has not complied with the court's orders issued on 12th February 2019 and that the applicant had already filed a similar suit are issues that the respondent can pursue through an appropriate application for contempt of court or a preliminary objection on the grounds of sub judice as they do not in any way affect the court's powers to transfer the case to the High Court.

11. I direct that the costs of this application shall abide the outcome of the main suit.

Dated, signed and delivered in open court at Nairobi this 25th day of July 2019.

W. A. OKWANY

JUDGE

In the presence of:

Miss Rono for the defendant

Court Assistant - Ali