



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE NO. 7 OF 2016

UKWALA SUPERMARKET ELDORET LIMITED PLAINTIFF

VERSUS

JAIDEEP SHAH 1ST DEFENDANT

KAMAL SHAH 2ND RESPONDENT

RULING

1. The applicant *Ukwala Supermarket Ltd* moved this court by way of a Notice of Motion dated 4th April, 2016 seeking one substantive prayer; that this court be pleased to withdraw Eldoret CMCC No. 660 of 2013 to itself for trial and final determination. The applicant also sought orders providing for costs of the application.

2. The application is anchored on *Sections 6 and 18 (b)* of the *Civil Procedure Act* and all enabling provisions of the law. It is supported by an affidavit sworn by one *Anil Haria*, the applicant's Managing Director and grounds stated on its face. In the main, the applicant who is the plaintiff in the instant suit contends that the parties in this suit and in CMCC 660 of 2013 are the same and that both suits arise from an alleged breach of contract executed by the parties on or about 28th August, 2012; that the issues arising in both suits are substantially the same but the applicant's claim which is in excess of Kshs.16,000,000 cannot be adjudicated upon in the lower court for lack of pecuniary jurisdiction; that the applicant's counter claim filed in CMCC No. 660 of 2013 was struck out for want of jurisdiction forcing the applicant to file the instant suit; that CMCC No. 660 of 2013 should therefore be withdrawn to this court so that both suits can be heard together.

3. The application is opposed by the defendants/respondents *Jaideep Shah* and *Kamal Shah*. There is a replying affidavit sworn by the 1st respondent on 16th May, 2016. The respondents contend that the application is bad in law, frivolous and is an abuse of the court process; that the application is resjudicata as it raises the same issues that were raised in a similar application dated 2nd December, 2014 which was dismissed by this court on 17th February, 2016; that there is an appeal pending namely Civil Appeal No. 9 of 2015 which challenges the ruling of the lower court dismissing the applicants counter claim in CMCC 660 of 2013; that allowing the instant application would be tantamount to allowing the appeal through the backdoor; that the suit in the lower court is properly before that court; that the instant suit is an afterthought aimed at delaying or defeating the respondents claim; that it would be prudent and just to dismiss the application.

4. By consent of both parties, the application was prosecuted by way of written submissions: Those of the applicant were filed on 8th November, 2016 while those of the respondents were filed on 21st

November, 2016.

5. I have carefully considered the application, the submissions filed by both parties and all the authorities cited.

I find that it is not disputed that CMCC 660 of 2013 which is pending in the lower court raises similar issues as those raised in the instant suit as both suits are premised on an alleged breach of contract entered into by the parties on 28th August 2012. It is also not contested that the parties in the two suits are largely the same.

6. It is common ground that the applicant filed a similar application dated 2nd December 2014 which was dismissed by this court on 17th February, 2016. The respondents claim that owing to the above, the instant application is resjudicata. I am unable to agree with the respondents on that submission because a look at the application dated 2nd December 2014 and the resultant ruling reveals that the facts on which the application was based are different from the facts in the instant application and the issues that fell for determination are entirely different from those that arise in the instant application.

7. In the initial application, the applicant had filed a counter claim in the suit pending in the lower court for over Kshs. 25,000,000 against the respondent's claim of Kshs. 5,000,000 which counterclaim was struck out by the trial court for want of pecuniary jurisdiction following a successful preliminary objection raised by the respondents.

8. The court in its ruling of 17th February, 2016 did not determine the merits or otherwise of the proposed withdrawal or transfer of the suit to the High Court. The application was dismissed on grounds that it had been overtaken by events since the counter claim was no longer in existence having been struck out before the ruling was delivered. Consequently, the claim that remained for the trial court's determination was within its jurisdiction. There was thus no need for the withdrawal of the suit to the High Court.

9. The facts in the instant application are different. The applicants have filed a fresh suit in this court against the respondents seeking sums which are far in excess of the lower court's jurisdiction. And since CMCC 660 of 2013 is still pending in the lower court, the question that now arises for my determination is whether it would be legally tenable to have the two matters run parallel to each other in the two courts or whether in the circumstances, the suit in the lower court would have to be withdrawn to this court for hearing and final disposal together with the instant suit. This was not an issue in the previous application. I am thus satisfied that the instant application is not resjudicata.

10. *Section 6 of the Civil Procedure Act* prohibits any court including the High Court from proceeding with the trial of any suit or proceeding in which the matters in issues are directly and substantially in issue in a previously instituted suit involving the same parties where such suit or proceeding is pending before any other court, having jurisdiction in Kenya to grant the relief claimed.

11. Given the above provision, it is clear that both suits cannot be heard separately in the High Court and in the lower court. And since the High Court has unlimited jurisdiction to hear any civil dispute irrespective of the amount of money involved, the interests of justice would require that the suit in the lower court be withdrawn to this court for hearing together with the instant suit so that all the matters in controversy between the parties can be exhaustively and effectively determined in the same trial.

12. The High Court under *Section 18 of the Civil Procedure Act* is empowered in the exercise of its supervisory jurisdiction to either transfer a suit to the lower court for hearing and determination or withdraw one filed in the lower court to itself either for hearing and final disposal or for transfer to another subordinate court.

13. As the lower court does not have the requisite jurisdiction to determine the applicant's claim, even if the respondent's suit was filed earlier, the instant suit cannot be transferred to the lower court and it is not permissible in law to have the two suits heard by two different courts. In any event, this court is enjoined

to give effect to the overriding objective of the *Civil Procedure Act* which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Hearing of the two suits together will not only save both material and human resources for the court and the parties but will also reduce the costs of litigation.

14. Lastly, I wish to briefly comment on the respondents claim that allowing the application would have the effect of allowing the applicants pending appeal through the back door. In response to this contention, the applicants have submitted that they have since withdrawn their appeal. They however did not depose so in the affidavit supporting the motion nor did they annex any evidence to that effect.

15. In my view, whether the appeal has been withdrawn or not is not material to the determination of the instant application. I say so because irrespective of the appeal's outcome, there will still be a suit pending in lower court involving the same issues and the same parties as the instant suit and since the applicants cannot be heard in the lower court for want of jurisdiction, it will still be necessary to withdraw the suit in the lower court to this court for hearing together with the instant suit. This is the only way that a just and fair determination of the dispute between the parties can be resolved with finality.

16. For all the foregoing reasons, I find merit in the application dated 4th April, 2016 and it is hereby allowed on terms that Eldoret CMCC No. 660 of 2013 is forthwith withdrawn to this court for consolidation with the instant suit for hearing and final determination.

Costs of the application shall be costs in the cause.

It is so ordered.

C.W GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 30th day of March, 2017

In the presence of:

Mr. Owalla for the applicant

Mr. Isiji holding brief for Mr. Kitiwa for the respondent.

Mr. Lobolia Court Clerk