



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISC.CIVIL APPLICATION NO. 171 OF 2014**

JAIDEEP SHAH ..... 1<sup>ST</sup> PLAINTIFF/RESPONDENT

KAMAL SHAH ..... 2<sup>ND</sup> PLAINTIFF/RESPONDENT

VERSUS

UKWALA SUPERMARKET (ELDORET)LTD ..... 1<sup>ST</sup> DEFENDANT/APPLICANT

MANISH SHAH ..... 2<sup>ND</sup> DEFENDANT/APPLICANT

**RULING**

1. By a Notice of Motion dated 2<sup>nd</sup> December, 2014, the applicants sought the following orders;
  1. *That this matter be certified urgent and heard on a priority basis.*
  2. *That pending hearing and determination of this application, the honorable court be pleased to grant an order of stay of proceedings at the lower court in ELDORET CMCC No. 660 of 2013 JAIDEEP SHAH & ANOR vs UKWALA SUPERMARKET & ANOR.*
  3. *That the court file in ELDORET CMCC No. 660 of 2013 JAIDEEP SHAH & ANOR vs UKWALA SUPERMARKET & ANOR be transferred to the High Court for hearing and determination.*
  4. *That costs of this application be in cause.*
2. The first two prayers are now spent. What remains for this court's determination is prayer 3 seeking the transfer of Eldoret CMCC No. 660 of 2013 from the lower court to the High Court for hearing and final disposal.
3. The application is premised on grounds stated on its face which have been duplicated in the supporting affidavit sworn on 2<sup>nd</sup> December 2014 by the applicant's advocate *Mr. Ray Tollo*. In a nutshell, the applicants contend that they are the defendants in Eldoret CMCC No. 660 of 2013 which was filed against them by the respondents vide a plaint dated 1<sup>st</sup> October, 2013; that in their defence, they filed a statement of defence and counterclaim in which they are claiming a total sum of Kshs. 25,250,000 from the respondents; that the respondent had filed a preliminary objection in the lower court seeking that the counterclaim be dismissed for want of jurisdiction and that the preliminary objection was pending ruling; that the court has power to transfer the suit to the High Court and that the application ought to be allowed in the interests of justice.
4. The application is opposed through a replying affidavit sworn on 6<sup>th</sup> January, 2015 by the respondent's counsel *Mr. Godfrey Nathan Kitiwa*. Counsel opposed the application on grounds that there was nothing to transfer to the High Court as the lower court had already ruled on the preliminary objection and had struck out the applicant's counterclaim; that even if the

counterclaim had not been struck out, this court did not have jurisdiction to transfer the suit as doing so would be tantamount to sanitizing an illegality. In a synopsis, the respondent asserted that the application was devoid of merit and ought to be dismissed.

5. By consent of the parties, the application was canvassed by way of written submissions. The applicants filed their submissions on 28<sup>th</sup> October, 2015 while those of the respondents were filed on 30<sup>th</sup> October, 2015.
6. I have considered the application and all the affidavits filed by the parties including the further affidavit sworn by *Ms. Sylvia Wambani* on behalf of the applicants and the further replying affidavit sworn by *Mr. Godfrey Nathan Kitiwa* on behalf of the respondents. I have also considered the written submissions filed by both parties and the authorities cited. Having done so, I take the following view of the matter.
7. To start with, I have noted that none of the parties availed to this court the pleadings in Eldoret CMCC No. 660 of 2013 in order to give the court an opportunity to ascertain for itself the subject matter of the party's respective claims before the lower court. However, from the affidavits on record and the written submissions filed by the parties, it is not disputed that the respondents had instituted a suit against the applicants claiming a refund of Kshs.5,000,000 allegedly paid to the applicants as deposit for the sale of furniture and fittings worth kshs.20,000,000; that the applicants filed a defence and counterclaim and in the counterclaim, they claimed against the respondents a sum of kshs.25,250,000. The respondents filed a preliminary objection in the lower court seeking the striking out of the counterclaim on grounds that it exceeded the court's pecuniary jurisdiction. It is also not contested that the said preliminary objection was upheld in a ruling delivered on 16<sup>th</sup> December, 2014 with the result that the applicant's counterclaim was struck out with costs. It is also common ground that the ruling was delivered when the applicants had obtained interim orders staying proceedings in the lower court vide the instant application.
8. Having set out the context within which the application was filed and prosecuted as can be ascertained from the material placed before the court, I find that the only task left for this court to do is to determine whether the suit filed in the lower court should be transferred to this court for hearing and final determination.
9. 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.

In this case, it is clear from the affidavits filed by the parties that the respondents' claim against the applicants was properly filed before the lower court as the same was within that court's pecuniary jurisdiction. It is the applicants who on filing their defence included a counterclaim which on its face value removed the suit from the pecuniary jurisdiction of the lower court.

10. It is common ground that the counter claim was subsequently struck out by the trial court on 16<sup>th</sup> December, 2014. With the striking out of the counterclaim, the foundation on which the instant application was premised was automatically removed as what remained pending in the lower court was the suit which had been filed by the respondents against the applicants which as I have noted earlier was within the court's jurisdiction.
11. I wholly agree with the applicants that the ruling which struck out the counterclaim was delivered at a time when orders issued by this court on 11<sup>th</sup> December, 2014 staying proceedings in the lower court were in force. It is however not clear whether or not the said orders had been served on the trial magistrate by the time the ruling was delivered as no evidence to that effect has been tendered by the parties.
12. The applicants have submitted that the order of the trial court striking out the counter claim was null and void for having been made when this court's orders staying proceedings in that case were in force. Whereas there is a sense in which the orders in question can be said to have been irregularly issued in view of the fact that they were issued when proceedings in the lower court had been stayed by this court, I am unable to agree with the applicant that for that reason only the

orders were null and void because they were made by a court of competent jurisdiction and in my view, they were not by themselves illegal. I will say no more on this point since I am aware that there is an appeal pending against the trial court's decision and in any event, the instant application does not seek to challenge the validity of the said orders but merely seeks the transfer of the suit to the High Court.

13. That said, I find that as there is no evidence that the orders of the lower court striking out the applicants counterclaim have been set aside and they have definitely not been overturned on appeal since the appeal challenging the same is still pending, I find that no good reason exists to warrant a transfer of the suit filed in the Eldoret Chief Magistrate's court to this court for hearing and disposal. The application has clearly been overtaken by events and is destined to fail. It is accordingly dismissed.

14. Given the reasons which have led to the dismissal of the application, I will not make any order as to costs. Each party shall bear its or their own costs.

It is so ordered.

**C.W GITHUA**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 17<sup>th</sup> day of February 2016**

in the absence of both parties and in the presence of Ms. Naomi Chondi Court Clerk.