



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 236 OF 2013

BAMBURI CEMENT LIMITED PLAINTIFF

V E R S U S

FURNCON LIMITED DEFENDANT

RULING

1. On 23rd September 2013 **Mbsa HCCC No. 172 of 2004 BAMBURI CEMENT LTD –Vs- FURNCON LTD** was listed for hearing. The record shows that the Court on its won motion made the following orders-

“This case is within the jurisdiction of the Chief Magistrate Court. I therefore order this case be transferred to Chief Magistrate’s Court Mombasa for disposal. Mention before the Chief Magistrate’s Court on 5th November 2013. The Deputy Registrar to inform parties of the new case numbers allocated to this matter.”

The matter on being transferred as ordered above was assigned **Mbsa CMCC No. 1880 of 2013.**

2. The Defendant FURNCON LTD has now filed a Notice of Motion dated 26th November 2013 under the title of this Miscellaneous Cause which seeks the following order-

“THAT the CMCC No. 1880 of 2013 pending before the Chief Magistrate’s Court at Mombasa be re-transferred to the Civil, Commercial and Admiralty Division of High Court of Kenya at Mombasa for hearing and final determination.”

That prayer is anchored on the following grounds-

1. **That the Defendant has since filed an application to introduce a Counter-Claim in the said suit and which application was filed subsequent to the transfer of HCCC No. 172 of 2004 from the High Court to the Lower Court.**
2. **That the intended Counter-Claim is in the sum of Kshs. 54,885,237/- which exceeds the pecuniary jurisdiction of the Chief Magistrate’s Court.**
3. **That it is only fair and just that the said CMCC NO. 1880 of 2013 be re-transferred for proper determination of the issues therein before a competent Court that is ceased with the requisite jurisdiction for the hearing and final determination of both the claim in the suit**

and the Counter-Claim once filed in the suit.

3. The application simply seeks retransfer of the Chief Magistrate's Court file to enable the Defendant argue an application for Amendment of Defence by pleading set off and Counter Claim. Although that is what the application seeks the Plaintiff in opposing the application essentially began to address the prayer for Amendment of Defence as though it was for consideration in this Ruling.

4. Section 18(1) of the Civil Procedure Rules is the guiding Section for the above application. That Section provides-

“18. (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.”**

From those provisions it is clear that this Court has power to grant the Defendant the prayers it seeks.

5. The Plaintiff's main objection is that such transfer will occasion delay and yet the debt the Plaintiff seeks in this claim was incurred in 1998. Plaintiff therefore is of the view that Defendant's present application is made in bad faith.

6. What the Defendant seeks is to have the **CMCC No. 1880 of 2013** file re-transferred to the High Court to enable it argue the application to amend Defence. The Defendant's application in my view has merit because it enables the Court to consider whether there is merit in the application to amend the Defence. If there is no merit and the claim is still within the jurisdiction of the Magistrate's Court the file will be returned there for trial. In my view the right for Defendant to be heard on its application for amendment should be balanced against Plaintiff's right to have its case heard expeditiously. In that balancing, I find in favour of the Defendant. This is because once the application for amendment is dealt with Plaintiff will be at liberty to fix its case for hearing.

The Court makes the following orders-

- a. **The Mombasa CMCC No. 1880 of 2013 is hereby transferred to this High Court and once it is transferred it shall retain case No. HCCC No. 172 of 2004.**
- (b) **The costs of the Notice of Motion dated 26th November 2013 shall be in the cause.**

DATED and DELIVERED at MOMBASA this 31ST day of JULY, 2014.

MARY KASANGO

JUDGE