

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. APPL. NO 293 OF 2013

DAS GROUP KENYA LTD.....APPLICANT

VERSUS

MAYFAIR HOLDINGS LTD T/A PECHE FOODS.....RESPONDENT

RULING

The notice of motion by the applicant dated 8-11-2013 prays for an order:

- a. **that this court to order for the withdrawal and transfer of the Civil Case in Kisumu Chief Magistrate Court Civil Case No. 162 of 2013 Das Group Ltd -VS- Mayfair Limited T/A Peche Foods from the Chief Magistrate's court at Kisumu to the High Court in Kisumu for trial and final determination.**
- b. **costs.**

The grounds in support of the said application are that the circumstances obtaining at the time of filing of the said suit have changed drastically thus necessitating the transfer of the same to the High Court. The applicant contends that due to the breach of contract the pecuniary jurisdiction of the lower court has been superseded and it is only this court that is capable of determining the same. The intended sum to be claimed is in excess of Kshs. 28 million.

The respondent has opposed this application vide the grounds of opposition. It contends that the same cannot be allowed as the suit pending at the lower court is a nullity. It argues that by allowing the application this court will be injecting life to an incompetent suit.

The argument by the parties herein, having read their submissions as well as the entire pleadings centres on the jurisdiction of this court to transfer suits. The suit in the lower court prays for taking of accounts and reconciliation of the same as well as orders of injunction. The big issue is whether as submitted by the applicant the plaintiff was not in the picture of the pecuniary nature of the suit. A close look at paragraph 5 of the plaint in my opinion states otherwise. The same states:

“It was also a term and/or condition of the said agreement that the defendant was to process the whole fish availed by the plaintiff of upto 90,000 kilograms per month at a consideration of USD 54,000 per month plus VAT and quantities over and above the said selling was to be processed at the rate of USD 0.45 per kilogram whole fish plus VAT. Thereafter, the contract consideration of USD 54,000/= was to be paid in advance before the 1st day of the relevant month or before the 7th day of the succeeding month”.

Though it is true that the suit has not gone to trial, a closer simple and plain reading of the above paragraph shows that the agreement between the parties shows a colossal sum of USD 54,000 at 90,000/= Kg of fish. I do not therefore agree with the applicant that at the time of filing suit they were unsure of the commercial value of the contract.

Having establish this what is therefore the fate of the matter at the lower court? I find that as long as the lower court does not have pecuniary jurisdiction to entertain the same, it is a nullity. This court cannot inject life to a suit of such nature.

The court is aware of its mandate as provided under section 18 of the Civil Procedure Act. The

reading of the said section in my opinion pre supposes a transfer of a suit which was from the beginning filed in a competent court with competent jurisdiction. But in a situation where the suit was incompetent, transferring it to another court for trial is tantamount to precipitating an illegality.

In Omwoyo -VS- Highlands & Produce Co. Ltd [2002] 1 KLR 698 Ringera J stated as follows:

“That being the case the sole issue of determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. In Kagenyi -VS- Misiramo & Another [1968] EA 48, Sir Udoma CJ held in relation to section 18 of the Uganda Civil Procedure Act – a provision which is in *pari materia* with section 18 of our code that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. In that case the appellant had sought to transfer a suit from the magistrate’s court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court. An in the very early case of Mendonca -VS- Rodrigues [1906 – 1980] 2 KLR 51, Hamilton J held that the High Court did not have power to order a transfer of a suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local jurisdiction of the lower court in which it had been filed. The principle of law to be gleaned from the authorities is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is file in the first place in a court which does not have pecuniary and or territorial jurisdiction to try it”.

Heavy reliance on the case of Karanja -VS- Diangui [2012] 1 EA 108 was made by the applicant. I have read the said authority and I want to differ from it on the ground solely that section 1A, 1B and 3 of the Civil Procedure Act are in my opinion relevant where the suits are properly before court. The overriding objectives contained therein does not mean that parties without doing their homework well proceed to file suits in the courts which do not have territorial or pecuniary jurisdiction then proceed to make all manner of applications citing these overriding objectives. The spirit of section 1A, 2, 3, 3A of the Civil Procedure Act and by extension Article 159 of the Kenyan Constitution 2010 is to ensure that where parties have brought themselves to the proper perview of the law they should be granted the liberty to have their matters determined expeditiously without any let or hindrance. Respectfully, they are not portions of law to be applied whimsically so as to heal illegalities. The position therefore taken by this court is that suits can only be transferred in situation where they were legally before a court of law.

Having stated as much I do not think the application herein is meritorious. The court does not have the necessary jurisdiction to transfer the suit for the reasons stated above. The application is dismissed with costs.

Dated, signed and delivered at Kisumu this 23rd day of July, 2014.

**H.K.
JUDGE**

CHEMITEI