



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISCELLANEOUS CIVIL APPLICATION NO. 656 OF 2011

NELSON BICHANGA.....APPLICANT

VERSUS

CITY COUNCIL OF NAIROBI.....RESPONDENT

RULING

The plaintiff's application dated 30th August, 2011 seeks to have the Chief **Magistrate's Civil Case No. 12084 of 2005** withdrawn from the lower court to the High Court of Kenya at Nairobi for hearing and disposal. The application was based on two grounds that:

“(a) The applicant already amended his plaint in the lower court and the amendment sought exceeds the jurisdiction of the lower court.

b) The applicant seeks to have the suit transferred to the High Court that has jurisdiction to entertain the suit.”

The application was supported by an affidavit sworn by **Monica Munyendo, an advocate in the firm of Ongweny & Moibi Advocates** which has the conduct of this suit on behalf of the plaintiff. The suit in the lower court was filed on 7th November, 2005 and the orders sought in the plaint are:

“(a) An order for a permanent injunction to issue against the defendant restraining it from advertising and/or selling the plaintiff's motor vehicles registration numbers KAJ 867F and KAE 144U.

(b) An order for the release of motor vehicles registration numbers KAJ 867F and KAE 144U to the plaintiff by the defendant.

(c) Damages.

(d) Costs of this suit.

(e) Interest on (a) and (b) above.

(f) Any further relief that this honourable court may deem fit and just to grant.”

Together with the plaint the plaintiff also filed an application seeking a temporary injunction to restrain the defendant from interfering and/or disposing of the said motor vehicles. The application was allowed and the court order was served upon the respondent. That notwithstanding, the defendant/respondent went ahead and sold the motor vehicles in issue.

Ms Munyendo further stated that the respondent’s action made the reliefs that had been sought initially in the plaint be overtaken by events and that prompted the plaintiff to file an application to amend the plaint in order to seek the relevant claims. The application for amendment of the plaint was heard by the lower court on 4th November, 2010. At the time the application was heard the issue of jurisdiction of the court based on the intended amendments escaped the attention of both parties and even the court and the application was allowed as prayed since the same was not opposed by the defendant.

The plaintiff’s advocate prepared the amended plaint and filed it in the lower court on 11th November, 2010. The prayers in the amended plaint include the value of the motor vehicles impounded, that is, **Kshs.1,235,242/=** and loss of user of the motor vehicles from the date they were impounded up to the date of judgment. Consequently, the reliefs sought exceed the pecuniary jurisdiction of the lower court, Ms Munyendo stated. She urged the court to allow the application failing which the plaintiff will suffer substantial loss, whereas on the other hand the respondent/defendant will not suffer any hardship or prejudice if the application is granted.

The application was opposed by the defendant who swore an affidavit through **Aduma J. Owuor**, the Deputy Director of Legal Affairs of the defendant. She stated that the plaintiff’s application is bad in law, incompetent, misconceived and an abuse of the court process. She added that the Chief Magistrate’s Court lacks pecuniary jurisdiction to hear and determine the plaintiff’s case. The High Court can only withdraw a suit from a court with competent jurisdiction to another court of competent jurisdiction and since the Chief Magistrate’s Court has no jurisdiction to hear the suit, the same cannot be withdrawn or transferred to any court, the deponent stated. She urged the court to dismiss the application.

In her brief submissions, Ms Munyendo sought to rely on the case of **CORNER HOLIDAY INN LIMITED & ANOTHER vs. ANDREW KURIA WANGUNYU [2006] eKLR**. In that application, the plaintiff had sought to withdraw its suit from the Chief Magistrate’s Court and transfer the same to the High Court for hearing and determination. The primary grounds for the application were that the plaintiff’s business had grown considerably and as such the value of the subject matter of the suit had exceeded the pecuniary limit of the Chief Magistrate’s Court. The defendant therein opposed the application on the ground that the suit was before a court which did not have jurisdiction in the first place and therefore it could not be transferred to any other place.

Azangalala, J. held that:

“Lack of jurisdiction may in circumstances such as the ones obtaining in this matter be a good reason or basis of withdrawal of a suit from the subordinate court and transfer to the High Court.”

The learned Judge proceeded to allow the plaintiff’s application.

Mr. Kithi for the defendant contended that a suit filed before a court without jurisdiction is a nullity. He urged the court to dismiss the application since there was nothing to transfer.

Section 18(1) (b) of the **Civil Procedure Act** grants the High Court power to withdraw any suit or other proceedings pending in any court subordinate to it and thereafter try or dispose of the same or transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same or re-transfer the same for trial or disposal to the court from which it was withdrawn. In **KAGENYI vs MUSIRAMO & ANOTHER [1968] EA 43**, Sir Udoma, C.J.held that an order for transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. Ringera J. was persuaded by that decision when he made a similar finding in **OMWOYO vs. AFRICAN HIGHLANDS AND PRODUCE COMPANY LIMITED [2002] 1 KLR 698**.

Azangalala J. was of the view that in the aforesaid decisions the learned judges imposed unnecessary limitations on the jurisdiction of the High Court which are not in Section 18 of the Civil Procedure Act. The judge stated:

“I dare say that imposing conditions on ourselves on occasions does not advance the course of justice and may indeed clog speedy determination of disputes between parties who come to our courts for justice.”

In this application the Chief Magistrate’s court initially had jurisdiction to try and determine the plaintiff’s suit. The amendment of the plaint was necessitated by the defendant’s violation of a lawful court order. In considering an application of this nature the court must take into account the overriding objective of the Civil Procedure Act and the rules made thereunder which is “to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act”. **Section 1A (2)** of the **Civil Procedure Act** states as follows:

“The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub section (1).”

Prima facie, the plaintiff has a well founded claim against the defendant. The plaintiff’s application to amend the suit was not opposed by the defendant. After the amendment the claim now exceeds the pecuniary jurisdiction of the Chief Magistrate’s Court. If the defendant had complied with the interlocutory injunctive order that had been issued by the trial court there would have been no need of amending the plaint. It is the defendant’s failure to obey the court order that necessitated amendment of the plaint. Equity cannot allow the defendant to benefit from its violation of a court order. To refuse to grant the plaintiff’s application would be tantamount to negating the overriding objective of the Civil Procedure Act as cited hereinabove.

If the plaintiff had initially filed his case before a court which had no jurisdiction to hear and determine the same I would have agreed with the defendant that there is nothing capable of being transferred to this court. But in the present circumstances, the interests of justice dictate that the plaintiff’s application be

allowed. Consequently, I grant the orders sought by the plaintiff save that the costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2011.

D. MUSINGA
JUDGE

In the presence of:

Margaret – court clerk

Miss Munyendo for the Applicant

No appearance for the Respondent