

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Misc Appli 789 of 2007

MONIER 2000 LIMITEDAPPLICANT

VERSUS

KENINDIA ASSURANCE CO. LTD.....RESPONDENT

R U L I N G

M/s MONIER 2000 LTD the Applicant herein is the Defendant in CMCC NO. 3416 of 2006. It has come to this court vide Misc. Civil Application No. 789/07 praying for orders that the case in the lower court be withdrawn and transferred to this court for hearing and final determination. That the time granted to it by the lower court within which to file and serve an Amended Defence, set off and counterclaim be enlarged. That the Applicant be granted leave to file an Amended Defence, Set-off and counterclaim in the High court in terms of the draft annexed to the Application and that costs be provided for. The Application is brought under sections 3, 3A and 18 of the Civil Procedure Act and Orders VIA rule 3, 6; Order VIII rule 2, Order XLIX rule 5 and all other enabling provisions of the Law. It is supported by the Affidavit of MORDECHAY MORDO, a director of the Applicant. The Application is opposed. The Respondent who is the Plaintiff in CMCC 3416 of 2006 has filed a Replying Affidavit and a Further Replying Affidavit sworn by its Legal manager one **REGINA N. KITHEKA**.

At the hearing of the Application Mr. Njoroge learned counsel for the Applicant after repeating what is on the face of the application submitted that the Applicant has a set-off and a counter claim which exceed the jurisdiction of the lower court. He argued that the transactions giving rise to the counterclaim and set-off relate to the same matter as that giving rise to the claim in the Plaint. He said that this court has unfettered jurisdiction to hear and determine the matter even on its own motion. The amount involved is Ksh.4,806,831 and this is beyond the lower court's jurisdiction. Counsel submitted that it is just and fair that the counterclaim and set off be delt together with the claim in the plaint so as to save on time, cost and effort. He then referred the court to the two authorities below on this point: **CORNER HOLIDAY INN LIMITED & ANOTHER –VS- ANDREW KURIA WANGUNYU [KLR] 2006 Misc.App.690/2006** and **INSECTA LIMITED –VS- MASTERMIND TOBACCO (K) [KLR] 2004 Misc. App. 363 of 2004**.

Mr. Njoroge then proceeded to urge the court to extend time within which to file the Amended Defence. He stated that parties herein filed a consent dated 16/10/2006 in the lower court consenting to the filing of the above mentioned Amended Defence counterclaim and set off but the same could not be filed in the lower court as the amount now way exceeded the lower court's jurisdiction. The Respondent would have corresponding time to file its Reply and so no prejudice would be suffered by it. This would ensure that substantial justice is achieved without undue regard to technicalities. Mr. Njoroge urged that this application be allowed to avoid multiplicity of suits and on this and the above point he referred the court to the cases of **TRUST BANK LTD –VS- AMALO COMPANY LTD, CIVIL APPEAL NO. 215/2000** and **LEROKA –VS- MIDDLE AFRACA FINANCE COMPANY LTD** Nairobi HCCC Civil App. No.113 of 1988.

Mr. Omwenga Learned Counsel for the Respondent in response relied on the Replying and Further Affidavits of Regina Kitheka and then stated that the Application was asking for orders that this court could not be able to grant. As there is no counterclaim and set off filed in the lower court, he submitted that this court has nothing to transfer. He further argued that nowhere in the Civil Procedure Act is there provision enabling this court to act on draft pleadings. He stated that if the court were to transfer the suit, it would be the suit without the counterclaim and set off. He stated that the Defence filed in the lower

court showed no indication that a counter claim and set off would be filed later. He submitted that the Applicant having failed to meet time granted by the lower court within which to file an Amended Defence, Counterclaim and set off, then this court cannot enlarge that time as the right place to pray for that time is the lower court. Counsel further submitted that only pleadings can be amended and referred to order 6A where pleadings are defined to mean plaint and Defence and hence stated that this being a miscellaneous application with no pleadings, this court lacks jurisdiction to make an order on a document that is not on the court file. He submitted that the court cannot be asked to amend the pleadings in the lower court and then transfer them to the High court for hearing. He said that the Applicant had not set out a strong case before this court to enable the court to grant the orders sought and that the Applicant was delaying the hearing of the main suit and holding a large sum of money belonging to the plaintiff and this application is without merit. He referred me to the cases of **KAGENYI -VS- MUSIRAMO and MENDONCA VS RODRIGUES** to reinforce his argument.

I have very carefully considered the different submissions by counsel. I have also considered the cases referred to me and for me the issue for my determination is whether the applicant has made out a case to have the suit filed against it in the lower court transferred to this court and whether the Amended Defence, set off and counterclaim should be filed as prayed.

On the onset let me repeat that the Applicant herein is the Defendant in the main suit. He did not therefore have control of where the Plaintiff was to be filed. The claim of Ksh.2,899,188 in the Plaintiff is well within the lower courts jurisdiction. That was the place for the suit to be filed. And that is the Plaintiff's case.

The Defendant's case is that he has a set off and counterclaim amounting to Kshs.4,806,331. That amount is way beyond the jurisdiction of the lower court at the present moment. It is not for this court at this point in time to adjudicate on the chances of success of the Defendant's/Applicant's counterclaim and set off. The issue now is whether the Defendant/Applicant should be allowed to transfer the suit to this court for determination. S.18 of the Civil procedure Act gives this court unrestricted discretion to withdraw any suit or proceeding pending in any court subordinate to it and to transfer such suit or proceeding to it for its disposal. The various cases quoted by counsel herein all point to the same point.

The consent dated 16/10/2006 filed in the lower court was for the Defendant to file its Amended Defence set off and counterclaim. It could not do so in the lower court for that court's lack of jurisdiction. The issues between the parties are best determined together. I therefore refuse to be bound by technicalities and choose to dispense greater justice. A transfer of the suit to the High Court is in this case necessary. The Plaintiff will not suffer any prejudice by having its claim heard by the High Court. I will and do hereby allow the application as hereunder-

- 1. cmcc No. 3416/2006 is hereby withdrawn from that court and transferred to this court for hearing and disposal;**
- 2. The Applicant is granted fifteen (15) days of today's date to file the Amended Defence, set-off and Counterclaim as drafted and serve the same.**
- 3. The Respondent is granted fifteen (15) days of the date of service to file a Reply if it chooses to**
- 4. costs of this application shall be in the cause.**

Orders accordingly.

DATED and DELIVERED at NAIROBI this 7th day of March 2008.

In the presence of Njorge for the Applicant and Mr. Ongori holding brief for Omwenga.

P. M. MWILU

JUDGE