



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISCELLANEOUS 645 OF 2007**

**RISING SUNKENYA (EPZ) LIMITED :::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**SUPER FIRST FORWARDERS LIMITED :::::::::::::::::::::::::::DEFENDANT**

**RULING**

The Plaintiff/Respondent filed suit in Milimani Principal Magistrates' Court at Milimani No. 4753 of 2007 against the defendant/applicant seeking Kshs.1,302,024.63 vide a plaint dated 30<sup>th</sup> may 2007. The Plaint was filed the same date of 30<sup>th</sup> May 2007.

There is a copy of an intended defence annexed as annexure D.W.2. It contains a counter claim of Kshs 11,035,758. It is on the basis of the said intended counterclaim that the defendant/applicant has presented to this Court a notice of motion dated 31.8.07 and filed on 13.9.07. It is brought under Order L rule 1, Section 18(1) (b) (i) and Section 3A of the Civil Procedure Act and all other enabling provisions of the law. It seeks orders that the Hon. Judge be pleased to withdrawal the suit in Nairobi Chief Magistrate Court at Milimani Civil case number 4753 of 2007 and thereafter transfer the same to the High Court at Nairobi for hearing and disposal.

The grounds are set out in the body of the applicants, supporting affidavit and oral submissions in Court. These are:-

- (1) The Counter claim exceeds the jurisdiction of the lower court.
- (2) The Court has jurisdiction to make orders sought.

The only opposition raised to the application is that the plaintiff has raised complaints concerning the merits for the said counter claim which is a matter for the trial.

The respondents did not attend court on the date appointed for the hearing of the application despite notice. However since they have their replying affidavit on record, their opposition cannot be ignored. The Court has perused the said replying affidavit sworn on 14.11.07 by Shaffy Mithwani and filed on 23.11.97. The major points relied upon by them are.

- (1) It is true they have filed a suit mentioned in Milimani CMCCC 4753 of 2007 claiming the amount mentioned.

(2) Paragraph 5 thereof stands to dispute the very basis as to why the counter claim should not be laid which is a triable issue

(3) Vide paragraph 11 thereof, tends depone that they will seek security for the said amount which is premature as that will arise after the suit has been regularized and relocated in the correct forum capable of disposing it off on merit.

In the courts assessment of the facts herein, it is clear that the respondent in his opposing deponement has not deponed that:-

(1) The Court has no jurisdiction to grant the reliefs sought.

(2) It is not disputed that the intended counter claim will be beyond the jurisdiction of the lower court.

On the merits of the application the court is satisfied that jurisdiction to grant the orders sought exists. Section 18 Civil Procedure Act Reads

*“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 proceedings 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 proceedings pending in any court subordinate to it and thereafter*

*(i) try or dispose off 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) transfer the same for trial or disposal to the court from which it was withdrawn.*

*2. Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may. Subject to any special direction in the case of an order of transfer either retry it or proceed from the point at which it has transferred or withdrawn”*

Section 3 A of the Civil Procedure Act on the other hand provides:

*“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court”.*

This Court has applied these two provisions to the facts herein and finds that:-

(i) The court has jurisdiction to grant the orders sought.

(ii) It will be unfair to deny the defendant applicant a chance to be heard on his intended counter claim which form the respondent’s deponements raises triable issues.

(iii) There is no dispute that the lower court has no jurisdiction to try the intended counter claim.

(iv) Declining the application will necessitate the filing of a separate claim by the defendants against the plaintiff which action will duplicate proceedings and prolong the trial as well as increase costs.

Justice therefore demands that a joint trial is the most ideal. This joint trial can only be facilitated

**by granting the orders sought.**

**For the reasons given prayer 1 of the application dated 31.8.2007 and filed on 13.9.07 be and is hereby allowed as prayed**

**(2) Costs will be in the cause.**

**DATED, READ AND DELIVERED AT NAIROBI THIS 24<sup>th</sup> DAY OF APRIL 2008.**

**R.N. NAMBUYE**

**JUDGE**