

REPUBLIC OF KENYA

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

Civil Suit 685 of 2004

WAMUNYU DECORATORS COMPANY LIMITED.....PLAINITFF

VERSUS

MUGOYA CONSTRUCTION & ENGINEERING LIMITED.....DEFENDANT

R U L I N G

This court by its ruling dated 18th July 2005 entered judgment for the Plaintiff for the liquidated amount of the Plaintiff's claim, being kshs 896, 528 and in so doing ordered that the suit be transferred to the Chief Magistrate's Court – Milimani for disposal. The Plaintiff was aggrieved with the order of transfer and has accordingly moved this court by a Notice of Motion dated 6.7.2006 seeking the court's review of that order. The application is brought under Section 3, 18 (1) and 80 of the Civil Procedure Act and order XLIV of the Civil Procedure Rules.

The Plaintiff's argument is that apart from the liquidated claim, for which judgment was entered in favour of the Plaintiff, the Plaintiff had additional prayer for general damages for breach of contract which the Plaintiff stated amounted to kshs 8.5 million approximately. That this claim is subject to the assessment by the court after hearing evidence. Plaintiff relied on a quote from the book CHITTY ON CONTRACTS 12 EDITION page 1044 as follows: -

“Defendant preventing complete performance. If the other party to the contract wrongfully prevents the Plaintiff from completing his performance, the Plaintiff may either recover damages for breach of contract, or alternatively sue upon a *quatum meruit* to recover a reasonable remuneration for his partial performance.”

The Plaintiff's claim is that it was prevented to complete the contract and its claim was therefore based on *quatum meruit*.

Defence in its replying affidavit concentrated in its response by showing the de-merit of the plaintiffs claim. With respect that cannot be for the court's consideration at this stage. Merit will be considered after the hearing of the case where evidence will be tendered. Defence further faulted the Plaintiff's application on the basis that the application failed to show under what rule in Order XLIV the Plaintiff relied upon. That further the Plaintiff had failed to show new important matter that had come to light.

The court has considered the application the affidavit evidence and counsel's submission. The failure of the Plaintiff to specify which rule it relied upon under order XLIV is not fatal to the application. It was in any case not the defendant's stand that such failure led in any way to its prejudice in dealing with the application. Order XLIV Rule 1 (1) amongst other ground provides that a review can be ***“for any other sufficient reasons.”*** This I find suffices to move this court to review its previous order for transfer of this suit to the subordinate court. The plaintiff has sufficiently argued that it estimates that its claim for general damages will exceed the amount of jurisdiction of the subordinate court. That to the court's mind is enough to move the court to grant the Plaintiff the prayers it seeks. Since the order being reviewed was issued by the court's own motion it is the courts view that the costs of the present application ought to be in the cause. The orders of the court are as follows: -

(1) That HCCC NO. 685 of 2004 is hereby withdrawn from the Chief Magistrate's court and is

retransferred to High Court Milimani for disposal.

(2) That the costs of the Notice of Motion dated 6.7.2006 shall be in the cause.

Dated and delivered this 25th day of January 2007.

MARY KASANGO

JUDGE