



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS**  
**Misc Appli 441 of 2006**

**HEILDELBERG (E.A) AFRICA LIMITED .....**  
**PLAINTIFF**

**VERSUS**

**NIZARALI DHANJI MOHAMMED HUDANI .....**  
**.....DEFENDANT**

**RULING**

The Respondent filed a suit against the Applicant in the Chief Magistrate's Court Milimani and made a claim for Kshs.250,000/= and US\$2500. The Applicant filed a defence and counterclaim and in the counterclaim made a claim against the Respondent for Kshs.2,979,125/= and US\$20,000. This counterclaim brought that action out of the monetary jurisdiction of the Chief Magistrate's court. The Applicant therefore, filed a Notice of Motion in this court seeking an order that the suit in the Chief Magistrate's court be transferred to the High Court Milimani. In the affidavit in support of that application stated that taking into account the award in damages sought in the counterclaim that the matter in the Chief Magistrate's court had gone beyond the pecuniary jurisdiction of the Chief Magistrate. However, before the Applicant would further advance in argument in support of that application, the Respondent raised the following preliminary objection:-

**“The Respondent herein shall at the hearing of the application dated 14<sup>th</sup> June, 2006 raise a preliminary objection on the grounds that this court has no jurisdiction to transfer a suit commenced in a court without jurisdiction”.**

The Respondent counsel in support of that preliminary objection stated that the claim in the counterclaim was beyond Kshs.3 million which is pecuniary jurisdiction of the Chief Magistrate. For that reason he argued that the counterclaim filed by the applicant in the lower court is a nullity for it was filed in a court which does not have jurisdiction to entertain it. On that basis he was of the view that the court cannot by the application filed by the applicant breathe life into that suit which was already a nullity by virtue of having a claim that is beyond the jurisdiction of the Chief Magistrate's court. The Respondent relied on the case of **Kagenyi v Musiramo & another [1968] E.A.** This is a Ugandan case which is based the Section 18 of the Ugandan Civil Procedure Act which seemed to be similar to the Kenyan Section 18 of the Civil Procedure Act. The holding of that case was as follows:-

**“(i) section 18 of the Civil Procedure Act gives a general power of transfer of all suits, which may be exercised at any stage of the proceedings even suo motu by the court without application by any party;**

**(ii) an order for the 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;**

**(iii) the subject matter of the application on the admission and showing of the applicant had been instituted in a court without jurisdiction and it was therefore incompetent for the case to be transferred to the High Court for hearing and determination”.**

The Respondent’s counsel submitted that for this court to entertain the applicant’s application the suit which is being sought to be transferred must first be a valid suit and must be filed in a court with competent jurisdiction. In conclusion the Respondent asked the court to uphold the preliminary objection. The Applicant’s counsel opposed the preliminary objection and submitted that the Respondent by raising the preliminary objection did not apply that the counterclaim be excluded. For that reason the applicant’s counsel concluded that by that failure the Respondent had acceded to the applicant’s counterclaim. He stated that such objection should have been made in the Chief Magistrate’s court where the respondent should have applied that the counterclaim be excluded. The Applicant referred to the same case relied upon by the Respondent and relied on the following passage of the case:-

**“principal matters to be taken into consideration are balance of convenience, questions of expense, interests of justice and possibilities of undue hardship”.**

The Applicant’s counsel stated that the balance of convenience is tilted to allowing the application for the transfer of the file in the Chief Magistrate’s court. That to accept the argument of the Respondent it would mean that the respondent would have filed the counterclaim in the High court then would have sought the transfer of the file from Magistrate’s court to the High court. That in his argument was not convenient to the applicant. He also was of the view that under Section 18 of the Civil Procedure Act the court does not have discretion in an application such as the one made by the Applicant hereof. He was also of the view that the preliminary objection raised by the Respondent was not a pure point of law and therefore, failed the test of the case of **Mukisa Biscuit Co. v West End Distributors [1969] E.A.** The Applicant also stated that the Respondent had raised an objection in the Magistrate’s court objecting to the counterclaim on the basis that it was filed without jurisdiction and the Magistrate upheld that objection. In a brief response counsel for the Respondent stated that the objection raised before the magistrate’s court related to limitation and not jurisdiction.

The Plaintiff has moved the court under Section 18 of the Civil Procedure Act. Section 18(1) provides as follows:-

**“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) ...**
- (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter**
  - (i) try or dispose of 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) ...**

That section shows that this court has jurisdiction to transfer for trial or disposal a matter from the subordinate court to the High court. The action in the Chief Magistrate’s court was initiated by the Plaintiff. The Defendant in filing the defence also included a counterclaim which took the matter out of the pecuniary jurisdiction of the Chief Magistrate’s court. Order VIII Rule 2 of the Civil Procedure Rules defines a counterclaim as a cross suit which enables the court to pronounce a final judgement. The suit

that was filed in the Chief Magistrate's court was within the jurisdiction of that court. That jurisdiction to my mind was not removed in any way by the value shown in the counterclaim. I reject the argument raised by the Respondent for indeed if I was to accept the same it would mean that the Defendant would have filed a defence in the Chief Magistrate's court and a counterclaim in the High court then would have had to transfer the Chief Magistrate's court file to the High court. Subsequently the applicant would have had to apply to consolidate the file from the Chief Magistrate's court with the file containing a counterclaim. Clearly the balance of convenience favours the Applicant for indeed Section 18 of the Civil Procedure Act clothes this court with discretion to order transfer from the Magistrate's court. For the above reasons the preliminary objection dated 8<sup>th</sup> June, 2006 is hereby rejected and dismissed with costs to the Applicant. Orders accordingly.

**MARY KASANGO**

**JUDGE**

Dated and delivered this 27<sup>th</sup> October, 2006.

**MARY KASANGO**

**JUDGE**