

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

MISC. APPL. NO.363 OF 2004

INSECTA LIMITED.....PLAINTIFF

VERSUS

MASTERMIND TOBACCO (K) LTD.....DEFENDANT

R U L I N G

The Applicant, **MASTERMIND TOBACCO (KENYA) LIMITED**, which is the Defendant in Nairobi CMCC No.2398 of 2004, seeks withdrawal of the suit from the Chief Magistrate's Court and transfer of the same to this court for hearing and determination. The application is essentially brought under Section 18 of the Civil Procedure Act, Cap.21 (the Act) which gives the court discretion to do, inter alia, what is sought, either on application of any of the parties or of its own motion. The main ground for the application is that the Applicant's counterclaim filed in the said suit exceeds the pecuniary jurisdiction of the Chief Magistrate. The Respondent, **INSECTA LIMITED**, which is the Plaintiff in the said suit, opposes the application upon the main ground that the counterclaim having been lodged in a court without jurisdiction, the same will not be maintainable either in that court or in this court for lack of jurisdiction. Therefore, the court also lacks jurisdiction to transfer the suit to itself.

I have read the affidavit sworn in support of the application and that sworn in reply. They are both essentially arguments for the respective positions of the parties as already stated. I have also given due consideration to the submissions of the learned counsels appearing made in furtherance of those arguments. Learned counsel for the Respondent relied on the decision of the High Court of Uganda in **KAGENYI -VS MUSIRAMO & ANOTHER [1968] EA 43** where it was held that Section 18 of the Ugandan Civil Procedure Act (which is identical to Section 18 of our own 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; but 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. There is an important distinction between that case and the case before me. In the Ugandan case it was the Plaintiff's claim that was outside the lower court's pecuniary jurisdiction and therefore should not have been filed in that court in the first place. In the present case the Plaintiff's case is well-within the pecuniary jurisdiction of the lower court and was properly instituted there. What is beyond that court's pecuniary jurisdiction is the counterclaim raised by the Defendant. The counterclaim is intimately connected with the Plaintiff's claim in that both arise out of the same transaction though the Plaintiff's claim is based on contract while the counterclaim is based on the tort of negligence. The counterclaim is also raised as a set-off against the Plaintiff's claim. In these circumstances I hold that it was proper for the Defendant to raise the counterclaim in the same suit instituted by the Plaintiff in order that all issues between the parties can be determined. It is merely incidental, in my view, that the counterclaim is beyond the pecuniary jurisdiction of the subordinate court. A transfer of the entire suit to the High Court is therefore necessary, and the Plaintiff will not have suffered any prejudice for its claim to be tried in the High Court rather than in the subordinate court. Besides, there will be a saving in time and money, rather than have the Defendant's counterclaim before the subordinate court struck out, only for it to be filed before the High Court.

It is therefore my respectful view that the doctrine in the Ugandan case of ***KAGENYI (supra)***, which is of persuasive authority only, is not applicable to counterclaims where the counterclaim is intimately connected to the Plaintiff's claim or arises out of the same transaction. I note that the doctrine was applied

by my sister, Ang'awa, J in the case of ***JOSLINE MUMO -VS- GIDEON MUTHAMIA (Unreported), Nairobi HCCC No.2893 of 1997*** . But in that case, just as in the Ugandan case, it was the suit as filed by the Plaintiff therein that was beyond the jurisdiction of the subordinate court. It was not a case, such as the present one, where a counterclaim arising out of the same transaction as the Plaintiff's claim, is raised by the Defendant. No case was quoted to me where the doctrine in the Uganda case was applied to a counterclaim.

For the reasons given above I will allow the application. Nairobi CMCC No.2398 of 2004 is hereby withdrawn from that court and transferred to this court for hearing and disposal. Costs of the application shall be in the cause. Orders accordingly.

DATED AND SIGNED AT NAIROBI

THIS 7TH DAY OF OCTOBER 2004

H. P. G. WAWERU

JUDGE

DELIVERED THISDAY OF OCTOBER 2004