



REPUBLIC OF KENYA



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Greenchain International Kenya Limited v Azalea Holdings Limited & 2 others (Miscellaneous Application 22 of 2022) [2023] KEELC 16270 (KLR) (14 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16270 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
MISCELLANEOUS APPLICATION 22 OF 2022**

MD MWANGI, J

MARCH 14, 2023

BETWEEN

GREENCHAIN INTERNATIONAL KENYA LIMITED PLAINTIFF

AND

AZALEA HOLDINGS LIMITED 1ST DEFENDANT

THE HUB KAREN MANAGEMENT COMPANY 2ND DEFENDANT

UPSTATE KENYA AUCTIONEERS 3RD DEFENDANT

(In respect of the 1st Defendant's Notice of Motion Application dated 2nd November, 2021) seeking the transfer of a suit from the Magistrate's court to this court on the basis of an intended counter-claim)

RULING

Background

1. What is before this court for determination is the Defendants' application dated November 2, 2021. The application was formerly filed in the High Court Commercial Division. It was transferred to this court pursuant to the Ruling of the said court delivered on August 4, 2022. The application is expressed to be brought under the provisions of Sections 18 (1) (b) and 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*. The substantive orders sought in the application are:
 - a. The Civil Suit No MCCC/E4431/2020- Greenchain International Kenya Limited vs Azalea Holdings Limited, The Hub Karen Management Company and Upstate Kenya Auctioneers be transferred from the Milimani Chief Magistrate's Commercial Court, Nairobi, to the Milimani High Court Commercial & Admiralty Division at Nairobi for directions, hearing and final determination.



- b. The deposit of Kshs. 2,000,000/= made by the Plaintiff in MCCC/E4431/2020, Greenchain International Kenya Limited vs Azalea Holdings Limited & 2 Others pursuant to the Chief Magistrate's Court orders of 8th January, 2021, be transferred to the custody of the High Court registry, pending the hearing and determination of the main suit.
 - c. The costs of this application be borne by the Plaintiff/Respondent.
 2. The application is premised on the grounds on the face of it and further supported by the Supporting Affidavit of Joshua Mwendwa Muinde, the Operations Manager of the 1st Defendant/Applicant Company deponed on November 2, 2021. The said deponent avers that the 1st Defendant/Applicant is the registered proprietor of the property L R No 1159/466, where it has developed shops and offices, in respect to which, it entered into a fixed term lease agreement dated July 26, 2019 with the Plaintiff/Respondent herein for Unit C2.01. He deposes further that the 1st Defendant issued a Proclamation Notice dated August 18, 2020 upon the Plaintiff for breaching the lease agreement by defaulting on rent payment.
 3. The Plaintiff filed a suit MCCC/E4431/2020 at the Milimani Chief Magistrate's Court where it was issued with interim orders staying the proclamation notice by the 3rd Defendant on behalf of the 1st Defendant. In response, the deponent states that the Defendants/Applicants, filed a statement of Defence and Counterclaim claiming special damages amounting to Kshs 52,278,876/= from the Plaintiff/Respondent.
 4. The Plaintiff/Respondent was ordered by the Magistrate's court to deposit Kshs 2,000,00/- as security for costs before release of its proclaimed goods by the 1st Defendant/Applicant. The Plaintiff complied and subsequently collected its goods from the 1st Defendant/Applicant.
 5. The Defendants/Applicants filed an application dated October 2, 2020 challenging the Magistrate's Court jurisdiction to determine the counterclaim which exceeded the court's pecuniary jurisdiction. The application was duly heard and the court made a ruling and held that it lacked the jurisdiction to hear the counterclaim but had jurisdiction to determine the Plaintiff's suit.
 6. The deponent contends that the Plaintiff remains in breach of the Lease Agreement. However, the 1st Defendant cannot exercise its right to distress for rent in view of the orders by the Magistrate's court. The 1st Defendant further avers that the Plaintiff's Shareholders/Directors are foreigners with no known property within the jurisdiction of the Court. Further that the guarantors of the Plaintiff's lease obligations are foreigners as well and flight risks.
 7. The Applicants assert that the High Court has discretionary power to withdraw and transfer any suit or other proceedings pending in any court subordinate to it where it deems fit. It is in the interest of justice that the suit pending in the Magistrate's court be transferred to this court for hearing and determination.
 8. The matter was mentioned before this court on November 24, 2022 when the Plaintiff/Respondent's counsel sought leave of court to file its Replying Affidavit. Leave was granted.
 9. The court further directed that the application be canvassed orally in open court on January 24, 2023. Parties were granted the liberty to file their respective bundle of authorities before the said hearing date.

Replying Affidavit

10. The Defendants' application is opposed by the Plaintiff vide the Replying Affidavit sworn by one Martin Koikai Kitambo, deponed on January 20, 2023. The deponent avers that the Plaintiff



approached the Chief Magistrate's Court through an application dated August 24, 2020 seeking for ex parte orders to stop the sale of the Plaintiff/ Respondent's goods via public auction.

11. The Chief Magistrate's Court issued an Order on August 24, 2020 staying the Proclamation Notice dated August 18, 2020 and prohibited the Applicant from proceeding with the sale of the Plaintiff's goods. On December 22, 2020, the court directed the Defendants to release the goods they had confiscated on condition that the Plaintiff pays a sum of Kshs 2,000,000/= as security for costs, which orders the Plaintiff duly complied with.
12. The deponent further states that the Applicant has merely marked as an annexure the draft Counterclaim but has not expressly sought an order for the same to be deemed as duly filed upon payment of the requisite court fees. That the court cannot suo motto grant orders which have not been expressly sought.
13. Further, that the Applicant had sought orders that the Plaintiff's suit be struck out for lack of jurisdiction on the basis that the Counterclaim exceeded the pecuniary jurisdiction of the Chief Magistrate's Court. The said application was however struck out by the Magistrate's court as the Counterclaim was yet to be filed.
14. The deponent contends that for this court to consider transfer of a suit based on a counterclaim, it has to be satisfied that the circumstances leading to the Counterclaim ought to be connected and intertwined with the Plaintiff's suit. That the burden of proving the connection between the two suits so as to warrant the transfer lies with the Applicant.
15. He avers that the genesis of the Plaintiff's suit in the Magistrate's Court is not for the entire sum owing in respect to the 6 year Lease Agreement but rather for the claimed rent owed that resulted in the Proclamation of the Plaintiff's movable properties.
16. That the amount claimed, based on the Proclamation Notice, is within the pecuniary jurisdiction of the Magistrate's Court under Section 7 (1) (d) of the [Magistrate's Court Act, 2015](#). The Magistrate's court therefore has the jurisdiction to hear and determine the suit.
17. Regarding stay of proceedings in the Magistrate's Court, the deponent avers that the Applicant has not met the test for grant of the said order and the Defendants' application is just but a mere delaying tactic.
18. The deponent further avers that the Applicants' prayer that the security deposit of Kshs 2,000,000/= be increased and transferred to the custody of the High Court is baseless as the amount was based on the contested rent arrears and also taking into account the deposit paid by the Plaintiff while occupying the premises. In addition, security for costs is within the discretion of the court in light of all the relevant circumstances of the case. The application is not only misconceived, but also frivolous and vexatious and should therefore be dismissed with costs.

Further Affidavit

19. I note that there are two Further Affidavits on record filed on behalf of the 1st Defendant/Applicant. One is deponed by Sameh Ibrahim, the Chief Operations Officer deponed on February 14, 2023. Though the second one is indicated to have been deponed by Joshua Mwendwa Muinde, but the deponent's name is indicated as Sameh Ibrahim, at the Jurat. This is an anomaly that the court cannot overlook. The faulty affidavit by Joshua Mwendwa Muinde is therefore expunged from the record. In any case, the contents of the two Affidavits are the same.
20. On the substance of the Affidavit by Sameh Ibrahim, he states that the connection between the Plaintiff and the Counterclaim is manifested by the fact that their prayers emanate from the Lease



Agreement dated July 26, 2019. That the rent arrears which form the basis of the Plaintiff's claim in the Subordinate court arise from the Plaintiff's occupation of the business premises.

21. The deponent states that the balance of convenience in administering justice is for the Plaintiff's suit and the Counterclaim be heard by this court to avoid multiplicity of suits over the same subject matter. That the Applicant seeks to challenge the 30 days' Notice of Termination of the Lease Agreement issued by the Plaintiff and it should thus not be denied the chance.
22. He avers that it is in the interest of justice that the proceedings in the Magistrate's Court be stayed as the intended hearing will amount to an unfair trial as the Applicant is yet to file a Defence and Counterclaim.
23. He asserts that the fact that the Magistrate Court categorically stated in its ruling of 14th April, 2021 that it lacked the pecuniary jurisdiction over the Applicant's Counterclaim of Kshs 52,278, 876.00, will mean that the Applicant will be pushed from the seat of justice if the current application is not allowed. The application should therefore be allowed and orders sought granted.

Applicant's Submission

24. Mr Njeru, for the Applicant identified 2 issues for determination, namely;
 - a. Whether the court has jurisdiction to transfer the suit.
 - b. Whether the application is merited.
25. On the issue of jurisdiction, Counsel submitted that it is not disputed that this court has the jurisdiction pursuant Section 18 of the Civil Procedure Act. That the said provision empowers the court on an application by any party or suo motto to transfer a case to itself.
26. As to whether the application is merited, the Applicant submits that a counterclaim is to be treated as a cross-suit with all elements of a Plaint. Rule 8 explains the rationale as to avoid multiplicity of suits based on the same cause of action.
27. In the instant case instant case, the Applicant asserted that the Plaintiff makes reference to a Lease Agreement dated July 26, 2019. In both the Plaint and Counterclaim reference is made to the Lease. It was pointed out that at Paragraph 4, the Plaintiff had indeed conceded that the relationship between the parties emanated from the Lease.
28. Counsel for the applicant submitted that the rental arrears of around Kshs 5.3 Million were still pursuant to the lease agreement. It was therefore clear that the circumstances in both the Plaint and Counterclaim were intertwined and closely related and ought to be heard together. The Magistrate's Court made a ruling on April 14, 2021 pronouncing itself to have pecuniary jurisdiction over the rental arrears but not the counterclaimed amount of over Kshs 52 Million.
29. The Applicant submitted that the Court should take into account the balance of convenience, expense, interest of justice and the possibility of undue hardship to be caused by multiplicity of suits. It will also be in the interest of saving judicial time and resources. Separating the counterclaim from the original suit will lead to multiple suits defeating the objects of Section 1A of the Civil Procedure Act. It would be contrary to the overriding objectives.
30. Counsel further submitted that the Respondents had not shown any prejudice they stood to suffer if the suit and counter-claim were heard as one suit. He submitted that the court has always in the interest of justice directed that the suit and counterclaim be heard as one. He relied on the cases of *A.O.*



Respondent’s Submission

31. In opposition to the Application, Mr. Owino submitted in respect of each of the orders sought by the Applicants. On the first prayer of transferring the suit from the subordinate court to the High Court, he submitted that a transfer would only be considered after looking at the motive, the character of the proceedings, reliefs sought, interests of the litigants and more importantly, administration of justice. He cited the case of Hangzhou Agrochemicals Industries Ltd –vs- Panda Flowers Ltd (2012) eKLR.
32. It was the Respondent’s submission that the motive and character of the proceedings before the Magistrate’s court were different from the intended counter-claim. That the substratum of the suit before the Magistrate’s Court was based on a Proclamation Notice dated April 27, 2020 issued by the applicant for rent arrears. It was not based on the 6 years Lease unlike the Counterclaim.
33. The Respondent pointed out that the alleged Counterclaim was yet to be filed. There was no order to deem the Counterclaim as duly filed either. The Ruling by the Honourable Magistrate at Paragraph 27 had noted that the Counter-claim had not been filed. That remains the position.
34. On the issue of stay, the Respondent prayed that the same be denied since the Magistrate’s Court has the jurisdiction to hear and determine the matter before it. It is not in the interest of justice to transfer the case. It has been 15 months since the matter was stayed. The stay order was issued on November 5, 2021. It was their submission that the Respondent had been ousted from the seat of justice for 15 months yet the matter had been certified ready for hearing. The Respondent asserted that its suit was distinct and different from the intended counterclaim. Nothing stops the applicant from filing a different suit.
35. Finally, on the issue of security for costs, the Respondent submitted that issuance of order for security of costs is a discretion of the court. He cited the case of Ocean View Beach Hotel Limited –vs- Salim Sultan Mollo & 5 Others (2012) eKLR.
36. It was the Respondent’s position that the Applicants had not filed an appeal nor an application for review of the order for security of costs. What is before the court is neither an appeal nor a review. It was the Plaintiff’s submission that this court should neither transfer the suit nor interfere with the order on costs.

Submissions in rejoinder by the Applicants

37. Counsel for the Applicants in a rejoinder reiterated that the Proclamation Notice was issued as a consequence of breach of the Lease. He admitted that the Counterclaim had not been filed and sought the court’s indulgence that it be filed in the court with the necessary pecuniary jurisdiction.
38. Regarding the security of costs, it was the Applicant’s submissions that security of costs was based on the amount sought by the party in the case (the subject matter of that suit). With the filing of the Counterclaim, the subject matter would significantly change. It would therefore be reasonable that the security for costs be proportionate to the claim. It would defeat reason to have security of Kshs. 2 Million in a case with a value of Kshs. 52 Million. Finally, the Applicants submitted that the purported distinction of the suit and the counterclaim as submitted by the Respondent was not realistic.



Issues for determination

39. The Court has carefully read and considered the application herein, the Affidavits in support thereto alongside the annexures attached thereto, the Replying Affidavit, and the submissions by both parties. The sole issue for determination is whether the Defendants/Applicants are entitled to the order of transfer of the suit before the Chief Magistrate's Court to this court in contemplation of the intended counterclaim.

Analysis and determination

40. Section 18 of the *Civil Procedure Act* bestows upon the High Court, and courts of equal status for that matter, the power to transfer any suit pending before it to any court subordinate to it and competent to try it or withdraw any suit pending in any court subordinate to it and thereafter try or dispose it or transfer it as the case may be. It provides;

- “(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 proceeding 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 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) re-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 directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

41. Additionally, the Applicant in this case further relied on Section 3A of the *Civil Procedure Act*.
42. The Defendants/Applicants have sought to transfer the matter pending before the Magistrate's Court to this court on the basis of an intended counterclaim which according to them will take the matter out of the pecuniary jurisdiction of the Chief Magistrate's court. The Defendants aver that the intended counterclaim is for a total sum of over Kshs. 52 Million emanating from breach of the 6 Years Lease Agreement executed between them and the Plaintiff hence their insistence that the Plaintiff's suit and the intended counterclaim be heard together.
43. The Honourable Magistrate in his ruling of April 14, 2021 in the case before him held that the subordinate court lacked the jurisdiction to hear and determine the intended counterclaim. The Honourable Court further noted that in any case the Counterclaim was not even before him as it was



yet to be filed. That remains the position to date. The counterclaim is still a proposal/ an intention in the minds of the Defendants/Applicants. Counsel for the Defendants/Applicants purported, though not expressly to seek leave of court to deem the counter-claim as duly filed. That would amount to stealing a march against the Plaintiff/Applicant.

44. Furthermore, the Applicants have not preferred an appeal against the Hon Magistrate's decision. Certainly, what is before me is not an appeal.

45. The Plaintiff insists that its suit is based on the Proclamation Notice issued by the 1st Defendant while the Defendants' intended counterclaim emanates from the Lease Agreement.

46. Counterclaims are provided for under Order 7 Rule 3 of the Civil Procedure Rules which provides that: -

“A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.”

47. A counterclaim is defined in Halsbury's Laws of England, Fourth Edition, Vol. 42, as follows: -

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.”

48. Further that,

“Any claim in respect of which the defendant could bring an independent action against the plaintiff may be enforced by counterclaim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff's claim. Thus not only claims for money but also other claims such as a claim for an injunction or for specific performance or for a declaration may be the subject of a counterclaim.”

49. The intended Counterclaim, emanates from the alleged breach of the Lease Agreement dated July 26, 2019. The Plaintiff's suit on the other hand is based on the Proclamation Notice dated April 27, 2020 issued by the applicant for rent arrears. I agree with the Plaintiff's Counsel that the two claims though emanating from the same contract, the causes of action are distinct. They may in an appropriate case scenario be tried in the same suit but in this scenario, it is clear that they cannot be conveniently disposed off together.

50. This court has power pursuant to Section 18 (1) (b) (i) of the Civil Procedure Act, Cap 21, Laws of Kenya, to make the order of transfer of a matter pending before the Magistrate's Court to this court for disposal. However, in the instant suit, the Counterclaim has not even been duly filed. I would, therefore, agree with Counsel for the Plaintiff that transferring the suit before the Magistrate's Court will not only be premature but also an abuse of process of court and more so the discretion bestowed upon this court on transfer of suits under Section 18 above. The Subordinate Court is properly seized



of the jurisdiction to hear and determine the suit before it as filed by the Plaintiff. The Applicants' action has unnecessarily delayed the hearing of the Plaintiff's case before the Magistrate's court.

51. Having held so, there is no basis in interfering with the Subordinate Court's discretion on security for costs. In any event, the Applicant has not preferred an appeal against the Honourable Court's finding on the same. Regarding the Applicants' concern that the Plaintiff's directors are foreigners and flight risk, parties voluntarily entered into the Agreement and the Court has no power to interfere with the same. That is also not the issue before this court.
52. Consequently, the Defendant/Applicants' Miscellaneous Application has no merit and the same is dismissed with costs to the Plaintiff/Respondent. The Defendants are at liberty to file their own independent suit.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MARCH 2023

M.D. MWANGI

JUDGE

