Mwangi v Mountain Top Publishers Limited (Miscellaneous Application E752 of 2024) [2025] KEHC 6764 (KLR) (Commercial and Tax) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6764 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E752 OF 2024

PM MULWA, J

MAY 22, 2025

BETWEEN

JOHN IRUNGU MWANGI ..... APPLICANT

AND

MOUNTAIN TOP PUBLISHERS LIMITED ..... RESPONDENT

RULING

1. Before the Court for determination is the Notice of Motion application brought under Sections 1A, 1B, 3, 3A and 18 of the *Civil Procedure Act*, and Order 51 of the Civil Procedure Rules. The Applicant seeks an order transferring Milimani MCCC No. 28 of 2021, John Irungu Mwangi v Mountain Top Publishers Ltd, from the Chief Magistrate's Court to the High Court, Commercial and Tax Division, for hearing and determination. Additionally, the Applicant seeks leave to amend the plaint.

2. The application is premised on the grounds that in 2018, the Plaintiff and Defendant entered into an agreement whereby the Plaintiff wrote the CRE Grades 1, 2 and 3 Pupils' Books and Teacher's Guides. Under the agreement, the Plaintiff was to receive 10% royalties from all sales of the publications. However, the Defendant failed to honour the agreement, prompting the Plaintiff to file a suit in the Chief Magistrate's Court vide the plaint dated 14th August 2020. The Plaintiff asserts that the value of the subject matter exceeds the pecuniary jurisdiction of the Chief Magistrate's Court, thus justifying the request to transfer the suit to this Court and amend the plaint to include a claim for 10% royalties from all sales made by the Defendant.

3. The motion is supported by the affidavit of John Irungu, sworn on 10th September 2024, which is annexed to the application.

4. In opposition, the Respondent filed a replying affidavit sworn by Lawrence Njagi on 30th September 2024. Additionally, the Respondent raised a Preliminary Objection on the same date.

5. The Preliminary Objection is based on the grounds that there is no existing suit pending before the Chief Magistrate's Court, as the suit was allegedly dismissed on 13th January 2021. The Respondent contends that the instant application is an abuse of the court process, as the Applicant had filed a similar application in Milimani High Court Commercial Misc. E873 of 2023, which was withdrawn.

6. Both the application and the Preliminary Objection were heard together through written submissions. The Plaintiff/Applicant filed submissions dated 30th October 2024, while the Defendant/Respondent filed submissions dated 16th October 2024.

7. The Applicant contends that the suit before the Chief Magistrate's Court is still active and has not been dismissed. The Applicant further asserts that the earlier suit filed before this Court, seeking the transfer of the suit from the lower court, was withdrawn, and as such, was not heard on its merits.

8. In contrast, the Respondent argues that this Court lacks jurisdiction to transfer the matter and that the Plaintiff should withdraw the matter in the Chief Magistrate's Court and file a fresh suit in this Court. The Respondent also disputes the Plaintiff's assertion that the information upon which the proposed amendment is based was not within the Plaintiff's knowledge at the time of filing the suit in the Magistrate's Court.

Analysis and determination

9. I have considered the application, the affidavits filed in support and opposition thereto, the preliminary objection raised by the Respondent, the respective submissions of counsel, and the applicable legal framework. The three issues that fall for determination are:

   i. Whether the Preliminary Objection is merited.

   ii. Whether this Court has jurisdiction to transfer Milimani MCCC No. 28 of 2021 from the Chief Magistrate's Court to the High Court, Commercial and Tax Division.

   iii. Whether the Plaintiff should be granted leave to amend the plaint.

Whether the preliminary objection is merited

10. The leading authority on the nature and scope of a preliminary objection remains Mukisa Biscuits Manufacturing Ltd v West End Distributors (1969) EA 696, where the law stated

> " ...a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which, if argued as a preliminary point may dispose of the suit."

11. The Supreme Court echoed this position in Hassan Ali Joho & Another v Suleiman Said Shabal & 2 Others, SCK Petition No. 10 of 2013 [2014] eKLR, affirming that a preliminary objection must raise a pure point of law capable of disposing of the matter at a preliminary stage.

12. The Respondent has raised a preliminary objection to the present application on the ground that it constitutes an abuse of the court process, citing the Applicant's earlier filing and subsequent withdrawal of a similar application in Milimani High Court Commercial Misc. Application No. E873 of 2023. The Applicant concedes to the withdrawal of the prior application but contends that the same was never heard or determined on its merits.

13. It is settled law that the withdrawal of a suit or application, without a determination on its merits, does not invoke the bar of res judicata as set out under Section 7 of the *Civil Procedure Act*. The doctrine

is premised on the finality of litigation and is only applicable where a matter has been conclusively adjudicated upon by a court of competent jurisdiction. In the present case, the previous application having been withdrawn prior to hearing, cannot be said to have been determined on its merits so as to preclude the Applicant from bringing the current application.

14. Upon careful consideration, I find that the preliminary objection raised does not meet the legal threshold established in the oft-cited case of Mukisa Biscuit (supra). A valid preliminary objection must raise a pure point of law, which is capable of disposing of the matter in limine. The Respondent's objection is interwoven with contested factual issues that would require evidentiary interrogation and cannot be resolved purely on the basis of law. It must therefore fail.

15. The Respondent further contends that the suit pending before the Chief Magistrate's Court is incompetent and incapable of being transferred on account of want of jurisdiction. I am not persuaded by that argument. A perusal of the pleadings in Milimani MCCC No. 28 of 2021 reveals that the suit was instituted by the Plaintiff seeking payment of 10% royalties on educational publications sold by the Defendant. At the time of filing, the Plaintiff did not specify the quantum of royalties claimed. The Applicant has explained that the failure to plead a specific sum was informed by the unavailability of information regarding total sales. The Plaintiff now avers that it is in possession of an approximate figure of the royalties due and has expressed concern that the value of the claim may exceed the monetary jurisdiction of the Chief Magistrate's Court, which is currently capped at Kshs. 20,000,000. That concern is not, on the face of it, frivolous.

16. This Court further notes that the Chief Magistrate's Court, in Milimani MCCC No. 28 of 2021, issued directions requiring the Respondent to furnish the Plaintiff with account statements. The Applicant contends that the Respondent has not complied with that directive, it is evident that the matter is still active in court.

17. The Plaintiff therefore seeks to have the suit transferred to the High Court to ensure it is heard by a court with competent jurisdiction. Section 18 of the *Civil Procedure Act* provides as follows:

    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. Retransfer 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.

18. Section 18 empowers the High Court to withdraw and transfer a suit pending before a subordinate court, either on application or suo moto. The discretion under this provision must, however, be

exercised judicially. The Applicant must demonstrate compelling reasons to justify the transfer of the matter.

19. In AO Basid Limited v ASL Credit Limited [2019] eKLR, where in approval of the decision in David Kabungu v Zikarengu & 4 others, Kampala HCCS No. 36 of 1995, the Court stated as follows-

> " Section 18 (1) (b) of the *Civil Procedure Act* gives the Court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the Court without application by any party..."

20. Additionally, Section 1A (1) of the *Civil Procedure Act* enshrines the overriding objective of the Act and the Rules made thereunder as being to facilitate the just, expeditious, proportionate, and affordable resolution of civil disputes. The transfer of this suit to a competent forum aligns with this objective and would avoid a situation where the court is unable to grant effective relief due to jurisdictional limitations.

21. I conclude that the applicant has established the requirements of Section 18 of the *Civil Procedure Act*.

Whether leave should be granted to amend the plaint

22. The Plaintiff also seeks leave to amend the plaint to reflect a specific quantum of the royalties claim and to include a precise prayer for 10% of total sales. The principles governing the amendment of pleadings are well settled. In Eluid Gachukia & Another v Zipporah Wangui Gachukia & 2 Others [2015] eKLR, the Court observed that:

> " Amendments should generally be allowed so as to bring out the real issues in controversy between the parties, provided no prejudice is occasioned to the opposing party that cannot be compensated by costs."

23. I am satisfied that the proposed amendment is both necessary for clarity and for the just resolution of the dispute. No prejudice has been demonstrated by the Respondent that cannot be mitigated by an appropriate award of costs.

24. In the result, I find that the Notice of Motion dated 10th September 2024 is merited and I allow the same on the following terms:

    i. Milimani MCCC No. 28 of 2021 - John Irungu Mwangi v Mountain Top Publishers Ltd is hereby withdrawn from the Chief Magistrate's Court at Milimani and transferred to the High Court, Commercial and Tax Division, for hearing and determination.

    ii. The Plaintiff is granted leave to amend the plaint to include a specific claim for 10% royalties from the Defendant's total sales. The amended plaint shall be filed and served within fourteen (14) days from the date hereof.

    iii. The costs of this application shall be in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Kimotho for Applicant

Mr. Macharia for Respondent

Court Assistant: Carlos