



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC MISCELLANEOUS APPLICATION NO. 3 OF 2020

AGNES NYAMBURA MUNGA T/A

UNISEX AERO SALON.....1ST APPLICANT

LYKEN HOLDINGS LIMITED T/A

CHARLES NDOLO.....2ND APPLICANT

VERSUS

CONVEST HOLDINGS LIMITED.....1ST RESPONDENT

JOSEPH KAHORO MUNDIA.....2ND RESPONDENT

UPSTATE KENYA AUCTIONEERS.....3RD RESPONDENT

RULING

The Applicants brought the application dated 16/1/2020 seeking to have this court stay **Nairobi Chief Magistrate's Court Civil Suit No. 1536 of 2019 – Agnes Nyambura Munga t/a Unisex Aero Salon and another v Convest Holdings Limited and Another** which was consolidated with **Milimani Commercial Court Misc. Civil Application No. 601 of 2019 – Joseph Kahoro Mundia t/a Upstate Kenya Auctioneers and Another v Agnes Nyambura Munga t/a Unisex Aero Salon**. Secondly, the Applicants sought to have this court call for the record of **Nairobi CMCC No. 1536 of 2019** as consolidated with **Misc. Civil Application No. 601 of 2019** and for the file to be transferred to this court. Thirdly, the Applicants sought to have this court exercise its supervisory role as enshrined in the Constitution to ensure that the proceedings are heard without delay and that justice is dispensed to the parties.

The application was made on the grounds listed as (a) to (t) covering over five pages. The grounds set out the sequence of the proceedings before the Magistrate's Court and made reference to a matter filed before the Business Premises Rent Tribunal (BPRT) regarding the dispute. At ground (i) of the application the Applicants listed the pleadings and documents which were filed in court. Ground (j) makes reference to an amended plaint filed in court on 14/10/2019 and states that the Plaintiffs' claim stood at Kshs. 12,903,086.40. That thereafter damages accrued and as at 31/1/2020 the Plaintiffs' cumulative claim stood at Kshs. 21,314,629.60.00, which was above the pecuniary jurisdiction of the Chief Magistrate's Court. The rest of the grounds set out the proceedings that transpired before the magistrate's court.

The 1st Plaintiff swore the affidavit in support of the application on 16/1/2020. Ms. Munga basically regurgitated the grounds set out on the face of the application. She made reference to Tribunal case number 544 of 2019 filed in the BPRT at Nairobi between her and Convest Holdings Limited regarding the termination of the tenancy. She set out the arguments regarding the matter that was before the BPRT, and basically reproduced verbatim the application she made and the proceedings. She also set out the pleadings filed in the Magistrate's Court in her quest to demonstrate the sum she claims against the Defendant. She urged the court to grant the orders sought in the application.

The court directed parties to file submissions. The Applicants submitted that this court had the power to withdraw the suit pending before the Magistrate's Court and transfer it to this court for determination. They contended that subsequent to the filing of the amended plaint dated 14/10/2019, the Applicants' claim continued to rise beyond the jurisdiction of the Chief Magistrates Court. The Applicants made some calculations ostensibly to show that as at May 2020 their claim against the Respondents stood at Kshs 25,806,172.80. They maintained that at the time of filing suit the claim was within the pecuniary jurisdiction of the Magistrate's Court but that over time it increased and exceeded the jurisdiction of the magistrate's court.

The Applicant framed a second issue regarding whether the Respondents' replying affidavit sworn by Haren Patel on 27/2/2020 offended the provisions of the law. The court does not need to consider that issue because no application was made to expunge that affidavit from the court record. The Applicants submissions mainly dwelt on that issue of Haren Patel's replying affidavit. The Applicants relied on various court decisions in support of their application.

The Respondents submitted that they had opposed the application through the affidavit of Haren Patel. They argued that where a suit sought to be transferred was filed before a court without jurisdiction, it cannot be transferred because it is a nullity and there is no suit. The Respondents contended that Article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act could not come to the rescue of the Applicants because litigants are required to comply with procedural imperatives when they seek justice from the court. The Respondents submitted that the Applicants' recourse was to withdraw their suit before the Magistrate's Court and file it in a court with jurisdiction. They pointed out that the 1st Respondent had filed a counterclaim in **Milimani CMCC No. 1536 of 2019** which was properly before that court.

The issue for determination is whether the court should grant the orders sought in the application dated 16/1/2020.

The court notes that the Applicants only attached to the application copies of the documents filed before the BPRT, a copy of the illegible CR 12 under the Companies Act relating to Convest Limited as well as some illegible agreement without exhibiting the actual pleadings filed before the Magistrates Court. They also attached photographs and some proclamations issued by the auctioneers. A copy of the application made before the Chief Magistrates Court was also exhibited but the pleadings filed in the Magistrates Court which would have guided the court on the computation of the sum claimed and in determining whether the Magistrates Court had jurisdiction over the matter when the matter was filed were not attached.

The court noted that the Applicants filed numerous documents which were not paginated and that it was difficult to tell what they related to. It is important that parties plead their cases in a precise manner to enable the court discern the orders they seek from the court. There were several affidavits filed by Fiona Badia, Charles Ndolo in response to an affidavit stated to have been sworn by Haren Patel. Unfortunately, a copy of that affidavit is not on the court file.

Without the benefit of the pleadings which were filed in **Nairobi CMCC No. 1536 of 2019** which is said to have been consolidated with **Misc. Civil Application No. 601 of 2019**, it is impossible for this court to determine whether the Magistrates Court has jurisdiction to hear the matter or whether it should be transferred to this court.

The court declines to grant the orders sought in the application dated 16/1/2020 and makes no orders as to costs.

Delivered virtually at Nairobi this 9th day of August 2021.

K. BOR

JUDGE

In the presence of: -

Ms. Fiona Badia for the Applicants

Mr. Brian Okech for the Respondents

Mr. V. Owuor- Court Assistant