



**Masinde v Director of Public Prosecution & 2 others (Miscellaneous Civil Application E1080 of 2023) [2024] KEHC 12751 (KLR) (Civ) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12751 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E1080 OF 2023  
CW MEOLI, J  
OCTOBER 24, 2024**

**BETWEEN**

**CAPT (RTD) CHARLES KW MASINDE ..... APPLICANT**

**AND**

**DIRECTOR OF PUBLIC PROSECUTION ..... 1<sup>ST</sup> RESPONDENT**

**KENYA WINE AGENCIES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. For determination is the motion dated 10.11.2023 by Capt. (Rtd) Charles K. W. Masinde (hereafter the Applicant) seeking among other orders that the Court be pleased to retransfer Milimani MCCC no 76 of 2022 - *Capt. (Rtd) Charles K. W. Masinde v Director of Public Prosecution & 2 Others* back to the High Court for hearing and determination; that the Court be pleased to grant the Applicant leave to amend his plaint dated 01.08.2019 and initially filed before this Court on 06.08.2019 as Nairobi HCCC no 167 of 2019 - *Capt. (Rtd) Charles K. W. Masinde v Director of Public Prosecution & 2 Others* in the manner set out in the draft amended plaint annexed to the supporting affidavit; that the intended amended plaint be deemed as duly filed in this honorable Court upon payment of the requisite Court filing fees. The motion is expressed to be brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Section 7(1) of the *Magistrates Court Act* and Order 8 Rule 3 & 5 of the *Civil Procedure Rules* (CPR). On the grounds on the face of the motion as amplified in the supporting affidavit sworn by Applicant.
2. The gist of his affidavit is that on or about 06.08.2019 he filed before this Court Nairobi HCCC no 167 of 2019 - *Capt. (Rtd) Charles K. W. Masinde v Director of Public Prosecution & 2 Others* seeking special damages for loss of employment resulting from malicious prosecution and therein he



had not specified damages because he was in the process of tracing documents in support of the claim. That notwithstanding, this Court on 30.05.2022 allowed him to file supplementary documents and statements in support of his claim, while contemporaneously transferring the suit to the Chief Magistrates Court where it was registered as Milimani MCCC no 76 of 2022 - *Capt. (Rtd) Charles K. W. Masinde v Director of Public Prosecution & 2 Others* (hereafter lower Court suit). He goes on to depose that having traced the requisite documents in support of his claim, he instructed counsel to file a supplementary bundle of documents before the lower Court suit it would be necessary, following computation of special damages, to amend his claim to align with his evidence.

3. The deponent further states that from the supplementary statement, bundle of documents and draft amended plaint and in light of the current exchange rate of the US dollar, it was evident that his special damage claim amounts to ksh 125,150,600/-. Which sum exceeds the pecuniary jurisdiction of the Chief Magistrate's Court. Hence amendment before the lower Court is untenable, and the intended transfer and amendment of the suit is necessary in order to place the suit before the proper Court with jurisdiction to determine the real issues in controversy between the parties. He asserts that the Director of Public Prosecution, Kenya Wine Agencies Limited and Ethics & Anti-Corruption Commission (hereafter the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondent/Respondents) will not be prejudiced if the application is allowed. In summation he deposes that he stands to be greatly prejudiced if the Court were not to allow the motion which ought in the interest of justice to be granted.
4. The 2<sup>nd</sup> Respondent opposes the motion through a replying affidavit dated 16.05.2024 and sworn by Alvin Likobebe Muhandick, counsel on record for the 2<sup>nd</sup> Respondent. He views the motion as premature, speculative, frivolous, in breach of binding statutory provisions, misleading, an abuse of the Court process. Asserting therefore that the motion ought to be dismissed as the grounds relied upon do not meet the requisite threshold, while taking issue with Applicant's deposition that the Court allowed him to file a supplementary list of documents on 30.05.2022. Pointing out that the record on the latter date only shows that this Court transferred the matter to the Chief Magistrates Court.
5. In the alternative and without prejudice to the forestated, he asserts that even if the Applicant filed an application dated 18.02.2022 seeking to introduce further documents, there was no record of the said motion being allowed, and consequently the Court ought to disregard such unsupported averments. Counsel further states that even if the Applicant's averments were to be believed, the present motion itself is replete with contradictions that point to dishonesty on the part of the Applicant, aimed at misleading the Court. In conclusion, he deposes that as it stands, the Applicant's claim is still within the pecuniary jurisdiction of the Chief Magistrates Court and the motion should be dismissed with costs.
6. The rejoinder by way of supplementary affidavit sworn by Nicholas Malonza, counsel on record for the Applicant, assails the 2<sup>nd</sup> Respondent's response by contending that the purport of the motion before the Court seeks to retransfer the lower Court suit and thereafter amend the same in the manner proposed in the annexed draft plaint. Contrary to the 2<sup>nd</sup> Respondent's assertions. Further, an amendment before the lower Court would not be tenable in light of the draft plaint. Moreover, that the order issued on 30.05.2022 transferring the matter to the Magistrates Court did not in any way bar the Applicant from filing a supplementary list of documents and witness statement dated 29.09.2023, as asserted by the 2<sup>nd</sup> Respondent. Counsel stating that the propriety regarding the filing of the forestated documents is a preserve of the lower Court, this Court having ceased to exercise jurisdiction upon the transfer of the suit.
7. He swore that the Applicant's prayer for amendment ought to be allowed to the extent that it seeks to furnish particular of the special damages already pleaded in the original plaint, and which now evidently exceed the pecuniary jurisdiction of the Magistrates Court. Counsel concludes by stating



that the 2<sup>nd</sup> Respondent's response is an attempt to scuttle the core issues in respect of the Applicant's motion. And that the said Respondent has not demonstrated prejudice to be suffered if the motion is granted.

8. Despite service, the 1<sup>st</sup> and 3<sup>rd</sup> Respondent did not participate in the instant proceedings.
9. At the hearing, the parties agreed that the motion be determined on the basis of their respective affidavit material on record, which the Court has duly considered. Alongside the prayer for retransfer of Milimani MCCC no 76 of 2022 - *Capt. (Rtd) Charles K. W. Masinde v Director of Public Prosecution & 2 Others* to this Court, the Applicant has equally sought leave to amend his plaint as initially filed before this Court in Nairobi HCCC no 167 of 2019 - *Capt. (Rtd) Charles K. W. Masinde v Director of Public Prosecution & 2 Others* in the manner set out in the draft amended plaint.
10. The motion invokes inter alia the provisions of Section 7(1) of the *Magistrates Court Act*, Order 8 Rule 3 & 5 of the *CPR* and Section 1A, 1B & 3A of the *CPA*. While Order 8 of the *CPR* generally relates to amendment of pleadings, Section 7 of the *Magistrates Court's Act* delineates the jurisdiction of the said Court. Section 3A of the *CPA* on its part reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court". With the above provisions in reserve the Court proposes to first deal with the prayer seeking re-transfer of Milimani MCCC no 76 of 2022 - *Capt. (Rtd) Charles K. W. Masinde v Director of Public Prosecution & 2 Others*.
11. The Applicant's motion stems from an undisputed order of this Court issued on 30.05.2022 pursuant to Sections 11 and 18(1) (a) of the *CPA* transferring the subject suit to the Chief Magistrate's Court. The motion is properly predicated inter alia on Section 3A of the *CPA*. As to the purport of the section, the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated as follows regarding the discretion of the Court under that section; -

"Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated *inter alia*, that, by "inherent power" it means that:

"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from the Constitution or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another versus Malolm Bell* [2013] eKLR, to add the following: -

"Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just." (sic)



12. It is also settled that the discretion of the Court to set aside an order, for that is essentially what the Applicant is seeking by his motion, is unfettered. A successful applicant is however obligated to adduce material upon which the Court should exercise its discretion, or in other words, the factual basis for the exercise of the Court's discretion in their favor. In the case of *Shah v Mbogo and Another* [1967] EA 116 the rationale for the discretion was spelt out as follows: -

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

13. The principles enunciated in *Shah v Mbogo (supra)* were amplified further by Platt JA in *Bouchard International (Services) Ltd v M'Mwereria* [1987] KLR 193. Although the Courts in the above cases were contemplating applications to set aside ex-parte judgments, the principles pronounced therein would apply in equal degree in this matter. In the instant proceedings, the Applicant has underscored the fact that in light of the intended amendments as can be gleaned from the draft amended plaint – Annexure CCM2 & CCM3 – and considering the current exchange rate of the US dollar to the Kenya Shilling, his special damage claim is equivalent to ksh 125,150,600/- , hence exceeds the pecuniary jurisdiction of the Chief Magistrate's Court . Besides, an amendment before the lower Court would equally be untenable.

14. As earlier noted, this Court's mandate and or authority to transfer a matter to the competent subordinate Court is donated by Section 18(1)(a) of the CPA which provides that:-

- “(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.”

15. As seen from the Applicant's affidavit material, specifically the annexure marked CCM1, the claim originally filed on 06.08.2019 in this Court was founded on the torts of malicious prosecution, injury to reputation, malice, and sought general and unquantified special damages. That claim as presented then, was a matter falling within the pecuniary jurisdiction of the Magistrates Court and or raised issues that would be for all intents and purposes, be competently tried and disposed of by the lower Court. The Applicant now disputes the competence of the subordinate's Court to entertain the subject suit on the basis of computations of his claim from annexure marked CCM2 & CCM3, comprising material intended to be relied on in support of the intended amendment to the plaint.

16. The High Court's original jurisdiction to entertain civil matters is found in Article 165(3)(a) of the Constitution as read with Section 5 of the *High Court (Organization and Administration) Act*. The pecuniary jurisdiction of the Magistrates Courts in civil matters is prescribed in Section 7 of the Magistrate's Court Act which states that:-

- “(1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—



- (a) twenty million shillings, where the court is presided over by a chief magistrate;
- (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
- (c) ten million shillings, where the court is presided over by a principal magistrate;
- (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
- (e) five million shillings, where the court is presided over by a resident magistrate.”

17. In addition, Section 11 of the [CPR](#) provides that:

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts: Provided that—

- (i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and
- (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same county.”

18. This Court having reviewed the Applicant’s affidavit material agrees with the 2<sup>nd</sup> Respondent that the lower Court is duly seized of the suit as presented. The Applicant’s plea for re-transfer to this Court is premised on an amendment that is yet to be allowed. Clearly, the Applicant has placed the cart before the horse. Reasonableness would dictate that for the Court to entertain an application for transfer on grounds of pecuniary jurisdiction, the pleadings before the lower Court must first be amended. The directions of this Court on 30.05.2022 were premised on the material before the Court at the time. Thus, the Applicant has not evinced any justification for this Court to exercise its discretion by setting aside its earlier order and to re-transfer the suit in the subordinate court to this court.

19. The parties through their respective affidavit material addressed issues relating to amendment of the plaint. The position right now is that having transferred the subject suit to the lower court, this Court is no longer seized of matter, a fact acknowledged in the Applicant’s supplementary affidavit. The prayer for amendment cannot be entertained before this court, therefore.

20. In the result, it is the court’s view that the Applicant has not demonstrated sufficient reason to move this Court to exercise its discretion by setting aside its decision transferring the subject suit to the subordinate Court. Consequently, the entire motion must fail and is hereby dismissed with costs to the 2<sup>nd</sup> Respondent.



**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**C. MEOLI**

**JUDGE**

In the presence of

Mr. Malonza for the Applicant

Mr. Wandeto for the 2<sup>nd</sup> Respondent

N/A for the 1<sup>st</sup> and 3<sup>rd</sup> respondents

C/A: Erick

