



REPUBLIC OF KENYA



**Vershi Vergi Investments Limited v Kenya Power and Lighting Company Limited (Miscellaneous Civil Application E298 of 2024) [2024] KEHC 12792 (KLR) (Civ) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12792 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CIVIL  
MISCELLANEOUS CIVIL APPLICATION E298 OF 2024  
CW MEOLI, J  
OCTOBER 24, 2024**

**BETWEEN**

**VERSHI VERGI INVESTMENTS LIMITED ..... APPLICANT**

**AND**

**KENYA POWER AND LIGHTING COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. Vershi Vergi Investments Limited (hereafter the Applicant) brought the Notice of Motion dated 9.04.2024 (the Motion). It is supported by the grounds laid out on its face and the depositions in the affidavit of the Applicant's Operations Manager, one Deep Dinesh Chandra Shah. The prayers in the Motion are:
  1. Spent.
  2. That this Honourable Court be pleased to withdraw and retransfer Milimani CMCC No. 142 of 2023 to this Honourable Court for trial and final disposal as Civil Suit No. 202 of 2016.
  3. That the Applicant be granted leave to quantify the mesne profits for the forcible location of the transformer prayed for in the suit as set out in the draft Amended Plaintiff.
  4. That this Honourable Court be pleased to grant leave for the Plaintiff to amend the Plaintiff dated 22.07.2016 and registered in court on 29.07.2016 in terms of the draft Amended Plaintiff herein annexed.
  5. That the draft Amended Plaintiff annexed to the Application be deemed as properly filed upon assessment and payment of any further court fees by the Plaintiff; and
  6. That the costs of the Application be provided for.



2. The Motion is expressed to be brought under Sections 1A, 1B and 18 of the Civil Procedure Act (CPA); and Order 1, Rule 10, Order 8, Rule 1, 2 and 3, and Order 45 of the Civil Procedure Rules (CPR).
3. By his supporting affidavit, the deponent stated that, the Applicant had through its advocates, initially instituted Civil Suit No. 202 of 2016 (the suit) in the Civil Division of the High Court, vide the plaint dated 22.07.2016 and seeking various reliefs against Kenya Power and Lighting Company Limited (hereafter the Respondent). Which reliefs the deponent asserts to have included special damages in the sum of Kshs. 2,024,106/- and mesne profits in the sum of Kshs. 19,890,847/- totaling liquidated damages in the sum of Kshs. 21,914,953/-. As the court will demonstrate in this ruling, mesne profits were not quantified in the original plaint, nor were any special sums pleaded therein so as to bring the total claim to the amount asserted by the deponent here.
4. That said, the deponent further stated that on 9.06.2023 the Applicant's advocates received a formal notice indicating that the matter had been transferred from the High Court to the Chief Magistrate's Court and been allocated CMCC No. 142 of 2023. That when the matter subsequently came up for mention before the lower court on 13.06.2023 the said magistrate confirmed that the Chief Magistrate's Court lacked pecuniary jurisdiction to entertain the matter and therefore directed that the Applicant makes a formal application before the High Court, for retransfer thereof.
5. It is the averment by the deponent that the Applicant's advocates therefore filed an application dated 4.07.2023 in the suit, seeking the retransfer of the suit to the High Court. That when the same was placed before the court on 26.10.2023 the said advocates were informed that the mesne profits had not been quantified in the original plaint and hence the said application could not be allowed.
6. It is equally the averment by the deponent that in filing the original plaint, the Applicant's advocates specifically sought mesne profits among the reliefs set out therein, adding that an assessment of the mesne profits was only done at the pre-trial stage of the proceedings and constitutes the Applicant's supplementary list and bundle of documents filed in the suit.
7. That pursuant to the foregoing, the Applicant's advocates filed an application dated 1.12.2023 seeking to amend the original plaint, which application was not opposed by the Respondent. That when the applications dated 4.07.2023 and 1.12.2023 came up for hearing on 11.12.2023 the court directed the Applicant to file a comprehensive application, hence the instant Motion. That therein, the Applicant seeks to have the court review its earlier orders, to enable an order for retransfer of the matter to the High Court, and a further order for leave to amend the plaint to include the sum sought on the mesne profits, which would therefore give the High Court pecuniary jurisdiction to hear and determine the matter.
8. The Respondent opposed the Motion by filing the Grounds of Opposition dated 28.05.2024 featuring the following grounds:
  1. That the application is frivolous, vexatious and is an abuse of the court process.
  2. That there has been an inordinate delay in bringing the application which seeks to amend the plaint which was filed in 2016.
  3. That the suit had substantially progressed and there are no new matters which have arisen since the filing of the suit to warrant the present application.
  4. That the Applicant having omitted to quantify the mesne profits in its claim should not be allowed to sue for such claim.



5. That the amendment to the plaint shall introduce a new suit with a different cause of action which did not exist at the time of filing the suit
6. That the character of the suit would be completely changed if the amendment of the plaint is allowed.
7. That this application is clearly erroneous, frivolous, scandalous, draconian and a waste of judicious time and it should be dismissed with costs. (sic)
9. The Motion was canvassed through brief oral arguments. On her part, Miss Kyama counsel for the Applicant in urging the court to allow the Motion as prayed, argued that the primary reason for seeking the order for retransfer of the suit is the fact that the damages being sought go beyond the pecuniary jurisdiction of the magistrate's court. She further argued that while the original plaint did not quantify the mesne profits sought, the Applicant wishes to amend its plaint accordingly on the basis of an assessment which was undertaken on the mesne profits, which would cause the damages totaling a sum of Kshs. 21,000,000/- to fall outside the pecuniary jurisdiction of the magistrate's court. She equally contended that the Applicant is keen on prosecuting the suit on a priority basis, adding that at the time of filing suit and taking pre-trial directions, the Applicant had not assessed the mesne profits, but that it had since done so.
10. Mr. Itonga advocate for the Respondent opted to rely on the Grounds of Opposition filed, reiterating that the order for amendment sought is misplaced and that the Motion has been brought too late in the day and without a reasonable explanation by the Applicant for its failure to quantify the mesne profits at the time of filing suit. That consequently, the instant Motion ought to be dismissed.
11. The court has considered the affidavit material supporting the Motion and the Grounds of Opposition and the rival oral arguments. As earlier mentioned, the instant Motion is primarily brought under Section 18 of the [CPA](#) and Order 45 of the [CPR](#). The former provision deals with matters touching on the withdrawal and transfer of suits by the High Court, and reads 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”.



12. Order 45 of the [CPR](#) echoes the provisions of Section 80 of the [Civil Procedure Act](#) (CPR) concerning applications for review. Order 45 of the [CPR](#) provides:

“ Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”

13. From the foregoing, the instances in which a court can review its decision include:

- a. the discovery of new and important matter or evidence, or
- b. some mistake or error apparent on the face of the record, or
- c. any other sufficient reason.

14. The Supreme Court in the case of [Parliamentary Service Commission v Martin Nyaga Wambora & others](#) [2018] eKLR whilst quoting with approval the findings of the East Africa Court of Appeal in [Mbogo and Another v Shah](#) [1968] EA stated concerning the power of review that:

“ Consequently, drawing from the case law above, particularly Mbogo and Another v Shah, we lay down the following as guiding principles for application(s) for review of a decision of the Court made in exercise of discretion as follows:

- i. A review of exercise of discretion is not as a matter of course to be undertaken in all decisions taken by a limited bench of this Court.
- ii. Review of exercise of discretion is not a right; but an equitable remedy which calls for a basis to be laid by the applicant to the satisfaction of the Court;
- iii. An application for review of exercise of discretion is not an appeal or a chance for the applicant to re-argue his/her application.
- iv. In an application for review of exercise of discretion, the applicant has to demonstrate, to the satisfaction of the Court, how the Court erred in the exercise of its discretion or exercised it whimsically.
- v. During such review application, in focus is the decision of the Court and not the merit of the substantive motion subject of the decision under review.
- vi. The applicant has to satisfactorily demonstrate that the judge(s) misdirected themselves in exercise discretion and:
  - a. as a result, a wrong decision was arrived at; or



- b. it is manifest from the decision as a whole that the judge has been clearly wrong and as a result, there has been an apparent injustice.”

15. Thus, the power of review is purely discretionary. Resultantly, a successful party ought to tender sufficient and credible material to persuade the court to exercise its discretion in his or her favour.
16. From the court’s study of the Motion and supporting documents, it appears that the prayer retransfer of the matter in question to this court, is essentially founded on the Applicant’s intention to amend its pleadings to include a quantification of the mesne profits sought which will automatically exceed the pecuniary jurisdiction of the subordinate court. The explanation offered by the Applicant is that the failure to include the quantified mesne profits in the original plaint was unintentional and constituted a genuine mistake on its part.
17. The court has also considered the opposing arguments by the Respondent that the intended amendments would raise new issues and give rise to an entirely new cause of action in the matter; and that the Motion having been brought too late in the day and without a proper explanation, the Applicant is not deserving of the orders sought therein.
18. The original file is not before this court but annexed to the supporting affidavit of Deep Dinesh Chandra Shah and marked as “DDCS 1” is a copy of the original plaint which is dated 22.07.2016. The prayer therein comprise special damages in the sum of Kshs. 2,024,106/-; general damages; and an order for injunction. Also sought therein were mesne profits, which prayer reads as follows:  
”(e) Mesne profits for the forcible location of the transformer due to the imminent safety risk”. sic
19. As evident from the draft amended plaint annexed as “DDCS 8”, the Applicant now seeks to amend the above prayer to read as follows, as seen in the:  
“(e) Kshs. 19,890,847 Mesne profits for the forcible location of the transformer to be determined by this Honourable Court”. sic.
20. The suit was originally filed in the year 2016 and had never progressed to hearing at the time of transfer some seven years later in 2023. Thus, the application for amendment is brought some eight years since filing of the suit. While the court reserves wide discretion concerning amendments, in this instance, it agrees with the Respondent that this application is brought after an inordinate period of delay, and for which no satisfactory explanation has been given. Indeed, despite receiving notification of the transfer of the suit on 9.06.2023, it took ten months for the Applicants to bring this motion. No explanation has been given for that delay.
21. Reviewing material before the court, it appears that the amendment application is an afterthought and without bona fides. More importantly, the court having transferred the suit to the lower court ceased to be seized of it and its power to allow to grant amendment in that suit at this stage appears doubtful. Moreover, it cannot be overlooked that if the amendment sought were to be granted, the effect would be setting the parties back leading to further delay in the conclusion of the suit.
22. In the court’s view therefore, to grant the orders sought in the present circumstances would run afoul of the overriding objective in section 1A and 1B of the *CPA*. The Court of Appeal stated the following in *Karuturi Networks Ltd & Anor v Daly & Figgis Advocates*, Civil Appl. NAI. 293/09:  
“The jurisdiction of this Court has been enhanced and its latitude expanded in order for the Court to drive the civil process and to hold firmly the steering wheel of the process in order to



attain the overriding objective.... and its principal aims. In our view, dealing with a case justly includes inter alia reducing delay, and costs expenses at the same time acting expeditiously and fairly. To operationalize or implement the overriding objective, in our view, calls for new thinking and innovation and actively managing the cases before the court.”

23. In the result, the court is of the view that the intertwined prayers seeking amendment of the original plaint to facilitate the retransfer of the suit for hearing before this court cannot be justified in the circumstances of this case. The Applicants had seven years to amend their plaint while it was pending before this court; it is too late in the day to seek to amend its pleadings now for the apparent sole purpose of facilitating retransfer to this court.
24. Consequently, the court finds no merit in the Motion dated April 9, 2024 which is hereby dismissed, with costs to the Respondent.

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

**C. MEOLI**

**JUDGE**

In the presence of:

Ms Kyania for the Applicants:

Mr. Bure for the Respondent:

C/A: Erick

