



**Caledonia Supermarkets Limited v Wagiciengo & another (Civil Suit 183 of 2018) [2024] KEHC 14337 (KLR) (Civ) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14337 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL SUIT 183 OF 2018**

**CW MEOLI, J  
NOVEMBER 14, 2024**

**BETWEEN**

**CALEDONIA SUPERMARKETS LIMITED ..... PLAINTIFF**

**AND**

**ANASTACIA WAGICIENGO ..... 1<sup>ST</sup> DEFENDANT**

**EZEKIEL WAFULA T/A WAFULA ASSOCIATES ADVOCATES .... 2<sup>ND</sup>  
DEFENDANT**

**RULING**

1. The Notice of Motion dated 11.06.2024 (the Motion) by Caledonia Supermarkets Limited (hereafter the Applicant) is supported by the grounds on its face and the affidavit of the Applicant's Manager, Martha Nyambura. It seeks that the Court be pleased to review and/or vary the orders issued on 22.05.2023 and to issue orders that the Applicant's suit, transferred to the Chief Magistrate's Court at Milimani (now MCCC 303 OF 2023 Caledonia Supermarkets Limited V Anastacia Wagiciengo And Ezekiel Wafula) be transferred back to this Court for hearing and determination; and that the Court be pleased to grant leave to the Plaintiff to amend the Complaint dated 31.07.2018.
2. The Motion is expressed to be brought under Sections 1A, 1B, 3, 3A and 18 of the *Civil Procedure Act* (CPA); and Order 51, Rule 1 of the Civil Procedure Rules (CPR).
3. In the supporting affidavit, the deponent stated that the Applicant instituted the present suit before the High Court; that however, the suit was transferred by the High Court on its own motion on 22.05.2023 to the Chief Magistrate's Court where it was consequently designated as MCCC 303 of 2023; that when the matter came up before the lower court for pretrial directions, it became apparent to the Applicant's advocate that it would be necessary to amend its pleadings in order to capture the accurate figures sought in the claim to Kshs. 80,000,000/-; meaning that the claim would automatically



exceed the pecuniary jurisdiction of the subordinate court. Thus, the prayers in the instant Motion ought to be granted.

4. Ezekiel Wafula T/A Wafula & Associates Advocates (hereafter the 2<sup>nd</sup> Respondent) opposed the Motion by filing the Grounds of Opposition dated 29.07.2024 stating the following:

“Take Notice that M/S Wafula, Washika & Associates Advocates for the 2<sup>nd</sup> Defendant/ Respondent herein will rely on the following Grounds of Opposition in answer to the Application dated 11<sup>th</sup> June 2024: -

1. That Plaint dated 31st July 2018 annexed to the Application as Annexure “MW-1” seeks the following final order:
    - a) General damages.
    - b) Permanent injunction restraining the respondent, their agents or workers from transferring ownership or interfering with the Plaintiff’s Motor Vehicle or any other properties of the Plaintiff/ Directors.
    - c) Permanent injunction restraining the respondent, their agents or workers from proceeding to list the Plaintiff and/or Directors in the Credit Reference Bureau as defaulters.
    - d) The costs of this suit.
    - e) Interest on (a) above at Court rates.
  2. That the draft Amended Plaint annexed to the Application as Annexure “MW-1” seeks to introduce a new course of action against a new party named “Wafula, Washika & Associates Advocates”.
  3. That the alleged cause of action in the draft amended Plaint as per as Annexure “MW-2a” and “MW-2b” relates to payments made on 19<sup>th</sup> July 2017 and 22<sup>nd</sup> February 2018 which claims being brought in excess of 6 years are time barred under the Limitation of Actions Act.
  4. That due to the foregoing, the Application dated 11<sup>th</sup> June 2024 and all prayers therein cannot be sustained and ought to be struck out with costs in favour of the 2<sup>nd</sup> Defendant/Respondent. (sic)
5. Counsel for Anastacia Wagiciengo (hereafter the 1<sup>st</sup> Respondent) indicated that he would not be opposing the Motion. The Motion was canvassed through brief oral arguments on 2.10.2024.
6. Mr. Washika counsel for the 2<sup>nd</sup> Respondent proceeded with his arguments first. He contended that the proposed amendments to the plaint will introduce a new cause of action relating to monies allegedly held by his client. He further contended that the proposed amendments are in any event time barred, the same being sought over six (6) years since the suit was commenced. In so submitting, he borrowed from the decision in Institute for Social Accountability & another v Parliament of Kenya & 2 others; Commission for the Implementation of the Constitution (Interested Party) [2014] KEHC 7356 (KLR) regarding the exercise of judicious discretion by a court in determining an application for leave to amend pleadings. For those reasons, counsel urged the court to decline to grant the orders sought in the Motion.



7. Mr. Ikua advocate for the Applicant in urging the court to allow the Motion as prayed, disputed that the proposed amendments introduce a new cause of action or new issues for that matter; rather, the sole amendment sought relates to the amounts pleaded in the prayers. He further argued that counsel for the 2<sup>nd</sup> Respondent has all along participated in the proceedings and hence no new issues would arise if the amendments sought are incorporated. Finally, counsel contended that as pleaded in the original plaint, some prayers are incapable of being granted, as they are.
8. Mr. Washika made brief rejoinder arguments, essentially echoing his earlier sentiments.
9. The court has considered the affidavit material supporting the Motion, the Grounds of Opposition and the rival oral arguments.
10. As earlier stated, the Motion is primarily brought under Section 18 of the CPA which provides for the withdrawal and transfer of suits by the High Court. The provision states 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”.

11. The prayer seeking retransfer was sought within the context of review and/or variation, although the Applicant did not cite any of the legal provisions relating to review, in its Motion. That notwithstanding, the applicable principles undergirding the court’s determination whether to review its order earlier made on 23.05.2023 are encapsulated in Section 80 of the *Civil Procedure Act* and Order 45 of the CPR, the latter which provides as follows:

- “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.”

12. Thus the instances in which a court can review its decision are as follows:
  - 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.
13. The Supreme Court in the case of Parliamentary Service Commission v Martin Nyaga Wambora & others [2018] eKLR, whilst quoting with approval the decision of the East Africa Court of Appeal in Mbogo and Another v Shah [1968] EA , discussed the review jurisdiction in the following manner:

“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.”
14. The power of review is therefore discretionary in nature. Consequently, the successful applicant ought to tender sufficient and credible material to persuade the court to exercise its discretion in his or her favour.
15. Looking at the Motion and supporting documents, it is evident that the prayers for review and retransfer of the subject cause are predicated on the Applicant’s asserted intention to amend its pleadings in a manner that would automatically take the claim outside the pecuniary jurisdiction of the



magistrate's court. The explanation given for the failure to incorporate the proposed reliefs at the onset is that it resulted from an inadvertent mistake, which mistake was only discovered at the pretrial stage of the proceedings before the subordinate court. The 2<sup>nd</sup> Respondent's stance was that the intended amendments would not only raise new issues giving rise to an entirely new cause of action in the matter; but that the proposed amendments are in any event time barred, by dint of the relevant provisions of the *Limitation of Actions Act*.

16. The record relating to Milimani CMCC No. 303 of 2023 was not before this court. However, the Applicant's advocate annexed a copy of the original plaint which is dated 31.07.2018 to the supporting affidavit of Martha Nyambura, as annexure marked "MW-1." The claim therein is for general damages and permanent injunctive orders.
17. According to the draft amended plaint annexed as "MW-3", the Applicant now wishes to not only amend the name of the 2<sup>nd</sup> Respondent to read "Ezekiel Wafula T/A Wafula Washika & Associates Advocates" but in addition, to amend the prayers in their entirety to read as follows:-
  - (d) Judgment against the 2<sup>nd</sup> Defendant for the sum of Kshs. Kshs. 80,238,072/=.
  - (e) Interest on (c) above at court rates from the 19<sup>th</sup> day of July 2017.
  - (f) The costs of this suit.
  - (g) Interest on (a) above at court rates. "(sic)
18. The subject suit was originally filed in the year 2018 and hence the prayer for amendment is being made some six (6) years later. In the court's view, this delay is inordinate and inexcusable. The court similarly finds the explanation given by the Applicant for the delay to be flippant and unconvincing in the circumstances. If anything, it is apparent that the amendments sought are an afterthought and the Motion has not been brought in good faith. There is no suggestion that the relevant facts and material giving rise to the proposed amendments were not within the knowledge of the Applicant at all material times. Equally, it cannot be overlooked that the amendments sought would, if granted, introduce new parties, which would inevitably set the parties back, thus delaying the conclusion of the suit even further.
19. In view of all the foregoing, the court is of the view that no credible or sufficient material has been placed before it, to warrant the exercise of its discretion by reviewing its order made on 23.05.2023. The upshot therefore is that the Notice Motion dated 11.06.2024 lacks merit and it is hereby dismissed, with costs to the 2<sup>nd</sup> Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF NOVEMBER 2024.**

**C.MEOLI**

**JUDGE**

**In the presence of**

Mr. Ikua for the Plaintiff

Mr. Washika for the Defendant

C/A: Erick

