



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL SUIT NO 202 OF 2016

VERSHI VERGI INVESTMENTS.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO LTD.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion application dated 2nd November 2018 and filed on 6th November 2018 was brought pursuant to the provisions of Section 3A, Section 11 and Section 18 of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law. It sought the following orders:-

1. THAT this suit be and is hereby transferred to the Chief Magistrate's Court at Nairobi, Milimani Commercial Courts for hearing and determination.

2. THAT the costs of this application be in the cause.

2. Its Written Submissions were dated 11th February 2019 and filed on 12th February 2019 while those of the Plaintiff were dated 18th February 2019 and filed on 21st February 2019.

3. Parties requested the court to render its decision based on its Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE DEFENDANT'S CASE

4. The Defendant's present application was supported by the Affidavit of its advocate, Matthew Kithinji Itonga that was sworn on 2nd November 2018.

5. The Defendant contended that the alleged cause of action by the Plaintiff fell within the territorial and pecuniary jurisdiction of the Chief Magistrate's Court at Nairobi and that Section 11 of the Civil Procedure Act requires that suits be filed in the court of the lowest grade possible competent to try them.

6. It pointed out that it had fruitlessly tried on several occasions to engage the Plaintiff to have the suit transferred to the Magistrate's court which thus necessitated the filing of the present application.

7. It was its averment that the Plaintiff would not suffer any prejudice if the suit was transferred and that it was in the interests of justice that the suit be transferred to the Magistrate's Court to enable faster and timely disposal of the suit herein at minimal costs.

8. It thus urged this court to allow its application as prayed.

THE PLAINTIFF'S CASE

9. In response to the said application, the Plaintiff's Managing Director, Kantilal V. Shah, swore the Replying Affidavit. The same was undated and filed on 12th November 2018.

10. The Plaintiff stated that it applied and obtained interlocutory judgment on 5th September 2016 against the Defendant herein, which interlocutory judgment was set aside on condition that the Defendant paid it throw away costs in the sum of Ksh 5,000/=.

11. It was emphatic that its cause of action and prayers sought in its Plaintiff fell within the jurisdiction of this court because it was claiming general damages in excess of Kshs 21,000,000/=.

12. It had also taken exception to the timing of the present application on 6th November 2018 because the hearing of the main suit was scheduled for 12th November 2018, the Pre-trial having been conducted with the Defendant not raising the issue of jurisdiction of this court.

13. It termed the said application as an afterthought that was intended to drag and delay the result of the suit which was filed three (3) years ago.

14. It therefore asked this court to dismiss the Defendant's present application with costs to it.

LEGAL ANALYSIS

15. The Defendant submitted that the Plaintiff's claim was for special damages of Kshs 2,024,506/=, general damages, mesne profits, costs of the suit and an injunction to compel the Defendant to relocate its transformer.

16. It was its contention that the Plaintiff had not laid any basis for being awarded general damages and that even if the same were to be awarded, the same would not place the claim beyond the pecuniary jurisdiction of the lower court which had power discretion and jurisdiction to grant the prayers that had been sought in the Plaintiff.

17. It argued that this court had power to transfer a suit to a lower court under Section 18 of Civil Procedure Act. It was emphatic that the Plaintiff would not suffer any prejudice if this suit was transferred to the lower court and in this regard, it relied on the case of **Kithita Ngeana vs Mwaniki Kisume [2018] eKLR** where the court therein ordered the transfer of a suit to the lower court.

18. On its part, the Plaintiff argued that the Constitution of Kenya, 2010 provides that the High Court has the original jurisdiction to hear and determine civil cases and that the Magistrates' Courts Act provides that the Chief Magistrate's Court had jurisdiction to adjudicate over civil matters where the value of the subject matter does not exceed Kshs 20,000,000/=.

19. It submitted that it had laid basis for its claim for an award of general damages in the main suit by pointing to the Defendant's breach of statutory duty and negligence that was the sole and proximate cause of the loss that it suffered.

20. It relied on the case of **Meeli Ole Naisewa vs Benson Gachuki Kinyanjui [2016] eKLR** where Nyakundi J while citing the case of **David Kabunga vs Zikarenga & 4 Others** (Kampala HCC No 36 of 1995), stated as follows:-

“ . . . The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground enough, though it is a relevant consideration. . . .”

21. It also referred this court to the case of **Hangzhou Agrochemicals Industries Ltd vs Panda Flowers Ltd [2012] eKLR** where it was held that:-

“ . . . if the court is left in doubt as to whether under all circumstances it is proper to order transfer, the application must be refused”

22. It further submitted that an application for transfer ought to be refused if it will occasion delay to a plaintiff. In this regard, it placed reliance on the cases of **John Mwangi Karanja vs Alfred Ndiangui [2011] eKLR** and **Sustainable Management Services vs New Mitaboni F.C.S. [2017] eKLR** where the common thread was that courts must consider the overriding objective of Civil Procedure Act which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes.

23. It averred that it had demonstrated that it had a strong case and why the suit should not be transferred to the lower court.

24. Right at the outset, this court found it prudent to consider the competency or otherwise of the Plaintiff's Replying Affidavit. This court noted that the same was undated. This was thus contrary to the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act Cap 15 (Laws of Kenya).

25. Section 5 of the Oaths and Statutory Declaration Act stipulates that:-

“Every commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made”.

26. The omission was not a procedural technicality that could be cured by Article 159(2)(d) of the Constitution of Kenya. Indeed, Article 159(2)(d) of the Constitution of Kenya is not a panacea for all procedural technicalities. An undated Affidavit is not a procedural technicality that can be cured by Article 159(2)(d) of the Constitution of Kenya as it goes to the root of the document, which becomes an oath and admissible, only after duly complying with the mandatory provisions of Section 5 of the Oaths and Statutory Declarations Act.

27. It was therefore the view of this court that the Defendant's present application was technically unopposed.

28. Having said so, a court ought not to grant orders sought in an application merely because that application is unopposed. The application must be merited and have a basis under the law.

29. This court therefore concluded that it had to look at the merits or otherwise of the Defendant's present application to determine whether or not it had laid out a strong case for the transfer of the suit herein to the lower court.

30. Further, the above notwithstanding, this court also noted that the Plaintiff had also raised legal issues in its written submissions. It was thus obligated to consider the same despite it having found that the Plaintiff's Replying Affidavit was incompetent *ab initio*.

31. This court thus looked at Section 18(1) of the Civil Procedure Act. The same 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.

32. It was therefore evident that a suit can be transferred from the High Court to the lower court, *suo moto* on the part of the High Court or on application of any of the parties to a suit. In this case the application was filed by the Defendant.

33. If it was the Plaintiff that had sought the transfer of its suit to the lower court, this court would not have gone to the trouble of obtaining a justification from it because this is its case and it could decide how to prosecute its case of course noting the pecuniary and territorial jurisdiction of courts as stipulated by the law.

34. However, bearing in mind that the said application was filed by the Defendant herein, the court was required to be satisfied that there was good reason to transfer the suit from the High Court to the lower court so as not to shut out the Plaintiff from prosecuting its case to the fullest.

35. Indeed, the High Court must in such application for transfer of a suit to the lower court by a Defendant keep in mind that no delays should be occasioned to a plaintiff because a lower court could, at the end of the trial, find that it had no pecuniary jurisdiction to hear and determine the case. The guiding principle should therefore be that such transfer ought not to prejudice a plaintiff.

36. In considering whether the Plaintiff would suffer prejudice if it allowed the Defendant's present application, this court perused the court file and noted that the matter had been fixed for hearing on 12th November 2018. The date was fixed at the Registry on 28th March 2018. An Affidavit of Service of Jacob Mwendwa Malelu that was sworn on 16th April 2018 and filed on 27th March 2018 showed that the Defendant's advocates were served with the Hearing Notice dated 3rd April 2018 on 5th April 2018.

37. It was evident that the Defendant was aware of the hearing date seven (7) months before it filed the present application. It did not adduce any plausible reason to explain why its present application could not have been brought in plenty of time.

38. Bearing in mind that the hearing of this suit was fixed for 12th November 2018 and the present application was filed on 6th November 2018, this court was satisfied by the Plaintiff's submissions that the transfer of the suit herein would have delayed the hearing and determination of its case. This court determined that the Defendant's application was not made in good faith but that the same was intended to scuttle the hearing of the case on 12th November 2018, which this court took judicial notice that the same did not, however proceed as the entire High Court Milimani Law Courts Civil Division did not sit that week.

39. This court was nonetheless persuaded that since the High Court diary of 2020 has now been opened and new dates can be taken, there

would be more delay in the matter being transferred to the lower court as it would have to be deemed to be a new matter and be assigned a new number in the year 2019.

40. Going further, a perusal of the Plaintiff's Plaint dated 22nd July 2016 and filed on 29th July 2016 showed that the Plaintiff had sought the following reliefs against the Defendants herein:-

- a) Kshs 2,024,106/= being special damages.
- b) General damages.
- c) Costs of the suit.
- d) Interest on items (a), (b) and (c) above
- e) Mesne profits for the forcible location of the transformer to be determined by the Honourable Court.
- f) An order of injunction compelling the defendant to relocate the transformer due to the imminent safety risk.
- g) Any other or further relief the Honourable Court may deem fit and just to grant.

41. It was evident that the court could not with certainty ascertain an approximate amount of quantum in respect of the Plaintiff's claim so as to assess whether its claim was within the pecuniary jurisdiction of the High Court or the lower court because there was a claim for *mesne* profits and general damages. The Plaintiff therefore ought to be given an opportunity to fully present its case.

42. Notably, the Defendant raised a pertinent issue regarding mitigating costs of prosecuting and defending the case herein. It was, however, the considered view of this court that the Defendant's concern could be addressed by the taxing master who has the discretion of not allowing costs that appear to him to have been incurred or increased through over-caution.

43. Notably, Paragraph 16 of the Advocates Remuneration Order states that:-

“Notwithstanding anything contained in this Order, on every taxation the taxing officer may allow all such costs, charges and expenses as authorized in this Order as shall appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but, save as against the party who incurred the same, no costs shall be allowed which appear to the taxing officer to have been incurred or increased through over-caution, negligence or mistake, or by payment of special charges or expenses to witnesses or other persons, or by other unusual expenses”.

44. In addition, the High Court has the discretion to award costs on a lower scale if it finds that a plaintiff has succeeded in its claim but its claim does not exceed Kshs 20,000,000/= which is the pecuniary jurisdiction of the Chief Magistrate's Court.

45. Indeed, Paragraph 58 of the Advocates Remuneration order stipulates that:-

“In causes or matters which, having regard to the amount recovered or paid in settlement or the relief awarded, could have been brought in a resident magistrate's or other subordinate court, costs on the scale application to subordinate courts only shall be allowed unless the judge otherwise orders.”

46. Accordingly, having considered the Defendant's affidavit evidence, Written Submissions and case law that were relied upon by both parties, this court came to the firm conclusion that the Defendant had not demonstrated an arguable case to persuade this court to transfer the suit herein to the lower court. Indeed, allowing the application would only prejudice the Plaintiff and deny it a chance of fully presenting its case.

DISPOSITION

47. For the foregoing reasons, the upshot of this court's decision was that the Defendant's Notice of Motion application dated 2nd November 2018 and filed on 6th November 2018 was not merited and the same is hereby dismissed with costs to the Plaintiff.

48. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of July 2019

J.KAMAU

JUDGE