



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL SUIT NO 241 OF 2019

ORTHODOX ARCHBISHOPRIC OF KENYA &

IRINOUPOLISAPPLICANT

VERSUS

ENERGY REGULATORY COMMISSION.....RESPONDENT

RULING

INTRODUCTION

1. The Applicant's Notice of Motion application dated 11th March 2019 and filed on 13th March 2019 was brought pursuant to Order 51 Rule 1 of the Civil Procedure Rules, Section 18 (1)(b) (ii) & (2) of the Civil Procedure Act and all the enabling provisions of the law. Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT the suit filed by the Respondent against the Applicant being Nairobi CMCC 4768 of 2017 Energy Regulatory Commission vs Orthodox Archbishopric of Kenya and Irinoupolis in the Chief Magistrate's Court be transferred therefrom to this court, for trial and determination.

3. THAT cost of the suit be provided for.

2. Its List and Bundle of Authorities were filed on 2nd April 2019 while its Written Submissions were dated 2nd May 2019 and filed on 3rd May 2019. The Respondent's Written Submissions were dated 22nd May 2019 and filed on 27th May 2019.

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

THE APPLICANT'S CASE

4. The Applicant's present application was supported by the Affidavit that was sworn by its Advocate, Christine Githii, that was sworn on 11th March 2019.

5. The Applicant pointed out that it intended to amend the Plaintiff it filed in CMCC No 4768 of 2017 Energy Regulatory Commission vs Orthodox Archbishopric of Kenya and Irinoupolis bringing the total value of the claim to Kshs 31,484,902.76.

6. It added that it also intended to consolidate the aforesaid suit with Nairobi CMCC No 4947 of 2017 Eagle Africa Insurance Brokers Ltd vs Orthodox Archbishopric of Kenya & Irinoupolis which would further increase the amount of the claim as a result of which the Chief Magistrate's Court would lack jurisdiction to hear and determine the case.

7. It averred that it was in the interests of justice and fairness that this court transfers the suit from the Chief Magistrate's Court to itself for hearing and determination.

THE RESPONDENT'S CASE.

8. In response to the said application, the Respondent filed a Notice of Preliminary Objection dated 3rd April 2019 on 4th April 2019. The grounds of objection were as follows:-

1. THAT the application as filed was premature and misconceived and a conjecture as no amended Plaintiff had been filed in the Lower Court being the Chief Magistrate's Court.

2. THAT the application was baseless and an abuse of the Honourable Court process.

3. THAT the application flew in the face of all known provisions of the law.

9. It therefore urged this court to dismiss the present application with costs to it.

LEGAL ANALYSIS

10. The Applicant referred to Section 18 of the Civil Procedure Act which empowers the High court to withdraw any suit pending before a lower court and bring it to itself and thereafter try the same.

11. It was its contention that the jurisdiction of the Magistrate's Court was limited by virtue of Section 7 of the Magistrate's Act No 26 of 2015.

12. It placed reliance on the case of **Joseph Muthee Kamau & Another vs David Mwangi Gichuri [2013] eKLR** where it was held that a suit can only be filed in a court which has jurisdiction and is competent to hear and determine a dispute before it.

13. Further, it referred this court to the case of **Kagenyi Musiramo & Another [1968] EA 48** where it was held that where a suit was instituted in a court without jurisdiction, it would be incompetent for the High Court to have such a suit withdrawn and transferred to another court ostensibly with relevant jurisdiction.

14. It submitted that it was impractical for it to file a separate suit as the same would be *res judicata*. It was its submission that the law allowed any party to amend its pleadings at any stage of the proceedings, with the leave of the court.

15. On the other hand, the Respondent argued that the present application was premature as no amended defence or counterclaim had been filed. It relied on the case of **Insecta Ltd vs Mastermind Tobacco (K) Ltd [2004] vs Civicon Ltd [2017] eKLR** where the court allowed an application to transfer a suit from the subordinate court to the High Court because the defendant's counterclaim exceeded the pecuniary jurisdiction of the subordinate court.

16. It was emphatic that by virtue of Order 8 Rule 3 of the Civil Procedure Rules, a party could seek leave of the court to amend its pleadings and that courts only adopt the value of the claim once the leave has been granted.

17. It relied on the provisions of Order 7 Rule 12 of the Civil Procedure Rules that provides that a party may apply to have a matter proceed by way of an independent suit if it did not wish the claim disposed of by way of counter-claim.

18. It also placed reliance on Section 7 of the Civil Procedure Act in arguing that an independent suit would not be *res judicata* as the counter claim in the lower court matter had not been heard and determined and parties might not be litigating in the same capacity. In this regard, it referred this court to the case of **The Independent Electoral and Boundaries Commission vs Maina Kiai & Others [2017] eKLR** where it was held that the following elements must be satisfied before a matter could be said to have been *res judicata*:-

1. THAT the suit or issue was directly and substantially in issue in the former suit.

2. THAT the former suit was between the same parties or parties under whom they or any of them claim.

3. THAT those parties were litigating under the same title.

4. THAT the issue was heard and finally determined in the former suit.

5. THAT the court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

19. It was its submissions that the case of **Kagenyi vs Musiramo & Another** (Supra) was not applicable herein because the matter that was filed before the lower court was properly before it and it had competent (*sic*) jurisdiction to deal with the same.

20. Right at the outset, this court wholly concurred with the Respondent's submissions that the facts of **Kagenyi vs Muriramo & Another** (Supra) were completely distinguishable from the facts of the case herein. The claim before the subordinate court was rightly lodged there.

21. The issue of *res judicata* did not therefore arise in the circumstances of the case because even if the Applicant were to opt to proceed by way of an independent suit, the same would not be *res judicata* as the suit in the subordinate court had not yet been heard and determined as was envisaged in Section 7 of the Civil Procedure Act.

22. Section 7 of the Civil Procedure Act provides that:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

23. Having said so, Order 7 Rule 12 of Civil Procedure Rules did not contemplate a defendant filing an independent suit if it did not wish to proceed by way of counter-claim. The said provision is clear that it is the plaintiff or any other party named in a counter-claim who wishes to have any counter-claim excluded that applies to court seeking orders that such counter-claim may be excluded and the defendant proceeds in an independent suit.

24. Order 7 Rule 12 of the Civil Procedure Rules stipulates that:-

“Where a defendant sets up a counterclaim, if the plaintiff or any other person named in the manner aforesaid as party to such counterclaim contends that the claim thereby raised ought not to be disposed of by way of counterclaim, but in an independent suit, he may at any time before reply, apply to the court for an order that such counterclaim may be excluded, and the court may, on the hearing of such application, make such order as shall be just.”

25. Going further, this court also agreed with the Respondent that the subordinate court had jurisdiction to hear an application seeking to amend any pleading and that it was not divested of power to hear an application for amendment where the value of the claim would exceed its pecuniary jurisdiction.

26. Indeed, Section 18 of the Civil Procedure Act envisages a situation where a matter that has been duly lodged in a subordinate court can be transferred to the High Court. It does appear to this court that the pecuniary jurisdiction of a subordinate court can only be exceeded after a case has been filed in the subordinate court. The reasoning behind this is that no suit can be filed in a subordinate court if *prima facie*, it can be discerned that the total value will exceed the court’s pecuniary jurisdiction as provided in Section 7 of the Magistrate’s Act.

27. It is important to point out that the High Court does not withdraw cases from the subordinate courts, *suo moto* or on application of any party unless there is reason to do so. Sufficient reason must be given as the hierarchical nature of courts ensures that each court deals with the cases it has pecuniary or territorial jurisdiction to deal with. This avoids forum shopping.

28. Section 18 (1)(b)(i),(ii) and (iii) of the Civil Procedure Act states thus:-

(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) try or dispose of the same; or

i. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

ii. retransfer the same for trial or disposal to the court from which it was withdrawn.

29. An order for transfer therefore, has to be grounded on solid facts. This court found itself in agreement with the Respondent that the present application was premature. The Applicant was yet to be granted leave to amend and/or to consolidate the case in the lower court with **CMCC No 4947 of 2017 Eagle Africa Insurance Brokers Ltd vs Orthodox Archbishopric of Kenya & Irinoupolis**. It could not speculate on the orders it was going to be granted because the court hearing the case would have to determine whether or not to allow the said application.

30. In the event that its applications in the lower court are allowed, it will be at liberty to move the court appropriately. If the said applications are not allowed, there are also other avenues for moving the court for relief. Allowing the present application before the applications are filed, heard and determined in the subordinate court have the potential of embarrassing the trial court in the event it was to find that the Applicant’s applications were not merited. This court therefore took the firm view that the Applicant ought to move in a systematic manner.

DISPOSITION

31. For the foregoing reasons, the upshot of this court’s decision was that the Applicant’s Notice of Motion application dated 11th March 2019 and filed on 13th March 2019 was not merited and the same is hereby dismissed with costs to the Respondent.

32. It is so ordered.

DATED and DELIVERED at NAIROBI this 21st day of November 2019

J. KAMAU

JUDGE