



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

MISCELLANEOUS APPLICATION NO. 467 OF 2016

MITCHELL COTTS FREIGHT LIMITED..... APPLICANT

VERSUS

CIVICON LIMITED..... RESPONDENT

RULING

1. The applicant Mitchell Cotts Freight Kenya Limited, the applicant, was on 16th March, 2016 sued by Civicon Limited, the respondent, in Mombasa CMCC No. 515 of 2016 for the sum of Kshs. 3,366,938.00.
2. The applicant on 10th May, 2016 filed a defence and a cross action by counterclaim and set off where it claims the sum of Kshs. 27,342,300/= from the respondent.
3. The respondent on 18th May, 2016 filed a defence to the counterclaim and set off ***“under protest”***.
4. The above circumstances propelled the applicant to file an application by way of Notice of Motion on 21st June, 2016 seeking the following orders:-

(i) Spent;

(ii) The Honourable court be pleased to withdraw Mombasa CMCC No. 515 of 2016, Civicon Limited vs Mitchell Cotts Freight Kenya Limited from the Chief Magistrate's Court at Mombasa and transfer the same to this Honourable court for hearing and final disposal;

(iii) That this Honourable court makes any other order or such further orders as it may deem fit and just to grant; and

(iv) Costs of the application be provided for.

The application is predicated on the grounds on the face of it and the supporting affidavit of Mark Mbua, the General Manager, Terminals of the applicant company.

5. On service of the application, the respondent filed grounds of opposition on 21st July, 2016 to the effect that:-

(i) The applicant's counter-claim in the lower court is a distinct cause of action from the respondent's original suit;

(ii) The counter-claim was filed in a court that lacks pecuniary jurisdiction to try and determine it and consequently, the Chief Magistrate's Court lacks the pecuniary jurisdiction to hear and determine the counter-claim;

(iii) Where a matter is filed in a Court which has no jurisdiction, then there is no suit, properly so called, which has been filed. Consequently, there is no suit, so to speak, to be transferred to any other court;

(iv) The High Court cannot exercise its discretion to transfer a suit from one Court to another if the suit is filed in the first place in a Court which does not have the pecuniary jurisdiction to try it;

(v) The counterclaim filed in the Chief Magistrate's Court Mombasa is not competent. It is therefore non-existent and there is nothing to transfer from that Court to this Court;

(vi) The interests of justice are best served by upholding the law and not bending it to suit the individual circumstances of the applicant.

6. Counsel for the applicant filed detailed and elaborate written submissions on 5th September, 2016 in which he cited several authorities to support his application. Counsel for the respondent did likewise on 30th August, 2016.

7. At the time of hearing the application, Mr. Nyabicha, Counsel for the applicant informed the court that he was fully relying on his written submissions. He did not highlight the same. Counsel for the respondent highlighted his submissions.

APPLICANT'S SUBMISSIONS

8. This Court will briefly outline the written submissions of the applicant's Counsel which are to the effect that the original claim in CMCC No. 515 of 2016, Civicon Limited vs Mitchell Cotts Freight Kenya Ltd., for Ksh.3,366,938.00 by the respondent herein arises out of alleged transportation of several packages from Kilindini to Kibarani and from Mombasa to Nairobi in the month of August, 2014. On the other hand, the counterclaim and set off against the respondent by the applicant is for the equivalent of Kshs.27,342,300/= based on damage to a passenger boarding bridge, hence the said amount is above the pecuniary jurisdiction of a Chief Magistrate. The applicant's Counsel relied on the provisions of Order 7 rule 3 of the Civil Procedure Rules to show that the counterclaim and set off are an integral part of the suit filed in the lower court. In Mr. Nyabicha's opinion, both claims are intertwined as they arise from the same set of transactions. The witnesses to be called by both parties herein are the same and the documents referred to by each party are similar. The submissions further indicate that a counterclaim can only be pleaded in the defence to the original suit. He cited the provisions of Order 7 rule 7 of the Civil Procedure Rules which provides that where any defendant seeks to rely upon any grounds as supporting a right of counterclaim, he shall in his statement of defence, state specifically that he does so by way of counterclaim.

9. The submissions state that the intention of the counterclaim as per Order 7 rule 3 of the Civil Procedure Rules is to enable the Court to pronounce a final judgment in the same suit and on the cross claim. The counterclaim, he added, is however outside the pecuniary jurisdiction of the Chief Magistrate.

10. The applicant's Counsel in his submissions indicated that the application is aimed at achieving the overriding objective of the Civil Procedure Act as provided in Sections 1A (1), (2), (3) and 1B. In addition, the present application seeks to prevent multiplicity of suits. The case of **China Sichuan International Co-operation Company vs Syokimao Dam Estates & 2 Others** [2005] eKLR was cited to buttress the above submission. Several other authorities were cited to show that no loss, damage or prejudice or inconvenience will be occasioned to the respondent if the application is allowed.

11. Counsel also cited the provisions of Article 50 of the Constitution of Kenya to assert that the applicant has a right to have the dispute resolved by application of the law, thus procedural technicalities should be

disregarded in favour of substantive justice.

RESPONDENT'S SUBMISSIONS

12. Mr. Muthama, Learned Counsel for the respondent submitted that Section 7 of the Magistrate's Court Act puts a cap of Ksh. 20 Million as the pecuniary jurisdiction of a Chief Magistrate. He implored the court not to aid the applicant to sanitize his blunder. Counsel submitted that a jurisdictional issue is not a technicality as it goes to the root of any matter and therefore what has been filed by the applicant in the lower court is a nullity. Counsel in seeking to have the application dismissed relied on his written submissions and the list of authorities attached thereto namely, **Edward Murangiri Mugambi vs Habib Bank Ltd.** [2012] eKLR where it was held that a court cannot transfer a suit which has been filed in a court without jurisdiction, to the High court. He also relied on the decision in the case of **Das Group Kenya Ltd. vs Mayfair Holdings Ltd. t/a Peche Foods** [2014] eKLR.

ANALYSIS AND DETERMINATION

The issue for determination is whether this court has jurisdiction to transfer a suit from a Court with no jurisdiction to another Court vested with jurisdiction.

13. The applicant's deponent in his affidavit filed on 21st June, 2016 has attached the pleadings filed in the lower court. It is thus clear from the plaint that the claim arises out of business transactions whereby the respondent on the applicant's request allegedly transported several packages from Mombasa to Nairobi and from Kilindini to Kibarani, on or about the 29th of August, 2014. The respondent issued several invoices and statements of accounts to the applicant arising out of the said transactions which have allegedly not been honored by the applicant. These are for the sum of Kshs. 3,366,938.00.

14. The applicant filed a defence and a cross action by way of counterclaim and set off on 10th May, 2016. In paragraphs 3 and 4 thereof, the applicant avers that the respondent was contracted by the applicant to transport one unit of a passenger boarding bridge valued at UK pounds 181,232 from Mombasa to Nairobi. It is alleged that on or about 31st May, 2014 when the said bridge was being transported, the respondent's motor vehicle registration No. KBU 405R/ZU 5822 was involved in a road accident which led to the passenger boarding bridge being written-off due to extensive damage.

15. Order 7 rule 3 of the Civil Procedure Rules provides as follows:-

"A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counter claim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim: but the court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof."

16. The foregoing provisions must be read together with those stipulated in Order 7 rule 14 which are in the following terms:-

"Where in any suit a set off or counterclaim is established as a defence against the plaintiff's claim, the court may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case."

17. I have perused the invoices attached to the respondent's list of documents, they are dated 29th August, 2014. The statement of accounts in relation to the invoices is for services rendered on 14th March, 2014 and 29th August, 2014. The said invoices are indicative of the fact that the parties hereto were transacting

business in the year 2014 when an accident happened on 31st May, 2014 that damaged the applicant's passenger boarding bridge. While the respondent is in the lower court seeking payment for work done, the applicant in the counterclaim is seeking compensation for damage to the said passenger bridge. The Civil Procedure Rules in Order 7 rule 15 permits a defendant to rely upon several distinct grounds of defence or set-off founded upon separate and distinct facts as long as they are, as far as practicable, separately and distinctly stated.

18. The original suit that was filed in the lower court was filed in a court that has pecuniary jurisdiction to hear it. The only point of departure is that the cross-action by way of counterclaim and set off exceeds the pecuniary jurisdiction of the Chief Magistrate's Court. The case of **Edward Murangiri Mugambi vs Habib Bank Ltd.** (supra) and the others cited on the issue of jurisdiction are therefore not applicable to the present application. In my considered view, the circumstances leading to the cross-action by way of counterclaim and set off are so closely intertwined that the only thing which any reasonable Court would do is to rule that the original suit and the counterclaim should be heard as one suit. It is my considered view that separating the counterclaim from the main suit will lead to multiplicity of suits and extra costs hence defeat the objective of section 1A (1) of the Civil Procedure Act.

19. The respondent could have availed itself of the provisions of Order 7 rule 12 of the Civil Procedure Rules at the earliest opportunity before it filed the defence to the counterclaim but it waited until the applicant had filed the present application to raise an objection to the same. The said provisions stipulate 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 by 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 orders as shall be just." (emphasis added).

20. Section 18(1) of the Civil Procedure Act gives the High Court the power to transfer cases in the following terms:-

"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 proceedings 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 to 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."

21. Having found that the original suit was filed in a court with pecuniary jurisdiction to hear it, it is my finding that the present application is well merited. The overriding objective of the Civil Procedure Act and the rules made thereunder were very well enunciated by the Court of Appeal in **Harit Sheth Advocate vs Shamas Charania** [2010] eKLR where the court said thus:-

"the principle aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of

arms is maintained and that as far as is practicable to place the parties on equal footing."

22. In view of the analysis and consideration of the facts in issue, the submissions put forth by Counsel for both parties, the authorities cited and the relevant law, I make orders for withdrawal of Mombasa **CMCC No. 515 of 2016, Civicon Limited vs Mitchell Cotts Freight Kenya Limited** from the Mombasa Chief Magistrates Court and hereby transfer the same to the High Court, Mombasa for hearing and final determination. Costs of the application are awarded to the defendant/applicant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of February, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Kariuki holding brief for Mr. Nyabicha for the applicant

Mr. Mugambi for the respondent

Court clerk - Oliver Musundi