

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
CIVIL CASE NO. 2 OF 2014

SIMONA RIZZATOPLAINTIFF

VERSUS

KENYA WAY LIMITED1ST DEFENDANT

FRANCESCA GOBESSO2ND DEFENDANT

RULING

The application dated 18th March 2016 seeks the following orders: -

1. The suit, Malindi CMCC No. 7 of 2014 – Kenya Way Limited vs Simona Rizzato, Franco Tattoni and Francesco Gobesso be and is hereby withdrawn/recalled from the Malindi Chief Magistrate's Court and transferred to this court – High Court of Kenya at Malindi for hearing and determination.
2. The suit Malindi CMCC No. 7 of 2014 – Kenya Way Limited vs Simona Rizzato, Franco Tattoni and Francesco Gobesso be and is hereby consolidated with the suit herein.

The application is supported by the affidavit of Simona Rizzatto sworn on 18th March, 2016. The respondent filed grounds of opposition to the application.

The application is brought under Sections 1A, 1B and 18 of the Civil Procedure Act. Mr. Nyasimi, counsel for the applicant maintains that the applicant intends to file an amended defence. The amended defence is raising a claim of Kshs.78,182,440/=. This amount is far beyond the jurisdiction of the Chief Magistrate's Court.

The grounds of objection are that there is no appeal from the Ruling of the Chief Magistrate. Parties were directed to take directions on how the matter shall proceed. There is an application by the 1st defendant seeking to strike out the suit which application is still pending.

The main issue for determination is whether Malindi Civil Suit No. 7 of 2014 should be transferred to this court and consolidated with this matter. The record shows that this suit was filed on 30th January, 2014. The plaintiff in this suit is the 1st defendant in the suit before the Chief Magistrate's Court. The intended amended defence by the applicant herein is in line with the plaint in this suit. The plaintiff in the suit before the Chief Magistrate is the 1st defendant in this suit. The dispute arises from rental premises known as White Elephant located in Malindi. The plaintiff before the Chief Magistrate's Court is the landlord while the applicant was a tenant. The applicant's claim is that she was wrongly evicted from the premises and in the process suffered damages and loss. The damages being claimed exceeds the jurisdiction of the Chief Magistrate's Court.

Under Section 18 of the Civil Procedure Act, the court is empowered to transfer a suit from the Subordinate Court to the High Court or from the High Court to the Subordinate Court. It is clear to me

that the suit before the Lower Court is similar to the one before this court. If the plaintiff before the Chief Magistrate's Court is successful, it will be granted the rent arrears. Similarly, if the plaintiff before this court is successful, she will be granted the damages being sought arising from the same dispute. The rent arrears can be granted by this court if it is proved. Having two parallel hearings will lead to waste of judicial time. The Chief Magistrate's Court cannot hear and determine the counter claim. The counter claim is the basis of the plaint in this suit. I do find that the two suits need to be consolidated and heard at once instead of two separate suits.

In the end, the application dated 18th March, 2016 is hereby granted as prayed. Costs shall follow the outcome of the main suit.

Dated and delivered at Malindi this 13th day of April, 2016.

S.J. CHITEMBWE

JUDGE