



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION NO. 192 OF 2015**

**MAGNATE VENTURES LIMITED .....APPLICANT**

**VERSUS**

**KENYA FERRY SERVICES LIMITED .....RESPONDENT**

**RULING**

1. The application before me dated 7<sup>th</sup> August, 2015 has been brought under Section 1 A, 1(B), 3(A), 18(1) (b) (i) of the Civil Procedure Act Cap 21 of the Laws of Kenya and under Order 51, rule 1 of the Civil Procedure rules. The application seeks the following orders;-

(i) That civil case No 3484 of 2014 Magnate Ventures Limited vs Kenya Ferry Services Ltd, be transferred to the High court for hearing and final determination and;-

(ii) The costs of the application be provided for.

The application is predicated on the grounds on the face of it and the supporting affidavit of Laura Kenyani dated 7<sup>th</sup> August, 2015.

The parties hereto filed their written submissions as directed by the court. They however did not highlight the same but requested the court to give a date for a ruling.

**THE APPLICANT'S SUBMISSIONS**

2. A perusal of the applicant's submissions reveals that the original suit was filed on 28<sup>th</sup> March, 2011 in the High Court Mombasa as Civil case No 72 of 2011, Magnate Ventures Limited vs Kenya Ferry Services Limited. The court on 26<sup>th</sup> November, 2013 on its own motion transferred the suit to the Chief Magistrate's court for final hearing and determination.

3. The applicant on 27<sup>th</sup> July, 2015 was allowed to amend the plaint which ousted the jurisdiction of the Chief Magistrate to hear and determine the matter hence the current application.

4 Counsel for the applicant in his written submissions relied on the case of **Bruce Mutie t/a Diani Travels Vs Equity Bank Limited**, (2015) eKLR, in which the court cited the case of **Joseph Muthee Kamau & another Vs David Mwangi Gichuri & another** ( 2013) eKLR, where the Court of Appeal stated thus:-

*“ In the instant case, the subordinate court had jurisdiction subject to the upper limit of the damages being ksh 300,000. We hold that jurisdiction does not operate retrospectively.*

***Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”***

5. The court’s attention was drawn to Section 18 of the Civil Procedure Act which empowers the court either on its own motion or on the motion of a party to transfer a case from one court to another. The submissions indicate that the suit was filed in a court with competent jurisdiction but the amendment of the plaint ousted the said jurisdiction. The applicant prays that the application be allowed.

**RESPONDENT’S SUBMISSIONS.**

6. The respondent filed its grounds of opposition on 20<sup>th</sup> August, 2015 raising the following grounds:-

(i) That the Plaintiff/Applicant’s application is frivolous, vexatious incompetent and otherwise and abuse of the due process of this court;

(ii) That the said application is ill conceived and it is otherwise unsustainable in law and ought to be accordingly dismissed with cost;

(iii) That the lower court lacked the requisite pecuniary jurisdiction to entertain an amendment in court case No 3483 of 2013, Magnate Ventures Limited vs Kenya Ferry Services Limited for a sum exceeding Ksh 20,000,000 /= and hence (sic) the amendment was absolutely irregular in law;

(iv) The parties cannot confer jurisdiction to a court of law not even by consent; and

(v) That the suit pending in the Chief Magistrate’s court which is since not seized of the necessary jurisdiction is not capable of being transferred to the High court of Kenya.

7. The respondent filed its written submissions on 25<sup>th</sup> September, 2015. The submissions were to the effect that the Magistrate in the lower court entertained amendments that were beyond his pecuniary jurisdiction as enshrined in Section 5 of the Magistrate’s court Act. This was for the reason that at the time of hearing the application to amend the plaint, the subject that was being considered by the magistrate was for Ksh 20,201,022.46/= and the magistrate was tasked with determining whether to allow the amendments or not.

8. The written submissions indicate that the applicant never filed the amended plaint after being allowed to amend it. It was argued that once the lower court allowed the amendments, it ceased to have jurisdiction to hear and determine the applicant’s suit and that such a suit is incapable of being transferred to the High court. Counsel cited the case of **Associated Warehousing Ltd vs Clarkson & Southern Ltd**, Mombasa High Court Civil Appeal No 166 of 2007, where the court found that valuation of the suit premises was Kshs.51,000,000/= for insurance replacement value, forced sale value Kshs.56,000,000/= mortgage value at Kshs.68,000,000/= and open market value at Kshs.80,000,000/= which surpassed the pecuniary jurisdiction of any magistrate.

9. Counsel also cited the case of **Owners of Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd** (1998) KLR 1, where Nyarangi J stated:-

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything, without it, a court has no power to make one more step.”***

10. The respondent contends that the learned magistrate had the competence to pronounce his court to be devoid of jurisdiction and to free himself of all judicial proceedings in the relevant matter, but he did not. The court’s attention was drawn to the case of **Kagenyi vs Musiramo & another** [1968] EA 48, where Sir Udo Udoma CJ of Uganda was of the view that where a suit is 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. The respondent prays for the application to be

dismissed with costs to the respondent.

### **ANALYSIS AND DETERMINATION.**

The issues that call for determination are:-

- (i) If the lower court had the jurisdiction to entertain the amendments sought; and
- (ii) Whether Civil case No 3484 of 2013 can be transferred to the High court.

11. The starting point in determining the present application is Section 18 (1) of the Civil Procedure Act which provides as follows:-

***“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.”***

12. In the instant case, transfer of the suit from the magistrate’s court to the High court is being sought solely for the reason that an amendment that was made to the plaint through leave of the court enhanced the claim to Kshs. 20,201,222.46/= which is above the pecuniary jurisdiction of the chief magistrate’s court. A copy of the amended plaint marked as LK1 is attached to the supporting affidavit dated 7<sup>th</sup> August, 2016 sworn by Laura Kenyani.

13. The respondent in its grounds of opposition states *inter alia* that the lower court lacked the requisite pecuniary jurisdiction to entertain and amendment in court case No. 3483 of 2013 involving the parties to this suit for a sum exceeding Kshs.20,000,000/= hence the amendment was irregular in law. The respondent in its written submissions states that the application to amend the plaint was allowed by consent of the parties. On its part, the applicant in its written submissions states that the original suit forming the basis of the present application was filed on 28<sup>th</sup> March, 2011 in the High court. It was civil case No. 712 of 2011. The said case was transferred by the court *suo motu* to the Chief Magistrate’s Court for hearing and determination.

14. It is common knowledge that a party seeking to amend a plaint attaches a copy of the amended plaint to the application seeking leave to amend. This must have been the case here, as the respondent has attached a copy of an amended plaint which it otherwise would not have got hold of. The respondent’s submissions further state that the amended plaint was never filed in court after the order to amend the same was granted. What is clear as day is that the respondent who was not opposed to the plaint being amended has now made an about face. This I note, is well within the respondent’s rights.

15. It is apparent that the counsel representing the parties at the lower court fell into error when they recorded a consent in a matter which by virtue of the amended plaint, fell outside the jurisdiction of the Chief Magistrate’s court. The magistrate also misdirected himself when he agreed to record a consent in a

matter whose pecuniary jurisdiction fell outside the jurisdiction conferred upon him.

16. I agree with counsel for the respondent as stated in the **Lilian S** case (supra) that the magistrate should have downed his tools on realizing that the claim in the amended plaint was over and above his pecuniary jurisdiction. This court however notes that the original suit had been filed in the High Court before it was transferred to the magistrate's court by the High court on its own motion and therefore the provisions of Section 18 (1) (b) (i) of the Civil Procedure Act comes into play.

17. In the case of **Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another** (2012) eKLR, the Court stated thus;-

*“ Whereas it is correct that Section 18 (1) (b) (i) talks about the court withdrawing the suit or proceedings and thereafter disposing of or trying the same, to say that the High Court cannot under the said provision transfer a suit from the subordinate court to itself is in my view a misconception. It is noteworthy that under Section 18 (1) (b) (iii) the High Court is empowered to “retransfer” such a suit back to the court in which it was originally filed. This may occur where a magistrate with pecuniary jurisdiction is posted to the said court. I am therefore clear in my mind that under Section 18 aforesaid the High Court has jurisdiction to transfer a suit from the subordinate court to itself for hearing and disposal.”*

18. Sections 1A and 1B of the Civil Procedure Act provide that:-

*"1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.*

*(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).*

*(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.*

*1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-*

*(a) the just determination of the proceedings;*

*(b) the efficient disposal of the business of the Court;*

*(c) the efficient use of the available judicial and administrative resources;*

*(d) the timely disposal of the proceedings, and all other proceedings in the Court at a cost affordable by the respective parties; and*

*(e) the use of suitable technology".*

19. This Court would be perpetuating an injustice if it denies the applicant the orders sought. More so, noting that the applicant had at the first instance filed its case in the High Court. As things stand at the moment, the Magistrate's Courts Act, 2015, confers a pecuniary jurisdiction of Kshs. 20,000,000/= to a Chief Magistrate. In which court then would the applicant seek justice with a claim above the said amount? This Court cannot in the circumstances of this case slam the door right on the face of the applicant due to errors on the part of its Counsel on record and the Magistrate who was seized of the matter in the lower court. **The overriding objective enshrined in section 1A(1) of the Civil Procedure Act is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. This Court cannot overlook the said provisions of law.**

20. Order 8, rule 5 (1) of the Civil Procedure rules provides as follows:-

***“for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”***

21. In the interest of justice I make the following orders:-

(i) CMCC NO. 3484 of 2013, Magnate Ventures Limited vs Kenya Ferry Services Limited is hereby withdrawn from the Chief Magistrate’s Court and transferred to the High Court of Kenya at Mombasa, for hearing and final determination;

(ii) Leave is hereby granted to the Plaintiff/Applicant to file and serve an amended plaint within 7 days from today’s date.

(iii) The Defendant/Respondent is granted leave to file and serve an amended defence, if any, within 7 days of service of the amended plaint;

(iv) Parties will after the duration of the 14 days stipulated above, file the requisite documents within 30 days in compliance with Order 11 of the Civil Procedure rules;

(v) The Plaintiff/Applicant will take a mention date for directions, at the registry, and effect service of the same; and

(vi) Costs to the applicant.

**DELIVERED, DATED and SIGNED at MOMBASA on this 1<sup>st</sup> day of September 2016.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

No appearance for the Applicant.

Mrs Wangari Nyange..... for the Respondent.

Ms Rose Echor .....Court Assistant.