



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS CIVIL APPLICATION NO. 46 OF 2015**

**ABDIRAHMAN S. MOHAMED T/A TOWNHIND SHOPPING COMPLEX.....APPLICANT**

**VERSUS**

**PATRICK GITHINJI MWANGI.....RESPONDENT**

**RULING**

1. Before me is the Notice of Motion dated 20<sup>th</sup> January, 2015. It is expressed to be brought under Article 159 (2) (d) of the Constitution of Kenya, 2010, Order 50 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A and 18 (1)(b)(i) of the Civil Procedure Act. The Applicant seeks orders that CMCC No. 2779 of 2014 (Milimani) Abdirahman S. Mohamed t/a Towhid Shopping Complex v. Patrick Githinji Mwangi be transferred to the Commercial Division of the High Court for hearing and determination of the application dated 16<sup>th</sup> May, 2014 and this suit.

2. This application is premised on the grounds set out on the face of the application and the supporting affidavit of the Applicant. The Applicant stated that the circumstances obtaining at the time of filing the suit has changed drastically necessitating the transfer of the same to the High Court. That the circumstances alluded to is due to illegal subleases that the Respondent executed with the tenants in his shopping centre and the rent that the Respondent collected under the subleases between the year 2009 and December, 2012. He stated that the jurisdiction of the subordinate court has been superseded in light of the new circumstances since he shall be seeking an amount in excess of KShs. 20 Million.

3. In response thereto, the Defendant filed a replying affidavit on 17<sup>th</sup> March, 2015. He contended that no circumstances obtaining at the time of filing this suit has changed and that the Plaintiff's real intention is to introduce a new suit camouflaged as a transfer. He contended that the Plaintiff has filed another suit being Nairobi ELC No. 136 of 2015 where he has sworn that there is no other pending suit between him and the Defendant on the subject matter. That the Plaintiff's action aforesaid is in violation of the mandatory provision of Section 6 of the Civil Procedure Act and constitutes perjury.

4. The submissions tendered on behalf of the Plaintiff was a reiteration of his averments in the supporting affidavit. For the Defendant, it was submitted that the Plaintiff's allegations have not been substantiated by evidence. It was submitted further that this court cannot transfer a suit that was filed in a court without jurisdiction. In that respect the Respondent's counsel cited **Das Group (K) Ltd v. Mayfair Holdings (2014) eKLR** and **Edward Mutangiri Mugambi v. Habib Bank Ltd (2012) eKLR**. The Defendant stated that the lower court had made a finding that it had no jurisdiction but did not dismiss the suit. It was stated that the subject matter of the suit was over KShs. 7,000,000/= which exceeded the lower court's jurisdiction.

5. I have considered this application, the Plaintiff has not contended that the lower court had no jurisdiction to entertain the matter. I have looked at the Plaintiff's claim that was lodged in the lower court on 16<sup>th</sup> May, 2013. There is no claim liquidated claim. The only semblance of a pecuniary claim is prayer (b). It seeks an order for the Defendant in that case to remit **all the monies** paid to him by the Plaintiff as agent of the lessor of the property. The amount has not been quantified. It could be Kshs. 1 or millions. Until and unless the same is quantified, there is no way one can tell whether the lower court had jurisdiction or not at the time the suit was filed. Further, it was not alleged in the body of the Plaintiff's claim that none of the rent had been paid over by the Defendant to the lessors of the subject premises. In this regard I do not think it can be said that the lower court did not have jurisdiction to hear the matter. As regards

the order of the lower court of 31/10/14, that court did not hold that it did not have jurisdiction. It left it open to the Applicant to prove before another court, the Chief Magistrates Court, that there was any jurisdiction in that court to entertain the suit.

The basis of the application before me is that due to the subleases that the Defendant has been executing over the shopping complex the monetary claim has now exceeded the jurisdiction of the lower court. The Respondents answer is that the application is an attempt by the Applicant to introduce a fresh cause of action. This I cannot see from either the Supporting or Replying Affidavit. My view is the suit had been filed in a court of competent jurisdiction but if the claim sought to be impleaded will exceed the jurisdiction of the lower court nothing impedes this court from transferring the suit to the High Court. Accordingly, the application is allowed but to the extent that the suit is transferred to the Civil Division of the High Court as a dispute as to rent is a civil claim and not Commercial. Costs in the Cause.

Dated, Signed and Delivered at Nairobi this 5<sup>th</sup> day of June, 2015.

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**A. MABEYA**

**JUDGE**