



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**MISCELLANEOUS APPLICATION NO. 88 OF 2014**

**COMM CARRIER SATELLITE SERVICE LIMITED.....1<sup>ST</sup> APPLICANT**

**AZHAR CHAUDRY.....2<sup>ND</sup> APPLICANT**

• **VERSUS –**

**GLOBAL FREIGHT LOGISTICS LIMITED.....RESPONDENT**

**RULING**

1. The applicants seek to stay proceedings in a suit at Nairobi Chief Magistrates Court, transfer and consolidate it with another suit pending at the High Court. The suit in the lower court is CMCC 195 of 2011 *Global Freight Logistics Limited Vs. Comm Carrier Satellite Service Limited and another*. The suit in the High Court is HCCC 86 of 2014 *Comm Carrier Satellite Service Limited and another Vs. Global Freight Logistics Limited*.
2. The gravamen of the motion is that the issues and parties are similar; that the applicants have a counterclaim which exceeds the pecuniary jurisdiction of the lower court; and, that the ends of justice will be met by the transfer and consolidation. Those matters are buttressed by two depositions of Azhar Chaudry sworn on 5<sup>th</sup> March 2014 and 21<sup>st</sup> March 2014.
3. The motion is contested. There is a replying affidavit of Arbi Mussani sworn 12<sup>th</sup> March 2014. The respondent's case is that steps have been taken to prosecute the suit in the lower court. That suit came up for hearing on 6<sup>th</sup> August 2012, 21<sup>st</sup> August 2012, 17<sup>th</sup> September 2013, 9<sup>th</sup> December 2013, 14<sup>th</sup> January 2014, 24<sup>th</sup> February 2014 and 19<sup>th</sup> March 2014. It was adjourned on all those occasions for reasons the respondent blames on the applicants. The respondent thus asserts that the present motion is a stratagem contrived to garrote the suit at the Magistrates Court.
4. The respondent also contends that the causes of action are different; that no prejudice will be occasioned if the lower court determines the suit; that the counterclaim is a red herring as it has never been raised in the lower court; and, that in all the circumstances of this case, the threshold for stay or for consolidation of suits has not been met. I have considered the rival submissions.
5. Section 18 of the Civil Procedure Act empowers the court to transfer suits from one court to another. There are caveats to that power. For example, where a suit has been filed in a court without the requisite jurisdiction, the court, as a general rule, should not cure the error by transfer to a new court. *Kagenyi Vs. Musiramo* [1968] E A 43, *Rainbow Manufactures Limited Vs. National Bank of Kenya* [2010] eKLR, *Abraham Wamigwi Vs. Simon Wanjiku & another* [2012] eKLR, *Kenya seed Company Limited Vs. Joseph Bosire* Court of Appeal, Nairobi, Civil Appeal 72 of 2002 (unreported).
6. In the present case, the suit in the lower court was filed by the respondent in the year 2011 claiming Kshs. 2,990,371.70. The applicants here were the defendants. The suit was filed in a

- court seized with *jurisdiction*. What the defendants in that suit are saying here is that they intend to file a counterclaim for goods detained by the respondent worth US\$ 250,000 or approximately Kshs. 20,000,000. That claim would obviously overshoot the pecuniary jurisdiction of the Chief Magistrates Court. Since the applicants are not the ones who filed the suit in the lower court, it would be to turn logic onto its head to say the suit was filed in a court without jurisdiction.
7. The High Court suit number 86 of 2014 was only filed on 7<sup>th</sup> March 2014. The applicants here have never pleaded the counterclaim in the suit in the lower court since the year 2011. The motion for transfer has thus been presented with undue laches. When delay is established, unless it is well explained, it is deemed to be inexcusable. *Allen Vs. McAlpine* [1968] 1 All 543, *Ivita Vs. Kyumbu* [1984] KLR 441.
  8. The applicant explains the delay as follows: that the director of the 1<sup>st</sup> applicant Anjum Chaudry and the company's attorney Peter Simani were both killed in the terrorist attack at Westgate Mall, Nairobi, on 22<sup>nd</sup> September 2013. Mr. Simani was acting for the applicants in the matter in the lower court. That may not be a sufficient explanation for the delay from the year 2011 to September 2013. Furthermore, the 1<sup>st</sup> applicant is a limited liability company with perpetual succession. I find that the delay is inordinate and inexcusable.
  9. I have then looked at the issues and parties in both suits. The parties are *similar* save that the plaintiffs in the lower court are the defendants in HCCC 86 of 2014. The issues are *not* entirely different. In the lower court, the plaintiff sought judgment for Kshs. 2,990,371.70 for dishonour of two promissory notes made to Guardian Bank, interest and damages. In HCCC 86 of 2014, the plaintiffs refer at paragraph 7 of the plaint to the promissory notes. They aver at paragraph 14 that the defendant fraudulently acquired the plaintiffs' documents and presented them to Guardian Bank. It is also pleaded that the defendant continues to hold assets of the plaintiff worth Kshs. 20,000,000 under a disputed lien. The plaintiffs in HCCC 86 of 2014 thus pray for that sum, damages, interest and an order for an account. The suit in the High Court is *essentially* the intended *counterclaim* in the lower court.
  10. It will be the true province of the trial court to find the merits of the competing claims. What is apparent is that the suit in the lower court and in the High Court stem from *similar* facts and issues. Since the parties are also *similar*, it would be convenient to try the two suits together. It would save time and judicial resources. Although the suit in the lower court was listed for hearing on the dates I set out earlier, it has not proceeded to full hearing. An earlier application for summary judgment was dismissed. The respondent would thus not be unduly prejudiced by the transfer of the suit across the road. Despite the laches in presenting this motion, the interests of justice and the overriding objective of the court dictate that the two suits be consolidated.
  11. This Court is now enjoined to do substantial justice to the parties. That is the spirit and letter of article 159 of the Constitution and sections 1A, 1B, 3A and 63 of the Civil Procedure Act. The overriding objective was well explained by the Court of Appeal in *Harit Sheth Advocate Vs Shamas Charania* Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] e KLR-

*“The principal 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 it is practicable to place the parties on equal footing”.*

12. There is also a long line of authorities on that subject. See for example *Abraham Wamigwi v Simon Wanjiku*, supra, *Grace Komo v Dan Ndwigwa* Nairobi, High Court Misc. Appl. 27 of 2013 [2013] eKLR, *Hangzhou Agrochemical Industries Limited v Panda Flowers Limited* Nairobi, High Court suit 97 of 2009 [2012] eKLR, *Miraflores Apartments Limited Vs Caleb Akwera and another* Nairobi, High Court ELC case 633 of 2011 [2012] eKLR, *Chimanlal K.N. Shah & others Vs Trust Agencies Limited* Nairobi, High Court case 1387 of 2001 [2012] eKLR, *Unga Limited Vs Magina Limited* Nairobi, High Court case 1250 of 1999 [2014] eKLR.
13. Granted all those circumstances, I am inclined to order the transfer of the suit in the lower court to the High Court. I am also persuaded to consolidate it with the other suit in the High Court. In the result I order as follows:

- a. That Nairobi Chief Magistrates Court civil case 195 of 2011 Global Freight Logistics Limited Vs. Comm Carrier Satellite Service Limited and another be and is hereby transferred to the High Court at Milimani, Nairobi, Commercial and Admiralty Division, for hearing and final determination.
- b. That upon transfer, the suit be and is hereby consolidated with HCCC 86 of 2014 Comm Carrier Satellite Service Limited and another Vs. Global Freight Logistics Limited. The plaintiff in the lower court shall remain the plaintiff at the High Court. The present plaintiffs in the High Court suit shall become the defendants in the consolidated suit to the intent that the original suit at the High Court shall now be pleaded as a counterclaim. I, *suo moto*, grant the parties general leave to amend their pleadings at the High Court to accord with this order.
- c. That the proceedings in the lower court in CMCC 195 of 2011 Global Freight Logistics Limited Vs. Comm Carrier Satellite Service Limited and another are hereby stayed.
- d. That costs shall abide the judgment in the consolidated suit.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 8<sup>th</sup> day of May 2014.

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of:**

Mr. J. O. Ochola for the plaintiffs instructed Soita & Saende Advocates.

Mr. A. A. Ondiek for the defendant instructed Anyegah & Company Advocates.

Mr. C. Odhiambo, Court clerk.