



Coastal Bottlers Limited v Acqualine Distributors Limited (Civil Appeal E067 of 2021) [2024] KECA 1806 (KLR) (20 December 2024) (Judgment)

Neutral citation: [2024] KECA 1806 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E067 OF 2021
AK MURGOR, JW LESSIT & GV ODUNGA, JJA
DECEMBER 20, 2024**

BETWEEN

COASTAL BOTTLERS LIMITED APPELLANT

AND

ACQUALINE DISTRIBUTORS LIMITED RESPONDENT

(An Appeal from the Ruling of the High Court at Mombasa (P. J. Otieno, J.) delivered on 29th May, 2020 in High Court Miscellaneous Application No. 330 of 2019)

JUDGMENT

1. The respondent, Acqualine Distributors Limited filed a suit in the Chief Magistrates' Court in Mombasa Chief Magistrate Court CMCC No. 418 of 2012 against the appellant, Coastal Bottlers Limited dated 2nd March 2012. By way of an amended plaint dated 15th October 2014 the respondent sought; i) a mandatory injunction against the appellant its agents, nominees, servants, employees or any other persons or institution to continue an uninterrupted supply of stock to the respondent as per the current dealings; ii) The appellant be restrained by way of a permanent injunction from terminating the distributorship route or operation/market area of operation; iii) the appellant to account for cheques banked against undelivered stock and to credit the respondent; iv) an order for general damages for loss of business of Kshs. 54,088,307, costs and interest. The plaint was further amended on 19th July 2019.
2. Upon the plaint being amended, the respondent filed an application in the High Court by way of Mombasa High Court Miscellaneous No. 330 of 2019 in which it sought orders for withdrawal of Mombasa Chief Magistrate Court CMCC No. 418 of 2012 from the Magistrates' Court and transfer of the suit to the High Court for hearing and determination.
3. The application was premised on the grounds that the Chief Magistrates' court in which the respondent's suit was filed, namely CMCC No. 418 of 2012 Mombasa, Acqualine Distributors Ltd



vs Coastal Bottlers Ltd had become an inappropriate forum as the pecuniary jurisdiction of the court was exceeded by the further amendment of the plaint which pleaded for general damages of Kshs. 54,088,307, and that the High Court was the proper forum to resolve the dispute between the parties. It was pleaded that the appellant stood to suffer no prejudice if the orders sought were granted so that the ends of justice could be served.

4. The appellant opposed the application contending that pursuant to the amendment, the respondent's application dated 29th August, 2019, invited application of the doctrine of relation back to the effect that, once amended, a pleading speaks from the date it was originally filed; that because the Plaintiff seeks special damages of Kshs. 54,088,307 that was way beyond the lower court's jurisdiction, the suit was per se a nullity. According to the appellant the High Court could not purport to transfer a suit which is a nullity to itself and the prevailing circumstances dictated that the suit ought to have been dismissed.
5. The learned Judge, upon considering the application held that;

On whether the Applicant has established a case for grant of transfer of suit to the High Court, the Respondent in its response avers that a suit filed without jurisdiction is a nullity in law and therefore there is nothing to be transferred to this Court, the Respondent further avers that by virtue of Section 18 of the Civil Procedure Act, power to transfer suits cannot be exercised in matters filed without jurisdiction... However, I would respectfully depart from the position taken on this question on the precedents cited. The explanation given by the applicant is that the filing of the suit before the lower court was by inadvertence by its erstwhile counsel in calculating the amount claimed for which the party should not be penalized. I do not wholly buy this argument of blaming the former advocate which appears to me to be the excuse than the reason. The copies of the plaint exhibited show that the former advocate never pleaded any sum as to put the claim beyond the jurisdiction of the lower court. In fact, by the time the current advocates came on record the matter was firmly within the pecuniary jurisdiction of the lower court. My view is that the current counsel ideally needed to prosecute the earlier application in Misc App No. 236 of 2018, citing the desire to amend then seeking the amendment before this court. In abandoning that application, going before that court and leading it to allow an amendment to deprive itself of jurisdiction and then using the same reason to ground the current application is to me an inefficient way to employ judicial time. In fact, I doubt if it was indeed open to the lower court to allow an application that put the matter beyond its jurisdictional mandate.

18. That conduct however must be assigned to the advocate and not the litigant who relied on professional advice by counsel and should not blur the court's vision on the dictates to do justice. If the court was to dismiss the application as sought by the Respondent will only escalate costs in that it will be compelled to file another suit at extra costs. That to me would defeat the purpose and overriding objective of the court to administer justice efficiently, fairly and at costs that do not compromise the right to access justice".
6. The Judge went on to hold:

"I am prepared to hold that it is untidy and may amount to unequal application of the law to have suits transferred between the High Court and courts of equal status yet it is not open to transfer a suit from a one subordinate court to another or even from the subordinate court to the High Court or Courts of equal status. While fully bound by the decisions of the Court of Appeal, I find myself with apparently two conflicting positions by that court. In those circumstances I chose to be guided by the position that I believe to meet the ends of justice, untrammelled by procedural technicalities, and this court being



mandated to supervise the subordinate courts, section 18, *Civil Procedure Act* should be interpreted to introduce nothing new beyond the inherent powers of the court to do justice and do so robustly and substantially. I reiterate that to refuse a transfer and leave a litigant with no prospects of being heard, save for his claim being dismissed on account of lack of jurisdiction, would not be in the interests of justice but meting out an injustice”.

21. “...Having established that the Chief Magistrates court lacks jurisdiction to determine the present matter I find that justice will only be served if the matter is transferred to the high court for efficient disposal. In doing so, this court will be furthering its obligation to give effect to the overriding objective considering that this matter can only be expedited before the High Court. The court is also saying that when filed the suit was before a proper court but that situation was altered by the order for an amendment. In those circumstances I chose to follow the law set by the Court of Appeal in *Eastern Radio Services vs R J Patel* (1962) EA 818 on the principal of law that not every time should an amended pleading be treated as if nothing ever existed before the amendment. I chose to consider the cause pleaded before the amendment and find in favour of sustaining the suit for hearing on the merits rather than leaning towards its defeat on account of lack of jurisdiction.”

7. In effect, the High Court invoked its inherent powers to allow the application for transfer of the suit from the Chief Magistrates’ court to the High Court notwithstanding that the, “...Chief Magistrates court lacks jurisdiction to determine the present matter...”, but for the reason that “...when filed the suit was before a proper court but that situation was altered by the order for an amendment”.
8. The appellant was aggrieved by the ruling and has appealed to this Court on the grounds that; the learned Judge was in error in fact and in law in failing to properly consider the weight of issues addressed in the appellant’s grounds of objection dated 31st October 2019 against the respondent’s subject application and its supporting affidavit; in arriving at a decision that is contrary to the well- established principles of the High Court’s powers to withdraw and transfer cases instituted in subordinate courts; in failing to properly consider and contextually appreciate the submissions made by the appellant; in finding that section 18 of the *Civil Procedure Act* granted the High Court powers to exercise its discretion in allowing the application notwithstanding the fact that the lower court lacked jurisdiction to transfer the case to the High Court; in finding that the doctrine of relation back did not apply to the amendment of the respondent’s *Plaint* as the same was inadvertently left out by the respondent’s previous advocates hence should not prejudice the respondent; in finding that if the respondent properly withdrew the matter in the subordinate court and filed it in the High Court, the extra costs in filing the latter suit would defeat the overriding objective of courts to cost-effectively administer justice; in finding that in spite of the lower court’s lack of jurisdiction to hear and determine the suit, the High Court’s obligation was to allow the respondent’s subject application; in finding that the court had jurisdiction to transfer to itself the respondent’s suit for hearing and determination.
9. Both the appellant and the respondent filed written submissions, and when the appeal came up for hearing on a virtual platform, learned counsel Mrs. Akwana appeared for the appellant while learned counsel Mr. Amadi appeared for the respondent.
10. In their written submissions, the appellant submitted that the pleading was to be considered from the date it was originally filed and not on the date the amendment was effected; that therefore, following the amendment, the suit was incompetent as the Chief Magistrate’s court lacked jurisdiction to entertain the suit. The case of *Joseph Muthee Kamau & Another vs David Mwangi Gichuru & another* [2013]



eKLR was cited to support the proposition that a suit filed in a court devoid of jurisdiction is a nullity, and is without remedy. It was submitted that the respondent's failure to institute its proceedings before a competent court cannot be attributed to a mistake of counsel, and neither could the issue be reduced to just a procedural lapse or a technicality; that it was a matter that goes to the root of the court's jurisdiction to entertain the suit; that the Judge failed to appreciate that where a suit is filed without jurisdiction, the only remedy was to withdraw it and to file a complaint suit in the court to be seized with jurisdiction.

11. It was further submitted that the learned Judge was in error in upholding the respondent's argument that the doctrine of relation back applied to the amendments made to the respondent's Plaintiff, and that the learned Judge in misapprehending the oxygen principles reached the wrong conclusion that no prejudice would be visited upon the appellant if the matter is transferred to the High Court.
12. In response, learned counsel for the respondent submitted that the pecuniary jurisdiction of the Chief Magistrate does not exceed Ksh.20 million and it was for this reason that the respondent sought for Mombasa CMCC 418 of 2010 Aqualine Distributers Ltd vs Coastal Bottlers Ltd to be transferred to the High Court for hearing and determination and that the High Court has the power to transfer a matter from the lower court to the High Court under section 18 (1) of the *Civil Procedure Act*, Cap 21 .
13. It was submitted that the doctrine of relation back applied to the circumstances of the case, because at the time of filing the suit and before the amendment was undertaken, the Chief Magistrates' court had jurisdiction; that on this basis the High Court had jurisdiction to transfer the suit notwithstanding that the amendment effected increased the claim beyond the pecuniary jurisdiction of the Magistrate's court. It was further submitted that the demands for substantive justice dictated that, a suit should be transferred to afford the party the right to access justice.
14. This is a first appeal, where it is this Court's duty to reevaluate and analyze the evidence and come up with its own independent conclusions as stated by Sir Clement de Lestang VP in the case of *Selle vs Associated Motor Boat Company* [1968] E.A. 123 at p. 126;

“...An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such appeal are well settled. Briefly put, they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular this Court is not bound necessarily to follow the judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”.

See also this Court's decision in *Jivani vs Sanyo Electrical Company Ltd* [2003] KLR 425 at p. 431.

15. The issues falling for determination in this appeal are; i) whether the learned Judge rightly exercised the power granted under section 18 of the *Civil Procedure Act* to transfer the respondent's suit from the Chief magistrates' court to the High Court; and ii) whether the learned Judge the principle of relation back was applicable to the circumstances of the case
16. The power bestowed upon the High Court to transfer suits of a civil nature is provided for under section 18 of the *Civil Procedure Act* that stipulates:



- (1) 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 proceeding 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 or 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.
 - (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn”.
17. In the case of *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] KECA 250 (KLR) this Court held that a court’s power to transfer proceedings from one court to another is an exercise of discretion. As variously held, this Court can only interfere with the exercise of such discretion, if it is satisfied that it was not exercised judicially. It must be shown that the Judge acted on matters which he or she should not have acted on or failed to take into consideration matters which she or he should have taken into consideration and in doing so arrived at a wrong conclusion. (See *Mbogo vs Shah* [1968] EA 93).
18. In the instant case, the 1st respondent averred in its application before the learned Judge that the trial Magistrates’ court had no jurisdiction to determine the suit after the amendment was undertaken. The averment read:
- “Civil Suit in the Magistrate Court, CMCC NO. 418 of 2012 Msa, Acqualine Distributors Ltd-vs-Coastal Bottlers Ltd in the chief magistrate’s court which has become an inappropriate forum on account of the pecuniary jurisdiction of that had been outstripped by the further amendment of the plaint dated 19/7/2019) which pleads prays for a sum of Kshs. 54,088,307/= on account of that amendment;”
19. The learned Judge was in agreement that the Magistrates’ court had no jurisdiction to determine the suit, but after applying the principle of relation back, and the court’s inherent powers, went on to transfer the suit to the High Court.
20. As to whether a suit can be transferred from a court without jurisdiction to a court with jurisdiction, the Supreme Court in the case of *Mumba & 7 others (Sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) vs Munyao & 148 others (Suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* (Petition 3 of 2016) [2019] KESC 83 (KLR) had this to say:
- “...an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore



irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.”

21. In the case of Equity Bank Limited vs Bruce Mutie Mutuku T/A Diani Tour & Travel (supra) this Court observed as follows:

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer”.

22. This position was again emphasized in the case Phoenix of E.A. Assurance Company Limited vs S. M. Thiga t/a Newspaper Service [2019] eKLR where this Court held that:

“If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself...the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void.”

24. It is evident from the above excerpt that a suit filed in a court without jurisdiction is a nullity in law, and anything founded on a nullity in law is equivalent to a nullity. It is clear from the amended pleadings that the amount of Kshs. 54, 088,307.00, claimed was well in excess of the pecuniary jurisdiction of the trial Magistrates’ court, and therefore, once the amendment was filed, the court had no jurisdiction to determine the suit, which was then rendered incompetent and a nullity. Consequently, the Judge ought not to have transferred a suit which was a nullity, ab initio to the High Court. The transfer of an incompetent suit to a court of competent jurisdiction could not sanitise or breathe life into a suit already rendered incompetent in the trial Magistrates’ court by the amendment.

25. Since the suit was a nullity, neither the reasons advanced nor the inherent powers of the court were capable of salvaging it. In the circumstances, we find that the learned Judge was wrong in allowing Mombasa CMCC 418 of 2010 Aqualine Distributors Ltd vs Coastal Bottlers Ltd to be transferred from the Chief Magistrates’ court to the High Court for hearing and determination.

26. Having said that there is still the matter of the principle of relation back that the respondent had raised that we think it necessary to address. As concerns applicability of the principle in amended pleadings, in the case of Sneade vs Wotherton, [1904] 1 KB 295 at 297, Lord Justice Collins, M. R., stated:

“It appears to me that the writ as amended becomes for this purpose the original commencement of the action, notwithstanding the fact that the writ originally claimed a larger sum. The reason why the judges have always held that the question on what terms



such an amendment should be allowed requires very careful consideration, is that, except in so far as such terms may provide to the contrary, the leave to amend involves that the claim as amended may be treated as if it were the original claim in the action. In this case the amendment was allowed on such terms as the learned judge thought would meet all the equities of the case. Upon that amendment being allowed, the writ as amended becomes the origin of the action, and the claim thereon indorsed is substituted for the claim originally indorsed.”(emphasis ours)

27. The amendment of a defence had the same consequences in the case of Warner vs Sampson [1959] 1 QB 297 at 321, the Judge observed:

“Moreover, the defence was amended before the reply claiming forfeiture, on which the plaintiff now relies, came into existence. I do not think that this amendment can be ignored. Once pleadings are amended, what stood before amendment is no longer material before the court and no longer defines the issues to be tried. Here the defendant has obtained leave to amend, and there has been no appeal against that order; and, whatever may have taken place at the hearing of the application to amend, the court must, I conceive, regard the pleadings as they stand, the purpose of amendment being to determine the real question in controversy between the parties:

28. Likewise, Nigerian Court of Appeal in the case of Saka Buraimoh & Others vs Tunde Alejo (2012) Lcn/5476(CA) held:

“The law is settled that an amended court process supersedes the original process. It has been held by the Supreme Court that “an amendment relates back to the date of the suit, process or document ... See further the case of Agbahomovo v. Eduyegbe (1999) 3 NWLR (Pt.594) 170 at 186 – 187, paras. H – C where the Supreme Court elaborately discussed the effect of amended pleadings thus:

Once pleadings are duly amended by the order of court, what stood before amendment is no longer material before the court and no longer defines the issues to be tried before the court. This, however, is as far as that proposition of the law goes. It does not and has not laid down any such principle that an original pleading which has been duly amended by an order of court automatically ceases to exist for all purposes and must be deemed to have been expunged or struck out of the proceedings. The clear principle of law, established is that such original pleading which has, been duly amended is no longer material before the court in the sense that it no longer determines or defines the live issues to be tried before the court. Not that it no longer exists. It does certainly exist and is before the court. It is however totally immaterial in the determination of the issues to be tried in the proceedings. Thus, it cannot be considered as the basis of one’s case in any action. Nor may a court of law rely on any such original pleading which has been duly amended as the basis for its judgment in the suit.”

29. Contrary to the findings of the learned Judge, the principle of relation back was inapplicable to the instant case once the further amended plaint was filed to incorporate a claim that was beyond the pecuniary jurisdiction of the trial court. This is because, once filed, the original plaint became immaterial as it no longer defined the issues for consideration and determination. The further amended plaint having superseded the original plaint became the pleading the respondent sought to transfer to the High Court for want of jurisdiction of the Chief Magistrates’ court for the reason that, the Chief Magistrate’s court, “...has become an inappropriate forum on account of the pecuniary jurisdiction of (sic) that had been outstripped by the further amendment of the plaint dated 19/7/2019) which...



prays for a sum of Kshs.54,088,307/= on account of that amendment...”. In applying the doctrine of relation back, with reference to the original plaint, without appreciating that the amendment had already rendered the further amended plaint incompetent, ab initio, we find that the learned Judge misdirected himself, and by so doing, reached the wrong decision to transfer the suit to the High Court. As a result, it becomes necessary to interfere with the learned Judge’s decision, and to allow the appeal, and set aside the ruling of the High Court dated 29th May 2020.

30. In sum the appeal has merit and is allowed, and we make the following orders:

- i. the appeal is merited and succeeds.
- ii. the ruling and orders of the High Court dated 29th May 2020 allowing the respondent’s Notice of Motion dated 28th August 2012 be and is hereby set aside, and substituted herewith an order of dismissal.
- iii. Costs to the appellant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF DECEMBER, 2024.

A.K. MURGOR

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

