



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI (PCA), KARANJA & MWERA, JJ.A)

CIVIL APPEAL NO. 217 OF 2008
BETWEEN

ONWARD CARGO SYSTEM COMPANY LIMITEDAPPELLANT

AND

EVEREADY EAST AFRICA LIMITED..... RESPONDENT

(An appeal from the Ruling of the High Court of Kenya at Nairobi, Milimani Commercial Courts (Lesiit, J) dated 31st July, 2008

in

H. C. Misc. Application No. 434 of 2008)

JUDGMENT OF THE COURT

1. ***Onward Cargo Systems Company Limited***, the appellant herein, instituted a suit by way of plaint in the Chief Magistrate's Court at Milimani. In that plaint, the appellant alleged a breach of contract by ***Eveready East Africa Ltd***, the defendant therein and the respondent herein, and claimed the sum of Kshs. 1,861,917.00 as being outstanding due and payable to it. The respondent filed a defence in which it denied liability to the appellant's claim, and further claimed that it was the appellant who had not only breached the express terms of the contract, but had also committed massive fraud against it. The respondent alleged that as a result of the said fraud, it suffered loss and damage, and counterclaimed for such loss in the sum of Kshs. 7,346,029.00. In addition, the respondent alleged that the conduct of the appellant exposed it in negative light, and therefore claimed punitive damages against the appellant.
2. Thereafter, the respondent filed an application dated the 14th June, 2008 in the High Court, seeking several orders, among them that:

“The Honourable Court be pleased to order the transfer of Nairobi (Milimani) CMCC No. 2263 of 2008 from the Nairobi Chief Magistrate's Court (Milimani) to the High Court for full trial and determination.”

The application was brought under **section 18** of the Civil Procedure Act and was grounded on the fact that after the appellant filed its suit before the Chief

Magistrate's Court, the respondent had filed a defence, set off and counterclaim for the amount of Kshs. 7,346,026.00 which amount exceeded the pecuniary jurisdiction of that court, and as such, the court could not entertain the defence and the counterclaim.

3. The respondent opposed the application by way of grounds of opposition dated the 25th June, 2008. The respondent alleged that since it was admitted that the counterclaim was filed in a court without jurisdiction to try it, it was therefore a nullity; that the jurisdiction under **section 18** of the Civil Procedure Act is intended only to transfer a suit that has, in the first instance, been brought to a court which has jurisdiction to try the suit; and that no sufficient reason has been advanced as to why the suit should be transferred to the High Court.
4. Lesiit J., considered the application, and in a ruling dated the 31st July 2008, rendered herself as follows:

“Section 18 of the Civil Procedure Rules should be interpreted having regard to the power of the court to try the matter at the time of the institution of the suit. The provisions of this section should not be applied to the defence or other pleadings filed subsequent to the pleading that instituted the suit in the first instance. That should be the correct way of interpreting the section.”

She went on to find and hold that:

“... The Plaintiff correctly filed the suit in a court which had jurisdiction to try it. I also do find that the Defendant had a right to file its defence and counterclaim in the manner as he did in the suit in question. Both these parties have a right to be heard and in view of the defence, set off and counterclaim filed in the matter; the suit can only be entertained by the High Court which has jurisdiction to hear the case. The Applicant's application is not barred by section 18 of the Civil Procedure Rules (sic) and neither is the jurisdiction of this court to transfer a suit to itself fettered by the provisions of that section.”

5. The learned judge therefore found merit in the application, and ordered that the suit be transferred from the Chief Magistrate's Court to the High Court for trial and determination, and that the costs of the application abide the ultimate outcome of the suit.
6. This is the ruling that has provoked the appeal now before us. The appellant filed a memorandum of appeal dated the 13th October, 2008 in which it presents its grounds of appeal as follows: that the judge erred in holding that **section 18** of the Civil Procedure Act does not apply to a defence or other pleadings filed subsequent to the pleadings that instituted the suit in the first instance; that the respondent was out of order in filing a counterclaim for a claim far in excess of the pecuniary jurisdiction of the Chief Magistrate's Court; that the judge erred in finding that the respondent's application was not barred by section 18 of the Civil Procedure Act; that the learned judge erred by not taking into account that a counterclaim is an independent suit that must be properly instituted in a court having jurisdiction; that the counterclaim was a nullity and could not be transferred; and that the exercise of the judge's discretion was improper as there was no basis to transfer the suit other than to assist the respondent escape an application to strike out the counterclaim that was pending hearing.

For these reasons, the appellant would have this Court set aside the ruling and dismiss the notice of motion with costs.

7. Mr. Geoffrey Oriaro, learned counsel for the appellant, argued grounds in support of the appeal. He submitted that it was improper for the counterclaim to be filed in the Magistrate's Court as a counterclaim is an independent suit and consequently the respondent filed a suit in a court that did not have jurisdiction to entertain it. To buttress his submissions, counsel referred us to ***Mulla on the Code of Civil Procedure (Act V of 1908) 16th Edition*** (at page 477) where it states:

“4” Jurisdiction: An order for the transfer of a suit from one court to another cannot be made under this section unless the suit has been in the first instance brought in a court that has jurisdiction to try it.”

Mr. Oriaro is of the view that the respondent should have first sought leave to transfer the suit and only after obtaining such leave and transferring the suit to the High Court should the respondent then have filed the counterclaim. As the respondent did not take this step, there was no basis to transfer the suit and as such, the learned judge improperly exercised her discretion.

8. The respondent opposed the appeal. Mr. Andrew Mukite Musangi, its learned counsel, submitted firstly, that the citation from *Mulla (supra)* is merely persuasive and that **section 18** of the Civil Procedure Act confers very wide discretion. He further submitted that the counterclaim arises from the same facts as those in the plaint, and as such, the plaint could not be divorced from the defence and the counterclaim.
9. He contended that the respondent took the proper course of action as the application of the transfer of the suit was made immediately after the close of pleadings. Counsel further contended that we should not allow the appeal as there would be a multiplicity of suits on the same subject matter which is inconsistent with the oxygen principles provided for in **sections 1A** and **1B** of the Civil Procedure Act, and **sections 3A** and **3B** of the Appellate Jurisdiction Act. He urged that it is in the interests of justice to refuse this appeal considering that it has been seven years since the ruling of Lesiit J., and the appellant has not stated what prejudice it has suffered. In his view, the interests of justice require that the suit be transferred in the terms of the order of the High Court, and therefore prayed that the appeal be dismissed.
10. The facts that lead up to the ruling of the High Court are not contested. The respondent did file a counterclaim for an amount that exceeded the pecuniary jurisdiction of the Chief Magistrate’s Court. What we must determine is whether the learned judge was correct in ordering the transfer of the suit from that court to the High Court which has jurisdiction to determine a claim of that nature.
11. **Section 18** of the Civil Procedure Act provides for the power of the High Court to withdraw and transfer cases instituted in subordinate court in the following terms:

18. (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—

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

(i) try or dispose of the same; or

12. In the persuasive authority of *Kagenyi v Musiramo and Another [1968] 1 EA 43 (HCU)* the High Court of Uganda held that:

“An order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it”

13. The principle in the *Kagenyi case (supra)* with regard to the transfer of suits as provided for in **section 18 of the Civil Procedure Act** has been adopted by this Court, before the enactment of the Constitution of Kenya 2010, in *Kenya Seed Co.Ltd v. Joseph Bosire C. A. Nairobi Civil Appeal No. 72 of 2002 (Tunoi, O’Kubasu, Waki JJA) (unreported)* with an alternative to matters arising on monetary jurisdiction of the trial court and states as follows;

“The suit must be filed in the first instance before a court which has jurisdiction to

determine it and if it is incompetent, in that respect, it cannot even be transferred. The remedy is to withdraw it and file it before a court which has jurisdiction. The other remedy, if the limit of jurisdiction is monetary, is to limit the claim to the jurisdiction of the trial court.”

14. In our view, the suit was, in the first instance, brought before a court of competent jurisdiction. It is the counterclaim that exceeded the pecuniary jurisdiction of the magistrate’s court. We do not accept Mr. Oriaro’s submission that the respondent ought to have filed his counterclaim as a separate suit because it is clear that the issues raised in the counterclaim arise from the same facts as those alleged in the plaint. It would therefore have been improper for the respondent to file a separate suit for its claim when there was an avenue for it to do so in the suit then existing in the magistrate’s court. Once the counterclaim was filed, then the magistrate’s court ceased to have jurisdiction over the suit, and therefore, there was no error in the learned judge ordering the said transfer as that was the only logical step.

15. In the premises, we find this appeal devoid of merit. Accordingly, we order that it be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 12th day of June, 2015.

P. KIHARA KARIUKI, (PCA)

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

J. W. MWERA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR