



**Lecy Supplies Limited & another v Rak Media Group Company
Limited & another (Miscellaneous Application E140 of 2024)
[2025] KEHC 479 (KLR) (Commercial and Tax) (24 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E140 OF 2024**

**BM MUSYOKI, J
JANUARY 24, 2025**

BETWEEN

LECY SUPPLIES LIMITED 1ST APPLICANT

LYDIA MAINA 2ND APPLICANT

AND

RAK MEDIA GROUP COMPANY LIMITED 1ST RESPONDENT

ANN KATHURE RUTEERE 2ND RESPONDENT

RULING

1. As far as I understand the fact of this matter from the documents filed by the parties herein, the respondents filed commercial suit number 4049 of 2018 in the Chief Magistrate's Court at Milimani commercial courts seeking judgment against the applicants for a sum of Kshs 9,643,827.00. The applicants did not file defence in time and default judgment was entered against them but the same was later set aside after the applicants made a successful application. The applicants subsequently filed a defence and after several appearances before the subordinate court, brought this application praying for the following orders;
 1. Spent.
 2. The court file for the suit, Rak Media Group Company Limited & Ann Kathure Ruteere vs Lecy Supplies Limited & Lydia Maina, milimani commercial courts cmcc case number 4049 of 2018 be withdrawn from the Chief Magistrates Court at Nairobi Commercial Court and be placed before this Honourable Court for trial and disposition.
 3. The applicant be allowed to amend their defence and counter claim.



4. Cost of the application be in the cause.
2. The main ground for the application for transfer is that the chief magistrate's court has no jurisdiction to try the matter based on the fact that the applicants claim to be entitled to a counterclaim of Kshs 26,588,259.00. The applicants aver that they had instructed their advocates to file a suit and counterclaim for the sum showed in their defence. They claim that their then advocates had ostensibly in execution of their instructions advised them that they had filed in this court civil suit number 606 of 2022 and that the court had directed that the said suit be consolidated with the respondents' suit for hearing and determination.
3. The applicants claim to have lost touch with their advocates as their several attempts to reach them were futile. Following the failure to get satisfactory services from their former advocates, the applicants in November 2022 engaged their current advocates who upon enquiries discovered that the aforesaid civil suit number 606 of 2022 was nonexistent. Following this discovery, the applicants lodged a complaint in the Advocates Disciplinary Tribunal against its former advocates which was terminated without being heard upon demise of the sole proprietor of the firm.
4. The applicants had also filed another suit in this court vide civil suit number E561 of 2022 which they withdrew allegedly to avoid duplicity of suits. The withdrawal was done after the respondents filed a preliminary objection to the effect that the suit was statutorily time barred.
5. The respondent has opposed the application through an affidavit sworn by the 2nd respondent on 28th March 2024. The deponent avers that the application is an attempt to delay trial of the matter pending before the chief magistrate's courts. According to the respondents, the applicants had distracted progression of the case in the lower by applying for adjournment and failing to file any further document after their defence. The respondents aver further that the lower court matter has been adjourned eleven times at the behest of the applicants. It is also the respondents' argument that the intended amendment would introduce a claim which is time barred as the cause of action occurred in 2016 and allowing the introduction of the counterclaim at this stage would deny them the defence of limitation.
6. The application was argued by way of written submissions. The applicants' submissions are dated 6th September 2024 while those of the respondents are dated 26th September 2024. The parties have cited several authorities on the issue of transfer of suit and limitation of time vis a vis introduction of the counterclaim. I will begin with the prayer for transfer of the suit.
7. Section 18(1)(b)(i) of the *Civil Procedure Act* provides that;

“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, withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter, try or dispose of the same.”
8. It is not disputed that this court has jurisdiction to transfer the lower court file as prayed. It is in no doubt that the matter was filed before a court which possessed the requisite jurisdiction as the amount claimed by the respondents was within the pecuniary jurisdiction of the said court. However, the applicants introduced another claim for Kshs 26,588,259.00 at paragraph 16 of the defence where they stated that;

“The defendants aver that the plaintiffs jointly and severally owe them the sum of Kshs 26,588,259/= which is beyond the jurisdiction of this court to hear and determine.”



9. I have not seen any reply to this defence as none has been exhibited by the parties. Despite that, I form the opinion that the claim contained in the said paragraph of the defence would inevitably form an issue for trial. I have not been told whether the parties had framed or filed issues in the lower court file but in my considered view, the court which will eventually try the matter will have to interrogate whether the applicants are owed Kshs 26,588,259.00. Order 15 Rule 2(b) provides that;

“The court may frame the issues from all or any of the following materials—

(b) allegations made in the pleading or in answers to interrogatories delivered in the suit;’

10. The applicants had made an allegation that the respondents owed them which this court is not able to ascertain whether it was answered. The trial court would therefore by virtue of the above rule be entitled to frame an issue from the said allegation. Order 20 Rule 5 requires that the court must state its finding or decision with the reasons therefor upon each separate issue. While dealing with that issue the court which will eventually try the matter must possess requisite pecuniary jurisdiction which in no doubt lacking in the chief magistrate’s court.

11. It would appear from the pleadings that, the debt claimed in the defence arose from the same transactions or events as the claim in the plaint. The trial court will therefore not avoid the examination of what the defendant is owed. Whether or not the amount is a proper counter claim or set-off is another issue all altogether. The fact remains that the existence of the debt or lack of it shall be an inevitable issue for trial. In that regard, it is my considered opinion that introduction of the that averments in the defence removed the jurisdiction of the chief magistrate’s court over the matter. It is instructive that in paragraph 17 of the defence the applicants denied the jurisdiction of the chief magistrate court over the subject matter. On this, point I would follow the reasoning of my brother Justice P.J.O Otieno in *Acqualine Distributors Ltd v Coastal Bottlers Ltd (2020) KEHC 5337 (KLR)* where he held that;

“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.’

12. Based on the above, I hold that the matter is a proper one for transfer to this court and I consequently allow prayer 2 of the application.

13. The applicants have also asked this court to allow them amend the defence. The draft of the proposed amended defence and counterclaim seems to be an effort to regularize the form in which the applicants framed their original pleading. This would not have been necessary if the applicants’ civil suit number E561 of 2022 filed in the high court was maintainable. The withdrawal of the said high court suit was in my view an attempt to avoid the issue of limitation. If not so, the applicants would have applied that the lower court matter be transferred to the high court and consolidated with the suit without necessarily withdrawing the same.

14. The above notwithstanding, I have taken position that the application for amendment is premature and made in the wrong forum. So far, this court is not seized of the matter until the same is transferred to it. I believe that the record and history of proceedings and the conduct of the parties therein are



factors for consideration in an application for amendment. This court does not have the complete record and history of the lower court proceedings. Again, an amendment cannot be allowed in a miscellaneous application. It should be made in the suit in which the pleading sought to be amended is filed. Once I am through with this ruling, this file will be marked as closed and it is not proper and procedurally correct to import or export an order for amendment from or to another file. I therefore decline to grant the prayer for amendment at this stage. Let that be dealt with by the court when it is properly seized of the matter and all relevant information is placed on the table.

15. In conclusion I make the following specific orders;

1. Civil suit number 4049 of 2018 in the Chief Magistrate's Court at Milimani Commercial Courts shall be withdrawn from the said court and transferred to this court for hearing and determination.
2. The prayer 3 of the application dated is 19th February 2024 is declined.
3. The applicants shall pay the costs of this application.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JANUARY 2025.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgment delivered in presence of Miss Mwangi for Mr. Kinaro for the applicant and Mr. Andiwo for the respondent.

