



Kenya Breweries Limited & another v Mbote Beer Distributors Limited (Miscellaneous Commercial Application E002 of 2024) [2025] KEHC 4122 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4122 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS COMMERCIAL APPLICATION E002 OF 2024**

**FN MUCHEMI, J
MARCH 27, 2025**

BETWEEN

KENYA BREWERIES LIMITED 1ST APPLICANT

UDV (KENYA) LIMITED 2ND APPLICANT

AND

MBOTE BEER DISTRIBUTORS LIMITED RESPONDENT

RULING

1. The application for determination dated 25th January 2024 seeks for orders of transfer of Thika Small Claims Court Case No. E1007 of 2023 to Chief Magistrates Court at Thika for hearing and determination.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 3rd May 2024.

Applicants' Case.

3. The applicants state that the respondent filed a suit against them in the Small Claims Court being Thika SCCC COMM No. E1007 of 2023 seeking judgment in the sum of Kshs. 1 million. In response to the claim, the applicants aver that they filed a Response to Statement of Claim dated 17th October 2023 denying liability and asserted that it is the respondent who owes them a sum of Kshs. 3,645,902.22 on account of unreturned products empties, withholding VAT payments and unutilized resources for promotional activities.
4. The applicants state that they intend to counterclaim against the respondent for the sum owed to them in the sum of Kshs. 3,645,902.22/- plus costs and interest. Owing to the limited pecuniary jurisdiction of the Small Claims Court, the applicants cannot file the proposed counterclaim in the suit. The applicants aver that the Thika Magistrates' Court has the requisite jurisdiction to hear and determine both the respondent's suit and their intended counterclaim in the suit.



5. The applicants argue that it is prudent that the suit be transferred to Thika Magistrates' Court in the interest of expedient and optimal utilization of judicial time and resources and to avoid the likelihood of multiple suits over the same subject matter involving the same parties.
6. The applicants state that no prejudice will be occasioned to the respondent in the event the application is allowed as the respondent will still have the opportunity to present and argue its claim before a court of competent jurisdiction.

The Respondent's Case.

7. The respondent states that vide a letter dated 6th April 2023, the applicants wrote a letter to them terminating the contract and upon termination they owed them a sum of Kshs. 638,638.96/-. Further, the respondent states that on 3rd June 2023, they wrote a letter to the applicants stating that they owed them a sum of Kshs. 1,031,183.40/- which letter was never responded to by the applicants.
8. The respondent avers that given their contract with the applicants had ended they have continued the business relationship on a cash basis and thus it is not possible for them to have accrued any debt.
9. The respondent states that the figures in the applicants' response are a stark contrast from what they have submitted to them vide their letter dated 6th April 2023 which figures they can counterclaim at the small claims court.
10. The respondent states that the instant application is a way to delay them from accessing justice as the amounts claimed are long standing debts.
11. The respondent states that if the contract between the parties has since ended they are claiming monies owed to them under the contract however the respondent's claim is for monies outside the contract and thus they ought to file a separate suit to claim their monies. The respondent avers that the debt the applicants allege does not arise from the same transaction and thus they ought not to counterclaim in the same suit.
12. The applicants filed a Further Affidavit dated 11th November 2024 and states that their relationship with the respondent was governed by various distribution agreements with the most recent one being the distribution Agreements dated 30th April 2019. The distribution agreements were originally set to conclude on 30th April 2021 but the parties continued their engagement beyond the specified end date adhering to the same terms outlined in the distribution agreements.
13. The applicants state that on 8th November 2022, the respondent contacted them seeking a suitable way to conclude their contractual relationship and after two strategic meetings, the applicants accepted the respondent's decision to terminate their business relationship. By a letter dated 6th April 2023, the applicants officially withdrew their offer to renew the distribution agreements.
14. The applicants state that while it is true that they conducted the initial reconciliation of the respondent's accounts and established that as of 6th April 2023, the respondent's accounts held a positive balance of Kshs. 638,638.96/-, they clarified that the initial reconciliation only covered completed transaction as of 6 April 2023. The applicants further state that they recognized that there were pending and incomplete transactions underway regarding the returnable bottles (product empties), promotional activities resources and related issues which would lead to adjustments in the respondent's accounts. The applicants state that they informed the respondent that its account would be conclusively reviewed once the pending issues were concluded and the respondent returned the product empties.



15. The applicants aver that the respondent's director responded to their email by an email of 6th April 2023 and alleged that the product empties belonged to the respondent. The applicants state that pursuant to Clause 2.8 as read with Clause 1.1 of the distribution agreements, it explicitly stated that bottles, crates, keg, barrels, pallets and keg pumps were returnable assets exclusively owned by the applicants.
16. The applicants state that they conducted a comprehensive review of the respondent's account on 31st May 2023 and they established that the outstanding balance on the respondent's account amounted to Kshs. 3,645,902.22/- due to unreturned product empties, unpaid VAT withholdings and unutilized funds earmarked for promotional activities.
17. The applicants aver that they intend to counterclaim for the said sum of Kshs. 3,645,902.22/- along with costs and interest but the small claims court in Thika lacks the necessary jurisdiction to adjudicate on their counterclaim. The applicants therefore pray that the court transfer the matter to Thika Magistrates Court ensuring that both parties can fully present and ventilate their claims.
18. Parties put in written submissions.

The Applicants' Submissions

19. The applicant relies on Section 18 of the [Civil Procedure Act](#) and the case of *Wambua v Kimondiu & 3 Others (Miscellaneous Civil Application 087 of 2022)* 2022 KEHC 10426 (KLR) (3 August 2022) (Ruling) and submits that this Honourable court has the requisite jurisdiction to order for the transfer of the suit from the Small Claims court to the Chief Magistrates Court to enable them file their counterclaim which exceeds the pecuniary jurisdiction of the Small Claims Court in Thika capped at Kshs. 1 million. To support their contentions, the applicants refer to the cases of *Co-operative Bank of Kenya Limited v Said (Miscellaneous Application E008 of 2023)* [2023] KEHC 20907 (KLR) (28 July 2023) (Ruling); *Daniels Outlets Limited v Yato Tools Limited (Miscellaneous Civil Application E1100 of 2020)* [2022] KEHC 11292 (KLR) (Commercial and Tax) (5 May 2022) (Ruling); *Oceanic Towers Limited v Hussein Builders Limited* [2021] eKLR; *Daikyo Japan Motors Ltd & 2 Others v Fairuz Feisal Yasin & Fairuz Feisal Yasin & Another* [2020] eKLR and *Kirui (Suing as the Chairman of Kessir Youth Bunge Self Help Group) v Kecha Sammy Matonyi t/a Kibochi Ventures (Miscellaneous Civil Application E007 of 2023)* [2023] KEHC 20720 (KLR) (21 July 2023) (Ruling) and submit that they have not yet filed their counterclaim before the Small Claims Court. The applicants further submit that they are not seeking to transfer an existing counterclaim but taking proactive steps to ensure that the entire matter including the counterclaim is adjudicated within a single competent forum, the magistrates' court which has jurisdiction to determine both the respondent's claim and their counterclaim.
20. The applicants argue that the respondent's argument that they should file a separate suit to pursue their counterclaim is unmerited and unsubstantiated. The applicants further argue that the sum of Kshs. 3,645,902.22/- represents the amounts arising from unreturned products empties, unpaid VAT withholdings and unutilized funds earmarked for promotional activities. The said sums are directly linked to the contractual relationship between the parties and therefore need to be addressed together to ensure a holistic resolution to the dispute.
21. The applicants submit that the respondent has failed to demonstrate any prejudice they would suffer if the suit is transferred to the magistrate's court where both claims would be heard together. They have not shown that their ability to present their case would be impaired or that they would suffer any disadvantage as a result of the transfer and consolidation of the matters. The applicants rely on the cases of *Co-operative Bank of Kenya Limited v Said* (supra); *Oceanic Towers Limited v Hussein Builders Limited* (supra) and *Daikyo Japan Motors Ltd & 2 Others v Fairuz Feisal Yasin & Fairuz Feisal Yasin*



& Another (supra) and argue that splitting the claims into separate suits would result in duplicative proceedings wasting both time and resources.

The Respondent's Submissions

22. The respondent relies on Section 18 of the *Civil Procedure Act* and the case of Hangzhou Agrochemicals Ltd v Panda Flowers Ltd [2012] eKLR and submits that the applicant has not laid any grounds to warrant transfer of the claim given the circumstances of the case. Pursuant to Section 12 of the *Small Claims Court Act*, the respondent argues that the Small Claims court is clothed with the jurisdiction and has the capacity to handle her claim as the adjudicators are advocates who are professionally qualified to handle claims of this nature.

The Law

23. Section 18 of the *Civil Procedure Act* provides:-

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.

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

24. Section 18 of the Act empowers the High Court to withdraw and transfer a case instituted in a subordinate court on application of any of the parties or on its own motion. For the court to grant an order of transfer the applicant must satisfy the court as to the reasons for such orders.
25. This principle was enunciated in the Ugandan case of David Kabungu v Zikarenga HCCC No. 36 of 1995 which held:-

Section 18(1)(b) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without the application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction....it is a well-established principle of law that onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper



to order transfer, the application must be refused.....Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court which transfer is sought has no jurisdiction to try the case, transfer would be refused.....

26. In the case of Hanzhou Agrochemicals Industries Ltd v Panda Flowers Ltd [2012] eKLR the court held:-

In my view, which view I gather from authorities and from the law. The court should consider such factors as the motive and character of the proceedings, the nature of the relief of remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.

27. In the instant case, the applicants argue that they intend on filing a counterclaim to the tune of Kshs. 3,645,902.22/- which exceeds the pecuniary jurisdiction of the Small Claims Court.

28. The jurisdiction of the Small Claims Court is provided for in Section 12(3) of the [Small Claims Court Act](#) which provides:-

The pecuniary jurisdiction of the court shall be limited to one million shillings.

29. The claim filed in the Small Claims Court being SCC COMM No. E1007 of 2023 by the respondent seeks for judgment in the sum of Kshs 1million being money owed by the applicants to the respondent. The applicants have annexed their Response to Statement of Claim where they state that it is the respondent herein who owes them a sum of Kshs. 3,645,902.22/- on account of unreturned product empties, withholding VAT payments and unutilized resources for promotional activities. The applicants filed their Response to the Statement of Claim dated 17th October 2023 despite the fact that they aver that they did not. Pursuant to Section 25 of the [Small Claims Court Act](#), a response to the claim includes a counterclaim. Therefore as it stands the Small Claims Court does not have jurisdiction to determine the counterclaim. Therefore the question arises as to whether this court can transfer a case pending before a court without jurisdiction to one with jurisdiction. Courts have held that where a suit is incompetent on account of jurisdiction, the court has no jurisdiction to transfer it to the court with jurisdiction. The argument is that the suit would be incompetent and the court ought not to transfer an incompetent suit to another court to avoid the succeeding court entertaining a suit that was originally incompetent. The Court of Appeal in *Equity Bank Limited v Bruce Mutie Mutuku t/ a Diani Tour Travel* [2016] eKLR held:-

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.

30. Similarly in *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another* [2012] eKLR, the Court of Appeal held:-

It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under Section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit is filed in court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to



transfer nothing and mould it into something through a procedure known as transfer. In other words, courts can only transfer a cause whose existence is recognized by law.

31. In the circumstances, this court cannot has not been convinced that there are sufficient grounds to transfer the claim. It is said that the Small Claims Court SCC COMM No. E1007 of 2023 lacked jurisdiction to entertain the counterclaim having exceeded the pecuniary jurisdiction of the Small Claims Court. The respondent argues that the known debt between the parties amounts to KSh.1,031,183.40 which was not denied at the time the parties were exchanging correspondence. The contract between the parties as regards the debt in question had ended and the parties moved on and resumed their business relationship. In my view, the counter claim seems to be an after thought on part of the applicant. It has not been denied that the alleged amount owing in the intended counter-claim is the subject of a new contract and can be claimed in a fresh suit.
32. I am of the view that the applicant has not passed the test of Section 18 of the Civil Procedure Act and is, therefore, not entitled to the orders sought.
33. I find no merit in this application and I hereby dismiss it with costs.
34. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

