



Rub Pharm Limited v Pioneer Holdings (Africa) Limited & another (Miscellaneous Civil Application 538 of 2019) [2024] KEHC 2134 (KLR) (Civ) (29 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
MISCELLANEOUS CIVIL APPLICATION 538 OF 2019
JN NJAGI, J
FEBRUARY 29, 2024**

BETWEEN

RUB PHARM LIMITED PLAINTIFF

AND

PIONEER HOLDINGS (AFRICA) LIMITED 1ST DEFENDANT

RUP BEAUTY WORLD 2ND DEFENDANT

RULING

1. The 1st Defendant/Applicant has filed an application dated 1st August 2019 seeking for orders that:
 - (1) Civil suit No.CMCC 8142 of 2018 be transferred from the Milimani Chief Magistrate’s Court Nairobi, to the High Court, Milimani Environment and Land Court for hearing and final determination.
 - (2) Costs of the application be in the cause.
2. The application is supported by grounds on the face of the application and by the affidavit of Philip Kisaka, learned counsel for the Applicant. The gist of the application is that the Plaintiff/Respondent sued the Applicant in Milimani CMCC No.8142 of 2018 subsequent to which the Applicant filed a defence and a counterclaim for liquidated amount of Ksh.89,577,521/= plus interest thereon as well as general damages for unlawful eviction. The Applicant says that the counterclaim surpasses the pecuniary jurisdiction of the Chief Magistrate’s Court and it is therefore in the interest of justice that it be transferred to a higher court for hearing and determination. The Applicant annexed to the application copies of the plaint, verifying affidavit and the defence and counterclaim.



3. The application was opposed by the Respondent vide grounds of opposition dated 26th August 2019 and by the replying affidavit of its Administration Manager, Shiraz Jeraj sworn on the even date. The grounds of opposition are that:
 - a. There is no longer any suit before the subordinate court which can be transferred to the High Court, the same having been withdrawn on 6th June 2019 before the filing of the purported counterclaim pursuant to Order 25 of the Civil Procedure Rules.
 - b. That as a counterclaim rides on the original suit, a counterclaim filed on a withdrawn suit is a nullity and an abuse of the process of the court.
 - c. That even if a counterclaim stands in the absence of the plaint, the claim cannot be filed in a court lacking pecuniary jurisdiction in which event the suit would be a nullity ab initio and the High Court would lack jurisdiction to transfer such a nullity.
4. The Respondent further countered the application vide an application of his own dated the 26th August 2019 seeking to restrain the advocate appearing for the Applicant, Mr. P. Kisaka from representing the Applicant in the case or any other case on the ground that he initially represented the Respondent when the dispute arose between him and the Applicant.
5. The applications were canvassed by way of written submissions.

Applicant's Submissions

6. The Applicant through his advocate, Mr.P. Kisaka, submitted that the High Court has power under Section 18 of the Civil Procedure Rules to transfer suits from itself to the subordinate courts and vice versa. The Applicant submitted that in this case the initial claim was within the jurisdiction of the subordinate court. However, that the claim surpassed the jurisdiction of the subordinate court upon filing of the counterclaim. That in such a scenario, the most prudent thing to do is for the High Court to transfer the suit from the subordinate court to the court with competent jurisdiction to try it. In this respect the Applicant relied on the case of *Daikyo Japan Motors Ltd & 2 others v Feiruz Feisal Yasin & Feiruz Feisal Yasin & another* (2020) eKLR where the court was faced with a similar application as in this case and stated that:
 27. In my considered view, the rationale of Order 7 rule 8 is to avoid multiplicity of proceedings and claims based on the same or different causes of action as between the parties to the suit. The section did not contemplate a Defendant filing an independent suit to a claim based on the same cause of action but rather envisaged the Defendant to proceed by way of counter-claim. I am also of the considered view that, the circumstances leading to the cross-action by way of Counter-claim and set off are so closely intertwined that the only thing which any reasonable Court would do is to rule that the original suit and the counterclaim should be heard as one suit. Separating the Counter-claim from the main suit will lead to a multiplicity of suits and extra costs hence defeat the objective of Section 1A (1) of the *Civil Procedure Act*....
 28. Similarly, Order 7 rule 3 of the Civil Procedure Rules as insinuating that a Counter-claim is to be treated as a cross suit with all the indicia of pleadings as a Plaint. Instead of relegating the Defendant to an independent suit, to avert multiplicity of the proceeding and needless protection, the legislature intended to try both the suit and the counter- claim in the same suit as suit and cross suit and have them disposed of in the same trial. In other words, a Defendant can claim any right by way of a counter-claim in the same suit as a suit and cross suit and have them disposed of in the same trial.



29. Applying the principles established above to the circumstances of the instant suit. It is clear that the parties and cause of action are the same and the Defendants ought to have filed a Counter-claim other than filing a fresh suit. The question of concern is however, whether the Applicants herein could Counter-claim Kshs.71,700,245/= in the case before the Lower Court. Clearly therefore, and considering the fact the pecuniary jurisdiction of the Chief Magistrates' Court is limited to the sum of Kshs.20,000,000/=, it goes without saying that the Applicants' Counterclaim is not capable of being heard before the Lower Court.
30. Having stated under Paragraph 24 above that CMCC. No.12 of 2020 was not a nullity ab initio, the inescapable verdict that one can make is that the matter be transferred to the High Court then the Applicant file their defence and cross suit so as to have them disposed of in the same trial. My support to this view is based on the overriding objectives of the *Civil Procedure Act* contained in Sections 1A and 1B of the Act as well as the principles of exercising judicial authority as enshrined in Article 159 (2) of *the Constitution* of Kenya, which now enjoin this court to perform its duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities.
7. The Applicant urged this court to transfer the suit as prayed.
8. As regards the Notice of Withdrawal of the suit by the firm of Orenge & Co. Advocates, the Applicant submitted that the court record indicates that the withdrawal was rejected by the trial magistrate on the ground that the said firm of advocates had failed to seek leave of the court to come on record yet judgment had already been entered in the case. That the Respondent later alleged that the suit was withdrawn again vide a notice of withdrawal dated 29th May 2019. That the withdrawal was endorsed by Hon. Gesora vide an order issued on 6th June 2019.
9. Counsel for the Applicant stated that the notices to withdraw the suit were not served on them. He argued that the Notice of 29th May 2019 does not bear any court stamp nor is it accompanied with a receipt evidencing payment of any filing fees. That it was filed by the same firm of advocates whose similar notice the court had rejected as they were not properly on record. That the same having been filed by a stranger, it was of no legal consequence. Further that the Notice of withdrawal does not require the endorsement of a judicial officer to take effect and therefore the endorsement by Hon. Gesora withdrawing the suit is of no legal effect. That all what was required was service of the notices to the parties which in this case was not done. In support of the above propositions the Applicant relied on the case of PH Kenya Limited v Joseph Oppong (2001) eKLR where Bosire JA. (as he then was) expressed himself thus:
- “The notice of Withdrawal was homemade and I infer that it was indeed filed by Plaintiff/ Personally. I say so advisedly. By this conduct he had no interest in the sui, with the results that his advocates had to formally apply for leave to cease acting for him. The Plaintiff in that suit did not need the leave of court to withdraw his suit nor was a court order necessary to give effect to the withdrawal. All that was necessary was for the Plaintiff to file a notice of withdrawal before judgment. After judgment, however, the leave of the court was necessary.
10. On the Notice of Withdrawal of the suit, the Applicant cited the provisions of Order 25 Rule 1 and 2 that provides for withdrawal of suits and relied on the case of Beijing Industrial Designing & Research



Institute v Lagoon Development Limited (2015) eKLR where the Court of Appeal considered the import of that rule and stated that:

The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon the all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The second scenario arises where the suit has been set down for hearing. In such a case, the suit may be discontinued or the claim or any part thereof withdrawn by all the parties signing and filing a written consent. In this scenario, the right of the Plaintiff is circumscribed by the requirement that he must obtain the written consent of all the other parties. The last scenario arises where the suit has been set down for hearing but all the parties have not reached any consent on discontinuance of the suit or withdrawal of the claim or any part thereof. In such eventuality, the Plaintiff must obtain leave of the court to discontinue the suit or to withdraw the claim or any part thereof, which is granted upon such terms as are just. In this scenario too, the Plaintiff's right to discontinue his suit is circumscribed by the requirement that he must obtain the leave of the court. That such leave is granted on terms suggests that it is not a mere formality.

11. The Applicant urged the court to allow the application sought.

Respondent's Submissions

12. The Respondent through his advocate, Mr. Masore Nyangau, submitted that counsel for the Applicant Mr. Philip Kisaka acted for the Respondent against the 1st Applicant when the dispute started before the Business Premises Rent Tribunal (BPRIT). It was submitted that Mr. Kisaka was served with the application dated 26th August 2019 on the 28th August seeking to bar him from acting in this matter due to his fiduciary relationship with the Respondent but he never responded to the application. That the application is unopposed and should be granted.
13. It was submitted that Mr. Kisaka is conflicted in this matter as he used the knowledge he obtained from the Respondent when he represented him to draw the pleadings in this case and in CMCC No.8142 of 2018. That the court should not allow such unprofessional conduct as it will bring the legal profession into disrepute. The Respondent in this regard relied on the case of Keing Woolen Mills Ltd v M/S Kaplan & Straton Advocates, Civil Appeal No.55 of 1993 where the Respondent firm of advocates represented the appellant in a loan transaction from Standard Bank which was guaranteed by East African Acceptances Ltd. Later there was a dispute between the Appellant and East African Acceptances Ltd which led to institution of a suit in which Kaplan & Straton purported to represent East African Acceptances Ltd. The Appellant sued the said firm of advocates to bar them from acting in the suit because of the fiduciary relationship that they had established in the loan transaction. The Court held that:

The above provision presents three clear scenarios regarding discontinuance of suits or withdrawal of claims. The first scenario arises where the suit has not been set down for hearing. In such an instance, the Plaintiff is at liberty, at any time, to discontinue the suit or to withdraw the claim or any part thereof. All that is required of the Plaintiff is to give notice in writing to that effect and serve it upon the all the parties. In that scenario, the Plaintiff has an absolute right to withdraw his suit, which we agree cannot be curtailed. The



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14. The Respondent urged this court to strike out the application as it is prejudicial to the Respondent.
15. As to whether the High Court has power to transfer a suit from the subordinate court to the Environment and Land Court, it was submitted that the dispute between the parties started before the BPRT as case No. 499 of 2008 then moved to Milimani Chief Magistrate's Court in CMCC No.8142 of 2018. That the case involves a land dispute and is not a civil dispute. That appeals from BPRT decisions and appeals from subordinate courts on decisions over land cases go to the Environment and Land Court as provided under Article 162 (2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. Therefore, that this application ought to have been filed elsewhere and not in this court. Consequently, that the same is incompetent and an abuse of the court process.
16. On the issue of withdrawal of the suit, it was submitted that upon rejection of Daniel Orange & Co Advocates as the Respondent's advocates, the subordinate court set aside the ex parte judgment and granted leave to the Defendant to file a defence. That it is at that stage that Daniel Orange & Co. Advocates again came on record for the Respondent and withdrew the suit on 29th May 2019 through a Notice of Withdrawal of Suit of that date. That the suit was formally withdrawn before the Chief Magistrate on 6th June 2019 as per the order of even date. It was submitted that the Plaintiff did not require leave this time as judgment had been set aside and the suit was pending filing of defence.
17. The Respondent submitted that Section 18 (a) and (b) of the *Civil Procedure Act* which gives the court power to transfer a suit from one court to another requires such a suit or proceeding to be pending before the court from which it is desired to be transferred, before the case is withdrawn then transferred. That where the suit has been withdrawn, the court does not have power to transfer it as the court cannot transfer what is not there. That in this case the subordinate court case was withdrawn before the defence and counterclaim were filed, hence there is no suit to transfer to the Environment and Land Court.
18. That notwithstanding, it was submitted that the counterclaim would be incompetent as it was filed before a court that did not have pecuniary jurisdiction to try it.

Analysis and Determination

19. I have considered the grounds in support of the Applicant's application dated 1st August 2019 and the Respondent's application dated 26th August 2019, the Respondent's grounds in opposition to the application dated 1st August 2019, the pleadings and the submissions by the respective counsels for the parties. The issues for determination are:
 1. Whether the Respondent's suit at the subordinate court was withdrawn.



2. Whether this court should restrain Mr. P. Kisaka, advocate, from acting for the Applicant in the matter.

Whether the Respondent's suit at the subordinate court was withdrawn

20. The Respondent contends that the suit at the subordinate court was withdrawn through Notice of Withdrawal of Suit dated 29th May 2019 and therefore that when the Applicant filed its defence and counterclaim on 11th June 2019, there was no suit in existence at the subordinate court. That the original suit having been withdrawn, the defence was superfluous and the counterclaim had no foundation on which to stand on.
21. The Applicant on the other hand says that the purported withdrawal was a nullity as counsel who filed the notices of withdrawal was not properly on record, the trial court having ruled that he did not seek leave of the court when he filed the first notice.
22. I have perused the subordinate court's record as I was requested to do by the counsels for the parties. The record indicates that the firm of Daniel Orange & Co. Advocates filed the first Notice of Withdrawal of suit on the 29/5/2019. By that time there was already ex parte judgment entered in the matter and another advocate, Mr Masore Nyangau, had been appearing for the Plaintiff. On the same day Mr. Orange appeared before court and sought to withdraw the suit. The learned magistrate in conduct of the matter declined to grant the request as there was judgment in place and Mr. Orange had not sought leave of the court as required by Order 9 Rule 9 since there was another advocate on record for the Plaintiff. The court proceeded to set aside the ex parte judgment and granted the Defendant time to file a defence. On the following day, 29th May 2019, Mr. Orange filed another Notice of Withdrawal of the suit. The withdrawal was allowed by Hon. Gesora by an order entered in the court file on 6th May 2019.
23. Mr. Kisaka argues that the withdrawal was irregular as it was done by the same advocate whose application to withdraw the suit was rejected on 28th May 2019. That a notice of withdrawal has to be served on all the parties in the suit which was not done in this case. That in face of the pronouncement in Beijing Industrial Designing & Research Institute case (supra), the purported endorsement of withdrawal and the subsequent order by Hon. Gesora that the suit was withdrawn is of no legal consequence as the withdrawal did not need any endorsement by the court to take effect. That all that was needed was service on all the parties.
24. Mr. Masore on the other hand argues that the withdrawal was proper as there was no judgment in place when the firm of Daniel Orange filed the Notice of Withdrawal on 29th My 2019.
25. I have considered the arguments by the two sides in regard to the withdrawal of the suit. The gist of Mr. Kisaka's submissions is that this court should ignore the Notice of Withdrawal of the suit filed by the firm of Orange & Co. Advocates and the fact that the lower court made an order withdrawing the suit. He urged the court to make a finding that the withdrawal was a nullity on the ground that the laid down procedure was not followed before the withdrawal was done. He submitted that the purported withdrawal of the suit by the magistrate was of no legal consequence.
26. In my considered view, there is no basis for this court declaring the withdrawal a nullity. The court is in the first place not dealing with an appeal or review for it to make such orders. The Applicant has not appealed against the withdrawal neither has he filed an application for review. There is no application to set aside the orders withdrawing the suit. The court cannot make the declaratory orders sought when there is no application seeking for the withdrawal to be set aside.



27. Mr. Kisaka alleges in his submissions that he was not served with the notice of withdrawal. I have perused the court file and noted that he has not sworn an affidavit to that effect. There was therefore no evidence to back up his submissions that he was not served with the notice. The law is that submissions do not constitute evidence – see Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR. The court cannot determine an issue based on submissions when the issue was not pleaded and was not brought up in evidence.
28. It is trite that an order of the court stands until it is set aside. In *Trusted Society of Human Rights Alliance v Cabinet Secretary for Devolution and Planning & 3 others* [2017] eKLR the court stated that:
- It cannot be disputed that an order of the court has to be respected by the parties who are bound by it. Therefore, every effort must be made to implement the order of the court and not to disobey the same. It is not up to that party to choose whether to comply or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned, subject to the party’s right to challenge the order in issue, in such a lawful way as the law permits.
29. In *Kenya Union of Savings and Credit Cooperatives (KUSCCO) Limited v Nairobi City Council (now Nairobi City County & 2 others* [2015] eKLR, it was held that:
- A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with.
30. The subordinate court in this matter made an order withdrawing the suit. Whether the Respondent rightly or wrongly withdrew the suit and whether the subordinate court rightly or wrongly made orders withdrawing the same can only be challenged in an appeal or review. The Applicant has not done any of these. He instead seems to be appealing against the withdrawal of the suit in the course of arguing his application for transfer of the matter to another court. There being no appeal or application for review before this court, there is no basis for this court to declare that the withdrawal of the suit was a nullity. The withdrawal thereby stands. In the premises, I am in agreement with the submission by counsel for the Respondent that there is no suit pending before the subordinate court that the Applicant can seek to be transferred to another court.
31. In view of my finding that there is no suit pending before the lower court, the application by the Respondent to restrain Mr. Kisaka from representing the Applicant in the matter falls by the wayside. In my view the application should have been heard before embarking on the hearing of the Applicant’s application. There is no need of me considering the application at this stage.
32. The upshot is that the grounds of opposition by the Respondent dated 26th August 2019 that there is no longer any suit pending at the subordinate court is upheld. The court finds no merit in the application dated 1st August 2019 and the same is dismissed with costs to the Plaintiff /Respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29TH FEBRUARY 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Nyang`au Masore for Plaintiff/Respondent

Mr. P. Kisaka for 1st Defendant/Applicant



Court Assistant – Amina
30 days Right of Appeal.

