



Wenfa Enterprises v Nile Company (Kenya) Limited (Commercial Miscellaneous Application E649 of 2023) [2024] KEHC 15488 (KLR) (Commercial and Tax) (29 November 2024) (Ruling)

Neutral citation: [2024] KEHC 15488 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL MISCELLANEOUS APPLICATION E649 OF 2023**

**MN MWANGI, J
NOVEMBER 29, 2024**

BETWEEN

WENFA ENTERPRISES APPLICANT

AND

THE NILE COMPANY (KENYA) LIMITED RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 20th July 2023 filed pursuant to the provisions of Section 18(1)(b) & 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*, 2010. The applicant seeks an order that CMCC No. 2002 of 2022 be transferred from the Chief Magistrate’s Milimani Commercial Court, Nairobi to the Chief Magistrate’s Court at Mavoko for hearing and final determination.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Gideon J. Ogude, an Advocate of the High Court of Kenya and learned Counsel for the applicant. Mr. Ogude averred that the plaintiff filed a suit against the defendant vide a plaint dated 31st March 2022 seeking damages and a refund of Kshs.1,000,000/= for a defective pulverizing machine. He further averred that the said suit filed as CMCC No. 2002 of 2022, was erroneously brought before the Chief Magistrate’s Court due to territorial jurisdiction confusion, as both companies are located at Mlolongo area, which falls at the boundary of Nairobi and Machakos Counties, and creates an impression of being part of Nairobi Metropolis.
3. He contended that dismissing the aforesaid suit on jurisdictional grounds would cause undue hardship to the applicant, in view of the high re-filing fees of Kshs. 71,000/=, especially since the case is still at the compliance stage. Mr. Ogude asserted that having the suit heard in the appropriate Court would serve justice, ensure substantive issues are addressed, and cause no prejudice to the defendant.



4. In opposition to the application, the respondent filed a replying affidavit sworn on 24th February 2024 by Ms Brenda M. Luvai, learned Counsel for the respondent. She averred that the instant application is an afterthought and it is only meant to delay Milimani MCCC No. E2002 of 2022- *Wenfa Enterprises v The Nile Company (Kenya) Limited*. She contended that the respondent has since filed a Notice of Preliminary Objection at the lower Court on grounds that the Court lacks the requisite territorial jurisdiction to hear and determine the applicant's suit by dint of the provisions of Section 15 of the *Civil Procedure Act*, thus it ought to be struck out. She asserted that the cause of action arose in Athi River, within the jurisdiction of Mavoko Law Courts, where the suit should have been filed. She contended that the applicant's suit is *ab initio*, null and void, and cannot be transferred to Mavoko Law Courts.
5. The application herein was canvassed by way of written submissions. The applicant's submissions were filed by the law firm of Gideon Ogude & Company Advocates on 9th June 2024, whereas the respondent's submissions were filed on 9th April 2024 by the law firm of Ababu Namwamba & Company Advocates.
6. Mr. Ogude, learned Counsel for the applicant submitted that the instant application was filed without undue delay, and that the orders sought will not cause prejudice to the respondent. He maintained that there has been no lack of diligence, and that the application is not an afterthought. He further submitted that the High Court has jurisdiction to supervise Subordinate Courts pursuant to the provisions of Article 165(6) of the *Constitution of Kenya*, 2010, and that the respondent has not demonstrated any prejudice it will suffer from transferring the matter. Counsel contended that justice, rather than jurisdictional technicalities, is the primary concern. Further, that the instant application was made to ensure the respondent does not block the applicant's access to Court. To buttress these submissions, Counsel relied on the case of *Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited* [2012] eKLR.
7. Ms. Luvai, learned Counsel for the respondent relied on the decisions in the *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, and the Supreme Court case of *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, and submitted that this Court has no jurisdiction to grant the orders sought by the applicant. She cited Section 18 of the *Civil Procedure Act* and stated that the applicant filed its suit in a Court with no jurisdiction and is now asking this Court to transfer it to a Court with jurisdiction, contrary to the provisions of Section 15 of the *Civil Procedure Act*. She asserted that the applicant's suit is a nullity and should be struck out.

Analysis And Determination.

8. On consideration of the application herein, the grounds on its face and the affidavit filed in support thereof, the replying affidavit by the respondent together with the written submissions filed by Counsel for the parties, the issue that arises for determination is whether the case filed by the applicant herein in Milimani Chief Magistrate's Commercial Court, namely CMCC No.2002 of 2022 should be transferred to the Chief Magistrate's Court at Mavoko Law Courts.
9. The High Court pursuant to the provisions of Section 18 of the *Civil Procedure Act* has the discretion to withdraw and transfer cases instituted in Subordinate Courts. Section 18(1) of the *Civil Procedure Act* states that -
 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.

10. In the case of *David Kabunga v Zikarega & 4 others* (Kampala HCC No. 36 of 1995) which was cited with approval in the case of *GKK v ANK & another* [2021] eKLR, the Court stated as follows on transfer cases -

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 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 well established principle of law that the 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... (Emphasis added).

11. The respondent argued that the applicant filed its suit in a Court with no jurisdiction and is now asking this Court to transfer it to a Court with jurisdiction contrary to the provisions of Section 15 of the *Civil Procedure Act* which provides as follows -

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- a. the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
- b. any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
- c. the cause of action, wholly or in part, arises.



Explanation. (1)—...

Explanation. (2)—...

Explanation. (3)—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely—

- i. the place where the contract was made;
- ii. the place where the contract was to be performed or the performance thereof completed;
- iii. the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

12. The applicant's suit ought to have been filed in Mavoko Law Courts in view of the fact that the applicant's cause of action arose in Athi River, within the jurisdiction of Mavoko Law Courts, and that both the parties herein are located at Mlolongo area. The applicant averred that Milimani CMCC No. 2002 of 2022 was erroneously filed before the Chief Magistrate's Commercial Court in Milimani, Nairobi due to territorial jurisdiction confusion, as both the parties are located at Mlolongo area, which falls at the boundary of Nairobi and Machakos Counties, and creates an impression of being part of Nairobi Metropolis.
13. Section 15 of the *Civil Procedure Act* provides that suits ought to be instituted either where the defendant resides or where the cause of action arose. This in my view is so as to avoid undue hardship being occasioned on the defendant when defending the suit. I however note that the applicant's suit before the Subordinate Court is still at the compliance stage, and has not yet been set down for hearing. This Court concurs with the Court's finding in the case of *Doshi Enterprises Ltd v Oriental Steel Fabricators & Builders* NRB HCC 627 of 2001, cited with approval by Odunga J., (as he then was), in *Justus Kyalo Mutunga v Labh Singh Harnam* [2012] eKLR, where the Court held that filing of a case outside the jurisdiction of both parties contrary to the mandatory provisions of Section 15 of the *Civil Procedure Act* does not make it a nullity because Section 15(b) of the said *Act* adds that a Court may give leave for the filing away from the local limits or the defendant may acquiesce in such institution. Further, the legislature by enactment of the provisions of Section 18 of the *Civil Procedure Act* envisioned instances where errors may be made in filing of suits in the wrong Courts, and made provisions for transfer of cases in certain instances.
14. The applicant herein acknowledges that it erroneously filed its suit in Milimani Chief Magistrate's Court instead of Mavoko Law Courts due to territorial jurisdiction confusion, as both parties are located at Mlolongo area, which falls at the boundary of Nairobi and Machakos Counties, and creates an impression of being part of Nairobi Metropolis. I am of the considered view that the explanation given is not so farfetched. I take Judicial Notice of the fact that the boundaries between Nairobi, Kiambu & Machakos Counties are commonly prone to confusion. The Court of Appeal in the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] KECA 3 (KLR), emphasized on the importance of sustaining a suit, by stating the following -

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.



15. It is therefore my finding that the respondent's allegation that the applicant's suit cannot be transferred as it had been filed in a Court with no jurisdiction cannot stand. In any event, the respondent has not claimed and/or alluded to the fact that it will be inconvenienced or suffer undue hardship or that the interest of justice will not be served in the event that the applicant's suit is transferred to Mavoko Law Courts.
16. The applicant on its part averred that striking out of its suit will cause it to suffer undue hardship, in view of the high re-filing fees of Kshs. 71,000/=. Additionally, this Court is of the considered view that it will be convenient for both parties in view of their physical location to have the dispute between them determined in the Chief Magistrate's Court in Mavoko.
17. Finally, filing a case in the wrong territory is not a grave error as compared to an instance where a case that is meant to be filed in either the Employment and Labour Relations Court or the Environment and Land Court is filed in the High Court. In such an instance, the High Court would not have the jurisdiction to transfer the case to either of the other two Courts. In this instance, the applicant seeks the transfer of its case from one Magistrate's Court in one territory, to another territory, due to an error made in decision making on where the suit should have been filed in the first instance. That is an excusable mistake.
18. In the circumstances, this Court is persuaded that the application herein is merited. I hereby order as follows -
 - a. Milimani Commercial CMCC No. 2002 of 2022 is hereby withdrawn from the Milimani Chief Magistrate's Commercial Court, Nairobi and transferred for hearing and final determination in the Chief Magistrate's Court at Mavoko Law Courts.
 - b. Costs are awarded to the defendant/respondent for being dragged to Court to defend the instant application due to the mistake made by the applicant on where to file the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 29TH DAY OF NOVEMBER 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Ogude for the plaintiff/applicant

No appearance for the defendant/respondent

Ms B. Wokabi - Court Assistant.

