



**Nganga v Kirkely Investments Limited (Miscellaneous Civil Case
E025 of 2022) [2023] KEHC 18231 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18231 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MISCELLANEOUS CIVIL CASE E025 OF 2022
CM KARIUKI, J
MAY 31, 2023**

BETWEEN

JOHN NGANGA APPLICANT

AND

KIRKELY INVESTMENTS LIMITED RESPONDENT

RULING

1. By a Notice of Motion dated 29/11/2022. The applicant seeks to order to transfer Nyahururu Chief Magistrate Civil Case No. E293 of 2022 to Chief Magistrate’s Court at Milimani Nairobi.
2. The same application is anchored on the provision of section 18(1) *Civil Procedure Act* and is supported by the Affidavit of John Nganga sworn on 29/11/2022.
3. The same is opposed by grounds of opposition dated 20/1/2023 filed by the Respondent.
4. The parties were directed to canvass the same application via submissions

Plaintiff/Applicant Submissions

5. It is submitted that; this court has the jurisdiction and power to grant the order sought to transfer Nyahururu C.M.CC No. 293 of 2022 from Nyahururu Law Court to Milimani C.M. Courts. The jurisdiction of this court is derived from article 165 (2) (a) of the *Constitution* of Kenya.
6. It is argued that the respondent cannot now object to the court’s jurisdiction to order the transfer of the suit to the Chief Magistrate’s Court in Nairobi. Additionally, the property regarding which the contract between the parties was made is L.R.No. 7665/5 situated in Nyandarua County, the headquarters of which is Nyahururu, within the jurisdiction of this court. The court has the power to order the hearing of the case in the Chief Magistrate’s Court at Nyahururu.



7. Moreover, section 3A of the *Civil Procedure Act* Provides that the court has inherent power to make such orders as may be necessary for the ends of justice to be met.
8. Respondent Submission
9. It is submitted that the invoked provisions are Section 18(1)(b) of the *Civil Procedure Act* cap. 21 Laws of Kenya for the transfer of a suit pending before the subordinate court. It is contended that an order for transfer of a suit can only be made in relation to a suit, appeal for other proceedings pending before the High Court Pursuant to the provisions of section 18(1)(a) of the *Civil Procedure Act*, cap. 21 Laws of Kenya. This is not the obtaining position here in so far as the suit sought to be transferred is pending before the subordinate court, and therefore, this provision of the law has no application to the matter.
10. That section 18 of the *Civil Procedure Act*, cap. 21 Laws of Kenya is invoked in relation to a suit pending before a subordinate court like in the case at hand, then in terms of sub-section (1)(b) thereof, the High Court has to in the first instance make an order for withdrawal of such suit.
11. The application cannot trigger the exercise of the court’s jurisdiction under section 18(1)(b) of the *Civil Procedure Act*, cap 21 Laws of Kenya
12. It is contended that the Applicant’s pending suit, having been filed before a court without jurisdiction, is incompetent and a nullity in law. It cannot, therefore, be breathed into life by invoking the provisions of section 18 of Kenya’s *Civil Procedure Act* cap 21 laws. See the cases of *Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & another* [2012] eKLR, *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016]eKLR,
13. Issues, Analysis, And Determination
14. The material before me discloses issues, whether the application has merit, and the order as costs.
15. Section 18(1) 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, though it is a relevant consideration.
16. 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 or the suit has been filed in a particular court for the purposes of working injustice. The court has to consider whether the Applicant has made a case to justify it in closing the doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction.
17. It is a 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 a balance of convenience, questions of expenses, the interest of justice, and possibilities to undue hardship and if the court is left in doubt as to whether, under all the circumstances it is proper to order transfer, the duplication must be refused.
18. “Section 18 (1) (b) of the *Civil Procedure Act* gives this 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.....”



19. A party seeking the transfer of a suit must provide sufficient reasons as to why the transfer is merited. The Court is vested with the discretion to either grant or decline to grant the transfer.

17. Section 15 of the *Civil Procedure Act* 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 is 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 is 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.

20. Another aspect to consider is the territorial jurisdiction of the court. The applicable law that confers jurisdiction to Magistrates Courts is section 3 (2) of the *Magistrates Courts Act* cap 10 Laws of Kenya which stipulates that: “The Resident Magistrate’s Court shall have jurisdiction throughout Kenya.”

21. I have anxiously considered this matter, and the issue for determination is whether Nyahururu Chief Magistrate’s Court has the territorial jurisdiction to hear and determine the suit. The suit is to be transferred to the territorial jurisdiction of the Chief Magistrate’s Court at Milimani Law Courts Nairobi.

22. And the ancillary question is whether the legislative enactments of the provisions of sections 17 and 18 of the *Civil Procedure Act* envisaged a situation where the High Court would transfer a suit from one court which has no jurisdiction to another court that has jurisdiction to hear and determine the dispute in question.

23. The applicable law that confers jurisdiction to Magistrates Courts is section 3 (2) of the *Magistrates Courts Act* cap 10 Laws of Kenya which stipulates that:

“The Resident Magistrate’s Court shall have jurisdiction throughout Kenya.”

However, section 15 of the *Civil Procedure Act* Mandates that a suit shall be instituted in a court within local limits.

24. The above two provisions of the Law then seem to conflict and confuse litigants who are forever raising issues of territorial jurisdiction of Magistrate’s Courts to try disputes that arose outside the territorial areas of those courts, such as between Milimani Nairobi and Nyahururu at the time of filing suit.

25. Assuming for one moment that Nyahururu Chief Magistrate’s Court lacks territorial jurisdiction to hear and determine the dispute as filed, would this court then transfer the same to the court with the necessary jurisdiction to determine the suit from a court with no jurisdiction?

26. The answer to the above ancillary question lies in the established case of *Omwoyo v African Highlands and Produce Ltd* (2002) KLR 698 where Ringera J, referring to *Kagenyi v Musiram & another* (1968) EA 48 by Sir Uldoma CJ held, in relation to section 18 of the Uganda *Civil Procedure Act* (similar to our section 18 of cap 21 Laws of Kenya)



that:-

“An order for transfer of a suit from one court to another court cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. In that case, the appellant sought to transfer a suit from the Magistrate’s court to the High court because the claim exceeded the pecuniary jurisdiction of the lower court....”

27. The legal principle gleaned from the above decisions is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first instance in a court that does not have pecuniary jurisdiction.
28. However, the case here concerns territorial jurisdiction.
29. Getting back to the question of whether Nyahururu Magistrate’s Court has territorial jurisdiction and, if not, whether I can order for a transfer of the suit from therein to Milimani Nairobi Milimani Law Courts, it is worth noting that the *Civil Procedure Act*, in its long title it is expressed that “An act of Parliament to make provision for the procedure in Civil Courts.
30. In other words, it is not the legal instrument that confers jurisdiction upon Magistrate’s Courts since the jurisdiction of Magistrate’s courts is governed by the *Magistrate’s Courts Act* cap 10 Laws of Kenya which express in the long title “An Act of Parliament to establish Magistrates Courts to declare the jurisdiction and provide for the procedure of such courts; to provide for appeals in certain cases and for purposes connected therewith or incidental thereto.”
31. The date of commencement of the *Magistrates Courts Act* is August 1, 1967, whereas that of the *Civil Procedure Act* is January 31, 1967, whereas that of the *Civil Procedure Act* is January 31, 1924.
32. Therefore, in as much as section 15 of the *Civil Procedure Act* appears to be in conflict with section 3 (2) of the *Magistrate’s Court Act*, the rules of Statutory interpretation provide that where there is a conflict between two statutes, assuming there is any, then the Magistrate’s Courts Act is deemed to have amended the *Civil Procedure Act*.
33. Thus, how would the Resident Magistrate’s Court, which is defined Under section 2 of the Magistrate’s Court Act to include Senior Resident Magistrate, Principal Magistrate, Senior Principal Magistrate, and Chief Magistrates Court, have jurisdiction throughout Kenya, whereas section 15 of the *Civil Procedure Act* dictate that suits shall be instituted in whose local jurisdiction the cause of action arose?
34. Ringera J (as he then was), in a decision in *Mohamed Sitaban v George Mwangi Karoki*, CA No. 13/2002, expressed himself thus, concerning the above-perceived conflict:

“Section 3 (2) of the Magistrate’s Courts Act provides that a court of the Resident Magistrate (which is defined to include a Senior Principal Magistrate’s Court has jurisdiction throughout Kenya. Such a court is not the subject of the local jurisdiction contemplated by section 15 of the *Civil Procedure Act*. In my opinion, section 15 of the *Civil Procedure Act* applied only to courts lower than the Resident Magistrate’s Court. I am fortified in that view by the fact that the Magistrate’s Courts Act, cap 10 of the Laws of Kenya, was enacted in 1967, long after the *Civil Procedure Act*.

The legislature was therefore aware of the provisions of section 15 of the *Civil Procedure Act* and the hallowed rule of Statutory construction that where two provisions in different statutes conflict, the provisions in the latter statute are deemed to amend the earlier



provision must be applied. Accordingly, I find that the Bungoma court had jurisdiction to entertain the suit, and the rule that a suit filed in a court without jurisdiction is nullity and cannot be transferred is inapplicable in the circumstances of this case. There may be sound administrative reasons for filing suits in administrative Districts in which the Defendant resides as the cause of action, but those reasons cannot oust the statutory jurisdiction”.

35. I hold the position that in cases where a suit is instituted in a court that is outside geographical local limits to entertain the claim, the suit, therefore, is not a nullity and incapable of being transferred to a court of geographical local limit.
36. In the instant case, the property regarding which the subject contract between the parties was made is L.R.No. 7665/5 situated in Nyandarua County, within the local limit of Resident Magistrates courts at Nyahururu, within the jurisdiction of this court. The court has the power to order the hearing of the case in the Residents Magistrate’s Court at Nyahururu.
37. No issues have been raised, such as being administratively convenient and saving on costs for both parties to the suit, as envisaged in sections 1A & 1B of the *Civil Procedure Act*.
 - i. Thus, the court finds no merit in the application, and the same is dismissed with orders that cost in the main cause.

DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 31ST DAY OF MAY 2023

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CHARLES KARIUKI

JUDGE

