



M'mwongo v Malibi Upendo Women Group (Miscellaneous Civil Case E024 of 2023) [2023] KEHC 21956 (KLR) (30 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21956 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL CASE E024 OF 2023
EM MURIITHI, J
AUGUST 30, 2023**

BETWEEN

RAEL MUKIRI M'MWONGO APPLICANT

AND

MALIBI UPENDO WOMEN GROUP RESPONDENT

RULING

1. The High Court has power to order the transfer of suits under section 18 of the [Civil Procedure Act](#) as follows:
 18. Power of High Court to withdraw and transfer case instituted in subordinate court
 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 retransfer the same for trial or disposal to the court from which it was withdrawn.



2. Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”
2. There *Civil Procedure Act* requires that Suits be filed in consideration of the lowest courts competent to try them, where the cause of action arose, where the defendant resides or carries on business, and where, in respect of immovable property, the property is situate. See sections 11 - 15 of the *Civil Procedure Act*. Where a suit is filed in the wrong Court, the High Court may order transfer in accordance with section 18 of the Act.
 3. However, if a suit is filed in a wrong court as regards the place where the defendant resides or works and the defendant does not at the first opportunity object to the filing in that court but proceeds to defend the suit and take action therein including recording a consent compromising the suit, he must be considered to have acquiesced in the wrong filing and waived his right to object. That is the import of section 16 of the Act, which provides-
 16. Objections to jurisdiction

No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice.”
 4. It would be an abuse of process to seek the transfer of the suit after the party has taken full participation to the point of entering into a consent on the settlement of the suit in order to or, which amount to the same thing, with the result that the orders hitherto made in the suit are defeated, frustrated or delayed.
 5. In this case two principal grounds for the transfer of suits are urged, namely, “that the cause of action in Meru CMCC No. 151 of 2019 arose in Tigania West Sub County which falls under the jurisdiction of the Tigania Senior Principal Magistrate’s Court” and “that all the parties in Meru CMCC No. 151 of 2019 are residents of Tigania West Sub-County.” In her supporting affidavit, the applicant explained her delay in bringing the application for transfer earlier in that “I did not bring this application earlier because I only came to learn of eh suit in February 2023.”
 6. The suit was filed in the Chief Magistrate’s Court at Meru by plaint dated June 6, 2019 seeking special damages in the sum of 108,930 together with interest at 10% from January 2019 until full payment in respect of default on a table banking loan facility granted to the defendant by the plaintiff/respondent herein.
 7. By replying affidavit sworn by an official of the respondent Mary Karwirwa Nyoroka on April 28, 2023, the respondent imputes bad faith in the applicant as seeking to delay the conclusion of the suit pointing to the heavy workload at Tigania law courts and more significantly that there exists a consent order in the matter which the applicant had not complied with, as stated in paragraphs 2-6 of the Replying Affidavit:
 - “2. That on April 13, 2013 a consent order was recorded in Meru CMCC No. 151 of 2019 to the effect that the Applicant herein deposits in court the entire decretal sum amounting to Kshs.156,796/- as a condition for setting aside the default judgment that had been entered against her.
 3. That the said deposit was to be done within 30 days from April 13, 2023 and the Applicant was ordered to appear in court on May 16, 2023 to confirm compliance with the order for deposit.



4. That I verily believe that the instant application is intended to circumvent the consent orders recorded on 131412023 and the order that the Applicant appears in court on May 16, 2023.
 5. That the Applicant should first comply with the court orders dated April 13, 2023 before she can be heard in this application as failure to comply with the court order dated April 13, 2023 will effectively mean there is no suit to be transferred or talk about.
 6. That further the Meru Chief Magistrate's court has the requisite territorial Jurisdiction to hear and determine the suit subject of this application.”
8. Counsel for the parties subsequently filed written submissions, the applicant's counsel urging that in considering the exercise of its power under section 18(1) (b) of the [Civil Procedure Act](#) for the transfer of the suit in the context of this case –
- “[T]he balance of convenience, questions of expense, interest of justice and possibility of undue hardship.
- In her supporting affidavit, the applicant avers that if the suit were to proceed at Meru, she would incur a lot of unnecessary expenses intravelling to attend court. Further, as the parties are based in Tiogania West Sub-County, there will be no prejudice suffered by the respondent if the matter is transferred there. As to the allegation of delay, the applicant avers no such intention as it would be in her interest if the matter is determined expeditiously.”
9. The respondent submitted that applicant does not come to equity with clean hands as she had not complied with the consent order of April 13, 2023 and the application of April 17, 2023 is a mere delaying tactic and the same should not be allowed unless the applicant complies with the court order issued on April 13, 2023.”
 10. For sure the process of the court should not be used to aid a party seeking to avoid compliance with a valid court order or to delay the fair determination and conclusion of a suit. That would be contrary to the overriding objective of the civil process as set out in section 1A and 1B of the [Civil Procedure Act](#).
 11. Having considered the present matter, the court considers that it would be wrong to allow the transfer of the suit where there is already a consent on the setting aside of ex parte judgment without compliance with the terms of the consent so as to defeat the consent or otherwise delay the hearing of the suit. An order of the Court must be obeyed (see Rule in [Hadkinson V. Hadkinson](#) [1952] 2 ALL E.R. 567) and a party cannot seek the assistance of the court to avoid compliance with its valid orders! There is not an appeal from the consent order of 13/4/2023 and no stay thereof has been granted and consequently, the applicant must comply with the terms of the said order before being heard on the application for transfer of the suit.
 12. As Denning LJ in [Hadkinson v Hadkinson](#) [1952] 2 All ER 567, 575, said:

“I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the Court to ascertain the truth or to enforce the orders which it may make, then the Court may in its discretion refuse to hear him until the impediment is removed or good reasons is shown why it should not be removed.”



13. While this court agrees with the applicant that the balance of convenience in exercise of power to transfer the suit subject of this application lies with the suit being heard at Tigania where both the Respondent and the Plaintiff reside and work, and where the cause of action arose, there is already intervening development in the nature of the consent order in the setting aside of the ex parte judgment, which as an order of a court, which has not been perfected on appeal or review, must, therefore, be obeyed before further intervention by way of an application by the parties bound by that order.

Order

14. Accordingly, for the reasons set out above, the determination of application for transfer of the suit dated April 17, 2023 is held in abeyance to await the compliance with the court order of April 13, 2023.
15. The time for such compliance was extended by a further thirty (30) days in view of the proceedings before this court.
16. In default of compliance, the respondent shall be at liberty to proceed with the suit in terms of consent order of April 13, 2023.
17. Mention for compliance and further orders as appropriate on September 30, 2023.
18. The costs of the application shall be costs in the cause.

Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF AUGUST, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Kiema for Mr. Kaberia Advocates for the applicant.

Mr. Kiogora for Mr. Kariuki Advocates for the Respondents.

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