



**Maroko v Cyber Courier Co Limited (Miscellaneous Civil Application
E037 of 2022) [2023] KEHC 22819 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MISCELLANEOUS CIVIL APPLICATION E037 OF 2022
WM MUSYOKA, J
SEPTEMBER 28, 2023**

BETWEEN

NELSON NYANGARESI MAROKO APPLICANT

AND

CYBER COURIER CO LIMITED RESPONDENT

RULING

1. This a case of a transfer of a case from one subordinate court to another. The transfer application is dated 28th July 2022. The suit sought to be transferred is Busia CMCCC No. 301 of 2018, and was initiated by the respondent as plaintiff. The respondent avers, in the plaint, that it was running business at Bungoma, whereas the residence or place of business of the applicant is said to be within Kenya.
2. The case by the applicant, in support of the proposed transfer, is that the agreement or memorandum of understanding, the subject of the suit, was entered into in Nairobi, all the witnesses for the applicant are based in Nairobi, the respondent is domiciled in Nairobi, the respondent would suffer no prejudice should the case be transferred to Nairobi, and the Chief Magistrate's Court at Nairobi had the jurisdiction. He has attached the pleadings and other documents filed in Busia CMCCC No. 301 of 2018.
3. The respondent asserts that it runs business within Busia town, although the agreement was entered into and executed in Nairobi. The deponent of the affidavit in reply, Kennedy Wanyonyi Situma, avers that he was, at the time of the agreement, a resident of Bungoma, but he subsequently changed residence to Busia, where the respondent does business. It is asserted that the applicant, as a defendant in the suit, could not possibility seek transfer of the suit. It is stated that the alleged witnesses of the applicant, who are allegedly based at Nairobi, were not mentioned in the filings. It is averred that the application is in the interests of the applicant to the detriment of the respondent. It is further averred that this is digital era, and the matter can be handled digitally with some parties and their witnesses



joining from Nairobi. It is averred that a suit over immovable property could be filed within the local limits of the court where the property is situated.

4. Directions were given on 20th July 2023, for disposal of the application, by way of written submissions. Only the applicant complied. He argues that a suit ought to be filed in the court with jurisdiction, and cites *John Mwangi Karanja vs. Alfred Ndiangui* [2011] eKLR (Waweru, J), where sections 1A and 1B of the [Civil Procedure Act](#), were applied, for the purpose of giving effect to the overriding objective of a just, expeditious, proportionate and affordable resolution of civil disputes, by having a suit, filed at the court without jurisdiction, being transferred to the court with jurisdiction. It is submitted that the cause of action arose in Nairobi, the offices of the respondent are in Nairobi, the Advocates for the applicant are based in Nairobi, and argued that it would be less expansive to have the case tried at Nairobi. *Hangzou Agrochemicals Industries Limited vs. Panda Flowers Limited* [2012] eKLR (Odunga, J) is also cited, with respect to exercise of discretion, under section 18 of the [Civil Procedure Act](#).
5. The power of the High Court to transfer suits is provided for in section 18 of the [Civil Procedure Act](#). The High Court may transfer suits from itself to subordinate courts competent to try or dispose of such suits, transfer suits from subordinate courts to itself for trial and disposal, and from one subordinate court to another. What is sought, in this case, is transfer from one subordinate court to another. The jurisdiction to transfer suits in that manner is not what is in dispute, but rather whether that power ought to be exercised in this case. The applicant argues that the subject suit was filed in a court without jurisdiction, and that the court with jurisdiction was at Nairobi, where the cause of action arose, and not at Busia. The respondent counters that there was jurisdiction at Busia.
6. Section 18 of the [Civil Procedure Act](#) provides that:

“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.”

7. Transfer of suits need not necessarily be about jurisdiction, but convenience. Where transfer is sought on grounds of convenience, there would be jurisdiction in the High Court to transfer the matter, from one subordinate court to another, as a matter of course, balancing the interests and convenience of the parties, along the lines discussed in *John Mwangi Karanja vs. Alfred Ndiangui* [2011] eKLR (Waweru, J) and *Hangzou Agrochemicals Industries Limited vs. Panda Flowers Limited* [2012] eKLR (Odunga, J). Where transfer is grounded on the suit having filed at a locus without jurisdiction, then the High Court would have no jurisdiction to transfer the same, going by *Boniface Waweru Mbiyu vs. Mary Njeri & Another* [2005] eKLR (Ojwang, J), *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (Makhandia, Ouko & M’Inoti, JJA), *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (Karanja, Gatembu & Sichale, JJA) and *Gaikia Kimani Kiarie vs. Peter Kimani Kiramba* [2020] eKLR (Gacheru, J). The transfer sought here does not appear to be so much rooted on jurisdiction, but convenience, much as the applicant seeks to argue the jurisdiction.
8. Only the courts vested with substantive jurisdiction, by *the Constitution* or statute, can exercise substantive jurisdiction, and a matter filed before a court which has no such substantive jurisdiction would be incompetent and a nullity, and it is in respect of such that the High Court would not exercise jurisdiction to transfer a null suit. A suit filed before a court which has no jurisdiction to handle a dispute, where the subject matter is beyond the pecuniary limits of that court, would be incompetent and a nullity, and such would not be for transfer by the High Court. The issue here is not with pecuniary jurisdiction, which is a matter of substantive jurisdiction, so that where it lacks, the suit would be incompetent, and a candidate for striking out, rather it is a matter of transfer on grounds of convenience.
9. Sections 14 and 15 of the *Civil Procedure Act* deal with territorial or geographical jurisdiction. These provisions generally state that a claim for compensation for a wrongful act, and other cases, can be filed where the cause of action arose, or where the defendant resides. The 2 provisions state as follows:
 - “14. Suit for compensation for wrong to the person or movables
Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts...”
 - “15. Other suits to be instituted where defendant resides or cause of action arises
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...”

10. There is quite some flexibility, on where a suit could be filed, as between where the defendant resides or works, and where the cause of action arose, and the plaintiff would appear to have the right to exercise the option. A proper reading of the provisions appears to give greater weight to a locus where the defendant resides or carries on business.
11. So, what is the position here? The applicant argues that he resides or carries on business at Nairobi. Do I have proof of that? I think not. He relies on the memorandum of understanding, executed between him and Kennedy Wanyonyi Situma, on 24th June 2014, as proof of his place of residence or business. Whereas the address for Kennedy Wanyonyi Situma is given as PO Box 1540-50200 Bungoma, that for the applicant is given as PO Box 6800-00200, without indicating the town or city. The agreement or memorandum of understanding, therefore, does not help in disclosing the place of residence or business for the applicant.
12. I have seen filings in Busia CMCCC No. 301 of 2018, which suggest that the applicant ordinarily resides at Kisii. The affidavit of service, sworn on 17th December 2018, indicates that he was served with the plaint and other process on 6th December 2018, at Mogonga, Kisii. The Motion, dated 24th May 2019, indicates that the applicant had relocated to Kisii, where his whereabouts were traced by the DCIO, Kisii Central Police Station. Indeed, that application appears to indicate that the applicant kept shifting residences, and appears to have been of no fixed address. When he filed his witness statement, on 28th January 2021, which is undated, he mentions Ongata Rongai and Kisii as the places that he kept shuttling between, during the course of the transaction. From his defence, the vehicle appears to have principally been located at Kisii, and so it does appear from his witness statement. The third-party notice, that he caused to be issued in the name of Evans Oruta Bibao, locates the vehicle at Isebania/Sirare. On the basis of this material, I am not satisfied that the applicant has disclosed his proper physical address, for residence or place of business.
13. He says that his witnesses are based in Nairobi. He filed a list of witnesses, in a filing dated 21st December 2020, on 28th January 2021. There is no indication, in that list, of the physical and postal addresses of the witnesses listed. Of course, one of them is the applicant himself, and I have noted above that his place of residence and business is not clear.
14. He relies a lot on the memorandum of understanding, dated 24th June 2014, as the reference point, for determining issues relating to the residences of the parties and their places of business. I have already indicated that his own place of residence or business from that document is vague, for it only has a postal number, but not the place. Secondly, the agreement or memorandum of understanding is between him and Kennedy Wanyonyi Situma. That document makes no reference whatsoever to the respondent. The said Kennedy Wanyonyi Situma has sworn affidavits herein as a director of the respondent. However, in the subject agreement or memorandum of understanding, he did not purport to enter into it in his capacity as a director of the respondent, nor to represent the respondent in that transaction. In his later filings, he has not sought to bring out the connection between the transaction, the subject of the suit, and the respondent. I have also not seen any document, which connects the respondent to the subject motor vehicle. In my view, on the face of it, there is no connection between the agreement or memorandum of understanding and the respondent. I do not, therefore, see the import of referring to the document as the basis for determining whether or not the suit was properly filed within jurisdiction, as the agreement or memorandum of understanding was not between the applicant and the respondent, but between the applicant and a third party to the suit, Kennedy Wanyonyi Situma. There was talk of a supplementary agreement or memorandum of understanding, which necessitated the issuance of a third-party notice. I have not seen, from the record before me,



a copy of the alleged supplementary agreement or memorandum of understanding, and, therefore, I cannot tell whether it refers to the respondent at all.

15. There is a contention as to whether the registered address or the place of business for the respondent is Nairobi or Busia. The applicant contends that the respondent is based at Nairobi, ostensibly in terms of registered address and place of business. I have seen no evidence of that. The only document relating to the respondent is its certificate of incorporation, dated 1st November 2012. The same has or bears no address. It does not indicate the registered address of the respondent, nor where it carries on business. I have nothing to tell me that the respondent operates from Nairobi. Kennedy Wanyonyi Situma asserts that the respondent operates from Busia. I have seen no proof of that. No document has been placed on record to demonstrate where the respondent operates from at Busia, and the nature of the business that it carries on there. It is not enough to just allege; some evidence should have been placed on record. That should be taken together with what is pleaded at paragraph 1 of the plaint, that the respondent carries on business at Bungoma. So, which is which? Bungoma or Busia? The averments in the plaint allege one thing, while those made in the affidavits allege another thing. A party is bound by its pleadings. The respondent is bound by its pleadings, in this case the plaint, for the affidavit is not a pleading, that it operates from Bungoma.
16. The other consideration is about where the cause of action arose. The applicant claims that it accrued at Nairobi, while the respondent is ambivalent on the matter. What was the cause of action in the first place? The plaint is vague about what the cause of action was. Although the respondent seeks nullification of the agreement or memorandum of understanding of 24th July 2016, there is no averment as to why that nullification should be ordered, for there is no allegation of breach of the agreement or memorandum of understanding of 24th July 2016, or any claim that the same was wrongful or unlawful in any respect, or was ineffective. I am of the persuasion that the plaint is so poorly drafted, it does not disclose any cause of action.
17. The said plaint is a short one, running into 7 paragraphs. The critical paragraphs are 3, 4 and 5, where the cause of action ought to have been disclosed. They read as follows:

“

 - “ 3. Vide a Memorandum of Understanding dated 24th July, 2016 the Applicant did give the Respondent Motor Vehicle Registration No. KBW 137 E with an agreement that the Respondent does furnish the loan of the said motorvehicle in Commercial Bank of Africa Ltd being Kshs. 6,096,000/- to be paid by the Respondent ksh. 127,000/- for 48 months and a sum of Ksh. 900,000/- to the Applicant upon furnishing the said loan in full.
 4. Unless the Defendant is stopped by this Honourable Court from offering for sale Motor Vehicle Reg No. KBW 137 E and if not compelled to produce the said Motor Vehicle there is a very high likelihood that the Plaintiff will suffer irreparable damage and loss and lose its only source of income which cannot be adequately compensated by an award of damages.
 5. The Plaintiff prays that the agreement dated 24th July, 2016 be declared null and void, the Defendant be compelled to return Motor Vehicle Registration No.KBW 137 E back to the Plaintiff.

6...”



18. As indicated above, there is no allegation that the agreement or memorandum of understanding of 24th July 2016 had been breached or that there was anything wrong with it, to provoke the filing of the suit, for its nullification. Secondly, an order is sought to stop the applicant from offering the vehicle for sale, yet there is no averment that he was doing so. Nullification of the agreement or memorandum of understanding is sought, yet no background is given as to why it is desirable to have the same nullified. I reiterate that the plaint is so badly crafted that it discloses no cause of action. For instance, I cannot make out what paragraph 3 of the plaint is about. I cannot, therefore, tell, from the plaint, when and where the cause of action arose, if at all one exists, to enable me decide where the suit should have been filed.
19. Does the agreement or memorandum of understanding of 24th July 2016, pleaded in paragraphs 3 and 5 of the plaint, even exist? I do not think it does. The agreement or memorandum of understanding that both sides have exhibited is dated 24th June 2014. For example, the copy annexed to the affidavit, that Kennedy Wanyonyi Situma swore on 24th May 2019, is dated 24th June 2014. I have not seen, from the record, a copy of any agreement or memorandum of understanding entered into on 24th July 2016, by the parties in the instant suit. The only pleading, which refers to the agreement or memorandum of understanding of 24th July 2016, is the plaint, which also says nothing about the agreement or memorandum of understanding of 24th June 2014. None of the papers or documents filed, after the filing of the plaint, by both sides, including the respondent, refer to the agreement or memorandum of understanding of 24th July 2016. What I have seen in them is the agreement or memorandum of understanding of 24th June 2014. So, to that extent, I cannot tell whether a cause of action could accrue, in the first place, from a seemingly non-existent agreement or memorandum of understanding .
20. I believe that I have said enough to demonstrate that I have no material before me, to guide me on where a suit between the applicant and the respondent should have been filed, between Busia, Bungoma and Nairobi. Secondly, I have no material upon which I can assess whether it would be more convenient or just or expedient to have the matter tried at either Busia or Nairobi. In the end, I find that there is no merit in the Motion, dated 28th July 2022, and I hereby dismiss the same. Let Busia CMCCC No. 301 of 2018 be tried at the Busia law courts, where it was filed. The original trial court records shall be returned forthwith to the Busia Chief Magistrate's Court for further handling by that court. The order made herein, on 20th July 2023, staying the proceedings in Busia CMCCC No. 301 of 2018, is hereby discharged. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT BUSIA THI 28TH DAY OF SEPTEMBER 2023

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Appearances

Mr. Okemwa, instructed by Nyabuto Nyakeri & Company, Advocates for the applicant.

Ms. Nabulindo, instructed by DK Nabulindo & Company, Advocates for the respondent.

