



Chapman (Suing as the Legal Representative of the Estate of Caroline Ann Chapman) v Wachiuri & another (Miscellaneous Civil Application E014 of 2022) [2023] KEHC 23967 (KLR) (25 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MISCELLANEOUS CIVIL APPLICATION E014 OF 2022
AK NDUNG’U, J
OCTOBER 25, 2023**

BETWEEN

**HARRY BROWNING CHAPMAN APPLICANT
SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF CAROLINE
ANN CHAPMAN**

AND

**JOSEPH KIMANI WACHIURI 1ST RESPONDENT
SIBA HONSE SIBA 2ND RESPONDENT**

RULING

1. This ruling concerns the application by Notice of Motion dated 01/11/2022 by the Applicant seeking the order that;

“Nanyuki CMCC No. E031 of 2022 be transferred from the Chief Magistrate Court at Nanyuki to High Court at Nanyuki for hearing and determination.”
2. The application is supported by an affidavit of Joseph K. Mungai, learned counsel for the Applicants. The grounds relied upon as gleaned from the face of the application are that the Applicant filed Nanyuki Chief Magistrate Court Case No. E031 of 2022 before the magistrate court which has territorial jurisdiction but the general damages and special damages claimed might exceed the pecuniary jurisdiction of the Magistrate Court. In the circumstance, it is the High Court which is best suited to hear and determine the matter since it has both geographical and pecuniary jurisdiction. That the Respondent will not be prejudiced if the order sought is granted.
3. By an order of this court (Waweru J), the Applicant filed a further affidavit dated 02/11/2022 attaching the pleadings of the lower court. The learned counsel for the Applicant claimed that the Deceased was



- earning 2000 British Pound which translates to Kshs.280,000/-, the Deceased died at the age of 33 years and had two children and if the said amount is used as a multiplicand, it might yield an amount way above Kshs.20,000,000/- which is way above the pecuniary jurisdiction of the Magistrate's Court.
4. In response to the Applicant's application, the Respondents filed a replying affidavit dated 15/03/2023 opposing the application. It was deponed that the application is vexatious, a non-starter and abuse of the court since a matter filed without jurisdiction of the court cannot be transferred. That the averment that the damages will exceed Kshs,20,000,000/- is a red herring as the Applicant cannot pre-empt the outcome of the court's determination. That the Applicant application is an attempt to forum shop.
 5. The application was canvassed by way of written submissions. The Applicant's counsel argued that the award of general damages is inherently of a discretionary nature hence the amount that guided the counsel in filing the suit was Kshs.660,000/- claimed as special damages. That the Respondent has not given a reasonable challenge against the jurisdiction. The counsel further submitted that section 18 of the *Civil Procedure Act* empowers the High Court to withdraw suits in the subordinate court and among other things, try the suit. Reliance was placed on the case of *AO Basid Ltd v ASL Credit Ltd* (2019) eKLR where the High Court transferred the matter from the lower court to the High Court on the grounds of pecuniary jurisdiction.
 6. Furthermore, the hearing has not commenced hence the Respondents cannot claim undue hardship. That the Applicant was not in possession of the Deceased earning records at the time of filing the suit and that is why the suit was filed in the subordinate court. That after obtaining the Deceased tax records, it became apparent that an award exceeding Kshs.20,000,000/- is foreseeable. That the Applicant application seeks to avail to the Applicant the highest range of potential awards and is not an attempt to pre-empt the final award. Therefore, it would be unjust and contrary to the spirit of the law for the Applicant to be denied the order sought.
 7. In rejoinder, the Respondent argued that a suit cannot be transferred if the court from which the transfer is sought lacks jurisdiction. Reliance was placed on the case of *Stephen Njuguna v All African Conference of Churches and Another* (2010) eKLR where the court refused to transfer the suit to the high court on account that the court could not transfer a suit from a court which lacked jurisdiction. Reliance was further placed in the case of *Rebecca Chumo vs Christina Cheptoo Chumo* where the same sentiments were given.
 8. The Respondents further submitted that as per paragraph 9 of the plaint, it is clear that the Applicant was well aware that the deceased was earning 2000 pounds and was aged 33 years hence, the Applicant was well aware of all this but opted to file the suit in the Magistrate's Court. That the Applicant's counsel is misleading this court by stating in the submissions that the issue of deceased's earning was new evidence whereas the amount was well quoted in the plaint.
 9. The Respondent submitted that the facts in the case of *Stephen Njuguna* (*supra*) are similar to the instant case in that the Judge in that case refused to transfer the matter stating that the Plaintiff at the time of filing the suit ought to have known the general damages sought would exceed the monetary jurisdiction of the Chief Magistrate's Court. Finally, that by stating that he intends to claim damages that are above the jurisdiction of the Chief Magistrate's Court, the Applicant has admitted to have filed the suit in a court with no jurisdiction therefore, his application is an abuse of the court.



10. I have considered the rival arguments by the parties herein. The application is stated to be brought under section 1A, 1B, 17 and 18 of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*. The Applicant counsel relied on section 18 of the *Act* to support his claim. The said section 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.
- (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.”

11. As to whether such a suit can be competently be transferred by the High Court to a court of competent jurisdiction has been a subject in numerous decisions. The Court of Appeal in *Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service* [2019] eKLR held that:

“...Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. The subordinate court could not therefore entertain the suit and allow only that part of the claim that was within its pecuniary jurisdiction.”

12. The court in the above case quoted the case where the same position was taken by the Court of Appeal in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR thus:

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle



or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same. ...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”

13. From the above decisions, it therefore follows that where a suit is instituted before a court having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a court where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing. In other words, courts can only transfer a cause whose existence is recognised by law.
14. Understandably, the issue of pecuniary jurisdiction where general damages are concerned must at times pose special difficulties to a party in determining in which court to lodge a claim for reasons that such damages are not ascertainable before the trial is heard. In my view, it behoves on a party to weigh carefully the facts supporting its case viz-a-vis case law to form a reasonable opinion on where to lodge the claim. Where in doubt, a party would rather file the matter in a higher jurisdiction even though it may eventually turn out that a lower court would have sufficed. In such a scenario, the matter would be transferrable to a court with a lower pecuniary jurisdiction since the matter would have been filed in a court of competent jurisdiction in the first place.
15. In our instant suit, the Applicant has in paragraph 9 of the plaint clearly set out the earnings of the deceased being a monthly income of 2000 British Pounds. Based on this fact, and following the Applicant’s assertion in this application, the applicant knew or ought to have known that the Chief Magistrates court had no pecuniary jurisdiction in the matter.
16. It is thus contradictory for the counsel to submit that the Chief Magistrates Court had jurisdiction and at the same time pray that the matter be transferred for lack of pecuniary jurisdiction. Counsel states at Paragraph 3.2 of the submissions;

“We also note that the majority of the Applicant’s prayers in Nanyuki CMCC No. E031 of 2022 are general damages which are inherently of a discretionary nature; thus the only factor that established the monetary value of the suit in Nanyuki CMCC No. E031 of 2022 was the Kshs.660,000/= claimed therein as special damages. Considering that the lowest ranked Judicial Officer, a Resident Magistrate, enjoys pecuniary jurisdiction of 5 million under section 7(1) of the Magistrate’s Court Act, it follows that the Nanyuki Chief Magistrate’s Court was the most appropriate Court to file the Applicant’s case. Any accusation of the Applicant forum shopping is thus far removed from the facts on the grounds and rather indirectly accuses the Applicant of having some control over the final award of the Court. Such an accusation demands serous evidence which has not been supplied here. For the reasons aforesaid, it is clear that there is no reasonable challenge which can be sustained against jurisdiction and by extension the validity of the Application herein to be considered. Let this ground be rejected.”

17. How can the Nanyuki Chief Magistrates Court be the most appropriate court to file the Applicant’s case and yet the Applicant seeks the suit’s transfer from that court. The Applicant ought to be candid and admit that a mistake was done. Once the suit was filed in a court without the requisite pecuniary jurisdiction as admitted by the Applicant and as held by the Court of Appeal in Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction.



18. From the foregoing, the application lacks merit and is dismissed. In the circumstances of this case, I direct that each party bears its own costs of the application.

DATED SIGNED AND DELIVERED AT NANYUKI THIS 25TH DAY OF OCTOBER 2023

A.K. NDUNG’U

JUDGE

