



**Obuoge v Maina & 2 others (Miscellaneous Civil Application
E91 of 2018) [2022] KEHC 10413 (KLR) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 10413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIVASHA
MISCELLANEOUS CIVIL APPLICATION E91 OF 2018
GWN MACHARIA, J
APRIL 21, 2022**

BETWEEN

JOSEPH OBUOGE APPLICANT

AND

LAWRENCE MAINA 1ST RESPONDENT

GEORGE WANJOHI 2ND RESPONDENT

KENNEDY KIBANDE 3RD RESPONDENT

RULING

The Application

1. The application for consideration is Applicant's Notice of Motion dated the 4th day of October, 2018 seeking to have file in Naivasha CMCC No. 641 of 2010 and 264 of 2010 to the Chief Magistrate's Court at Nakuru.
2. The application is based on the grounds on the face of it and supported by the Affidavit of Joseph O. Obuoge.
3. The Application was not opposed, the Respondents having not filed a Response to the application or attended court .

Background

4. The two suits were originally filed in Naivasha Chief Magistrate's Court and were consolidated on the 29th day of July, 2012.
5. Pursuant to an application by the Plaintiffs, the said suits were transferred to Nakuru Chief Magistrate's Court vide an order made on the 21st day of June, 2017 by Hon. D. Nyambu, CM.



6. Subsequent to this order, the Plaintiffs filed an application dated 29.1.2018 seeking a review of the orders issued on 21st July, 2017. The application was premised on the grounds that the accident occurred around Elementaita area and it was reported at Gilgil Police Station which is within the jurisdiction of Naivasha law courts.
7. In a ruling delivered on 1st August, 2018 by Hon. Bidali, CM, the application was dismissed for failing to meet the threshold under Order 45 of the *Civil Procedure Rules*.
8. It suffices to state that an order of transfer from one court to another can only be issued by the High Court; hence the instant application.
9. The Applicant's supporting affidavit has an abstract issued by the Traffic Police at Gilgil Police Station in whose jurisdiction the accident occurred.
10. The Applicant urged the court to allow the Application.

Analysis and Determination

11. I have carefully considered Applicant's application and the affidavit in support and find that the only issue for determination by the Honourable Court is whether the application is merited.
12. This Honourable Court is vested with the powers to transfer a suit instituted in a Subordinate Court. Section 18 of the *Civil Procedure Act* provides as follows:-

“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.”



13. In the case of *Hangzhou Agrochemicals Industries Ltd. Vs Panda flowers Ltd*[2012] Eklr, the court held:-

“..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. 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. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”

14. This Court borrows from the position in *Executive Super Riders Limited v Albert Joacquinne Osumba* [2022] eKLR where it was held that:

“The transfer of suit is not automatic. It has to be premised on clear facts envisaged in Sections 11, 12, 13, 14, 15 and 17 of the *Civil Procedure Act*. In other words, a party may apply to transfer a suit from one court to the other if the suit is filed in courts that do not have territorial and pecuniary jurisdiction to determine the same. A suit is not transferred at the whim of an applicant or as a form of forum shopping. There are clear procedures that must be adhered to.

21. Section 15 of the *Civil Procedure Act* stipulates that:-

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—Where a person has a permanent dwelling at one place and also a temporary residence at
(1) another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation—A corporation shall be deemed to carry on business at its sole or principal office in Kenya,
(2) or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place (emphasis court)

Explanation—In suits arising out of contract, the cause of action arises within the meaning of this section
(3) 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.” (emphasis court).
15. I have perused the Police Abstract annexed by the Applicant in support of its application and note that the same was issued by the Traffic Officers from Gilgil Police Station and it is without doubt that the cause of action arose within the jurisdiction of Naivasha Chief Magistrate’s Court. The suit therefore ought to be heard in this court.
16. It is equally notable that the consolidated suits are very old. The application in view serves no other purpose than to derail the just and expeditious disposal of the same. It serves no justice to allow the application.

Disposition

17. For all the foregoing reasons, the upshot of the Court’s decision is that the application dated the 25th day of October, 2018 has no merit and is hereby dismissed with costs to the Respondents. The trial court file shall be mentioned before the Chief Magistrate on 16th May, 2022 for purposes of fixing an early hearing date. In this regard, I order that the suits be heard on a priority basis.

It is so ordered.

DATED AND DELIVERED AT NAIVASHA THIS 21ST DAY OF APRIL, 2022.

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

Mr.Mboga for the Applicant.

No appearance for the Respondents.

