



**Ouma v Maina & another (Miscellaneous Application E496 of 2021)
[2022] KEHC 3358 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 3358 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL
MISCELLANEOUS APPLICATION E496 OF 2021
SJ CHITEMBWE, J
MAY 31, 2022**

BETWEEN

WILSON OUMA ALIAS WILLY PAUL APPLICANT

AND

EWM ALIAS MP 1ST RESPONDENT

MUSLIM ALI ALIAS PRESENTER ALI 2ND RESPONDENT

RULING

The applicant moved the court via the application dated October 7, 2021 seeking the following orders:-

1. Spent
2. That the 2nd Defendant/Respondent's video posted on his you tube channel title "Willy Paul Forced me to Have sex with him – Miss P opens up on why she left Saldido" be pulled down pending the hearing and determination of this application.
3. That the 1st Defendant/Respondent herein either by themselves, their servants, agents, assigns or any other person spreading the video or circulating the same be restrained by an order of the court from defaming, spreading and continuing to defame the plaintiff/applicant pending the hearing of this miscellaneous application.
4. The HCCC file E219 of 2021 be reinstated back at the High Court as the damages now exceed 20 million and the Plaintiff/Applicant will be amending their plaint accordingly before close of pleadings therefore the lower court will be short of pecuniary jurisdiction to deal with the matter.
5. The honourable court does grant any other order it may deem fit to grant.
6. The costs of the application be in the cause.



2. The application was opposed by the respondents through grounds of opposition dated 26th October, 2021 and a replying affidavit dated 25th October, 2021 sworn by both respondents. Submissions on the application were made orally on 4th November, 2021.
3. Counsel for the applicant, Miss Ochieng, submitted that the application is interlocutory in nature and the main suit is what they seek to reinstate. She propounds that the court gave directions that the case be transferred to the subordinate court as the damages would not likely exceed Kshs 20 million. However, after consulting with the applicant after the order was given, the applicant informed her that he lost some deals because of the defamatory video which deals amount to almost Kshs 20 million. They intend to amend the plaint as pleadings were not closed and pre-trial directions were not done.
4. Miss Gathoni, counsel for the respondent put out five issues in her submissions. Firstly, the applicant should have moved the court properly as the orders sought by the appellant are substantive and cannot be granted through a miscellaneous application. Secondly, she submitted that there are two suits, suit E291/2021 was only transferred to the lower court, no new case number was given. This makes the current application *sub judice*. Thirdly, she contends that the applicant has not satisfied the elements set out in *Giella v Cassman Brown* in the case of *David Ndiu & Others V A.G. & Others* [2021] eKLR in granting injunctions. The applicant has not explained nor tendered evidence on what damage will be suffered. Fifthly, she argued on whether the applicant ought to have appealed or sought for a review of the orders from the court guided by order 45 of the *Civil Procedure rules*.
5. There is the issue of procedure as to whether the applicant should have appealed or applied for a review of orders under order 45 of the *Civil Procedure Rules* which provides for discovery of new evidence as one of the conditions for granting an order for review. The new and important matter must not have been in the knowledge of the applicant at the time the order was made.
6. The reason for the application to transfer the case was that following a turn of events caused by the video, the damages now exceed Kshs 20 million. This was not within the knowledge of the applicant's counsel at the time the order was made. In my view, this was sufficient reason to seek a review of the orders. The transferred file is yet to be dealt with by the Magistrate's Court. Nevertheless, this does not bar the court from making a determination on the transfer considering the court has jurisdiction to effect the same.
7. Section 18 of the *Civil Procedure Act* bestows upon the High Court the powers to transfer suits of a civil nature. It provides;
 - “
 - (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”.

8. In the case of *Kithita Ngeana Vs Mwaniki Kisume* [2018] eKLR the Court stated;

“Circumstances that would move a court to grant the order sought were considered in the David Kabungu Case (Supra) where Okello J stated that;

“What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is 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, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and 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... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”

9. The party that seeks an order of transfer has to make a strong case as to why the transfer should be effected. The applicant contends that following the turn of events caused by the video, the damages now exceed 20 million and the subordinate court will not have jurisdiction to determine the matter. Jurisdiction, as held in the case of *Owners of the Motor Vessel “Lillians” v Caltex Oil (Kenya) Ltd.* (1989) *Owners of the Motor Vessel “Lillians” v Caltex Oil (Kenya) Ltd* [1989] eKLR is everything and a court of law has no option but to down its tools where it finds that it has no jurisdiction to determine the matter in question. Should this court ignore the issue of pecuniary jurisdiction and have the case proceed in the subordinate court, the applicant would not be accorded a chance to be heard considering the fact that the pleadings were not yet closed in the main suit and he intended to seek leave to amend his pleadings after the suit is transferred back to the High Court.

10. It was held in the case of *John Mwangi Karanja v Alfred Ndiangui* [2011] eKLR

“It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction.

If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the *Civil Procedure Act* and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1)).



The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions”

11. The court cannot make a determination on whether the applicant provided evidence that the suit is worth Kshs 20 million as this would be digging into the substance of the matter before it is heard. It will then be upon the applicant to prove on a balance of probabilities that the deals lost were worth Kshs 20 million.
12. On the second and third prayers, the applicant seeks to have orders of injunction issued against the respondents. These are interlocutory orders which are normally sought before the court hears and determines the issues in contention. The contentious issue in this case is defamation which is yet to be determined in the main suit, Civil Case 291 of 2021. This raises the issue of sub judice which was pointed out by the respondents in their grounds of opposition. On sub judice, The Supreme Court of Kenya in *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* stated that:
 - (67) The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.
13. It is not contended that the parties in the main suit are the same. Additionally, the orders sought are substantive in nature. The miscellaneous application will not offer this opportunity as it is a suit filed out of the main suit. The court cannot make orders on the prayers sought as they are already under determination in the main suit.
14. Furthermore, had the issues not been sub judice, the applicant ought to have moved the court properly. Order 3 rule 1 provides that suits may be instituted by way of a plaint, petition or through originating summons. This position is confirmed in the case of *Nairobi West Hospital Limited v Joseph Kariba & another* [2018] eKLR the court held that:-
 8. A perusal of Order 3 rule 1 of the Civil Procedure Rules will reveal that suits may be commenced by way of a plaint, a petition and or originating summons which is not the case here. The miscellaneous application may not offer the parties the opportunity to be heard. The order for discharge of a patient who is suffering from a rare condition stated to be a metrophyic lateral scleroses and still admitted in the Intensive Care Unit of the applicant’s hospital is strenuously opposed.
 9. With respect, I agree with the 1st respondent’s submission that the application raises constitutional issues which relate to the right to life and healthcare which form part of the Social Economic Rights under Articles 26 and 46 of the Constitution of Kenya, 2010. It is apparent from the arguments of the 1st respondent that one of the issues which cannot be



determined summarily is whether the order sought is to the best interest of the patient. It has been argued that the grant of the order of discharge is tantamount to condemning the patient to death.

10. In the end, I find the preliminary objection to be meritorious. I have purposely avoided to determine the application on its merits because I do not intend to prejudice the applicant's right to pursue its rights and have the same substantively determined."
15. In light of the foregoing, the court shall only grant order four (4) of the application dated October 7, 2021. Civil Case 219 of 2021 shall hereby be transferred back to the High Court for trial.
16. The rest of the prayers are unmerited and are hereby dismissed. The applicant to pursue those orders in the main suit. Costs shall follow the outcome of the suit.

DATED AND SIGNED AT NAIROBI THIS 18TH DAY OF MAY 2022

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S. CHITEMBWE

JUDGE

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY 2022

J.K. SERGON

JUDGE

