



REPUBLIC OF KENYA



**Wambua v Kimondiu & 3 others (Miscellaneous Civil Application  
087 of 2022) [2022] KEHC 10426 (KLR) (3 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 10426 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
MISCELLANEOUS CIVIL APPLICATION 087 OF 2022  
GV ODUNGA, J  
AUGUST 3, 2022**

**BETWEEN**

**DAVID WAMBUA ALIAS WAMBUA DAVID ..... APPLICANT**

**AND**

**URBANUS MUTISYA KIMONDIU ..... 1<sup>ST</sup> RESPONDENT**

**MESCHACK MUTUKU KYENGO ..... 2<sup>ND</sup> RESPONDENT**

**DENNIS MUTHOKA ..... 3<sup>RD</sup> RESPONDENT**

**KELVIN MUINDE MUTUKU ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion dated 23<sup>rd</sup> June, 2022 expressed to be brought, substantially, under section 24 of the *Civil Procedure Rules*, 2010, Laws of Kenya, the applicant herein, David Wambua alias Wambua David, seeks the following orders:
  1. That this application be certified as urgent and service thereof be dispensed with in the first instance.
  2. That pending the hearing and determination of this application the judgment in Machakos Small claim court No. SCC 123 of 2022 be arrested and there be a stay of further proceedings herein.
  3. That the Honourable court be pleased to order that the Machakos Small Claim SCC no. E123 OF 2022 be transferred to Machakos Chief Magistrates Court and direct that the judgment therein be delivered by a Magistrate of competent jurisdiction.
  4. That the costs of this application be in the cause.



## **Applicant's Case**

2. The applicant was supported by two affidavits sworn by Munyoki Muthangya, the Applicant's advocate. According to him, Machakos Small Claim Case No. E123 of 2022, (hereinafter referred to as "the suit") was filed in the Honourable Court at Machakos by way of Plaint, designed to be heard before Chief Magistrates Court, on 12<sup>th</sup> April, 2022. It was averred that the said suit was as a result of Road Traffic Accident where the applicant suffered grievous harm.
3. The said matter, according to the deponent, proceeded to full hearing before the Small Claims Court at Machakos whereof parties presented evidence and witnesses were heard and the same was reserved for filing of submissions on 23<sup>rd</sup> June 2022. It was then that, upon examining the records of the claim that it became apparent that the matter ought to proceed before the Chief Magistrate since the claim was a sum more than One (1) Million. According to him, the Small Claims Court lacks jurisdiction to make an award of the sum claimed and therefore, the Applicant will suffer prejudice if the court proceeds to deliver judgment therein.
4. It was averred that this application was brought without undue delay and that the orders sought will not occasion any prejudice to the respondents.
5. The deponent denied that he had been in conduct of the hearings in the small claims court and averred that the Applicant was represented by one Mr. Muema during those proceedings. It was reiterated that the said suit was filed by way of Plaint dated 20<sup>th</sup> April 2022 indicated "the Chief Magistrates Court as Machakos" and not the Small Claims Court and its reference to the Small Claims Court by the registry was unknown to the deponent until the latter stages of the matter while he was preparing submissions. It was his contention that the Applicant has never waived his rights for compensation over and above Kshs. 1 Million as his claim and Verifying Affidavit was directed to the Chief Magistrates Court and not the Small Claims Court.
6. According to him, the decision by the registry to file the claim under the Small Claims Court was purely a clerical decision and a mistake by the officers thereat and therefore, the same ought not to be visited upon the Applicant who sustained serious injuries due to the negligence of the Respondents. In his view, the decision by a Court to transfer a suit is done on case to case basis and on merits of each case presented.
7. He insisted that there is no prejudice which has been shown to be visited upon the Respondent by transfer of this matter to the Chief Magistrates Court for determination as all parties were granted an opportunity to be heard in the matter. He denied that the Applicant represented or alleged that the Small Claims Court lacks jurisdiction to hear and determine the claim in Small Claims Court No. E123 of 2022 but rather, the court lacks the jurisdiction to award damages of more than Kshs. 1 Million and therefore, the suit cannot be termed as a nullity ab initio.
8. It was deposed that the Applicant has no other available forum to ensure adequate compensation is given to him for the injuries sustained unless the suit is transferred to a court of higher monetary jurisdiction than the Small Claims Court.
9. No submissions were filed on behalf of the 1<sup>st</sup> Respondent.

## **1<sup>st</sup> Respondent's Case**

10. On behalf of the 1<sup>st</sup> Respondent the application was opposed vide a replying affidavit sworn by Crispin N. Ngugi, the 1<sup>st</sup> Respondent's advocate. According to him, this application is grossly unmerited as no sufficient basis has been demonstrated to justify the belated transfer of Machakos SCCC No. E123 of



2022 as sought. In any event, it was averred, want of jurisdiction of the court from which the transfer is sought is no ground for ordering a transfer. It was his view that the application is in that event unbelievably hollow, spurious, undoubtedly pretentious and malafides and that the same is, in the same vein, hopelessly frivolous and vexatious merely intended to annoy and cause unnecessary anxiety and expense.

11. It was averred that contrary to the impression made, the applicant was not forced to file Machakos SCCC NO. E123 of 2022 in the Small Claims Court but did so consciously on his own motion and thus waived recovery of any sum in excess of one million shillings and cannot now purport that he wants to claim more than one million shillings. Having been represented by an advocate, it was contended that the applicant is deemed to have been duly advised of the jurisdiction of the Small Claims Court but deliberately elected to litigate his claim before the Small Claim Court notwithstanding.
12. It was disclosed that the suit is fully heard before the Small Claims Court in a hearing which took two days and where a total of six witnesses testified hence the transfer sought is an affront to the overriding objective of the *Civil Procedure Act* and the spirit of the *Small Claims Court Act*. To the deponent, the applicant has been less than candid and his conduct militates against this court's exercise of its discretion in his favour. It was urged that the applicant is also guilty of inordinate delay and blatant want of vigilance and diligence and that the application is an unpalatable afterthought, smirks of wanton dishonesty and is just but a gross abuse of the courts process merely intended to derail and delay the conclusion of Machakos SCCC N0. E123 of 2022 and thereby evade, obstruct or delay the course of justice.
13. According to the deponent, the 1<sup>st</sup> respondent is bound to be unduly prejudiced if the orders sought are granted having defended the suit on the legitimate expectation that the award thereof would not exceed Kshs. 1 million. There is also bound to be further undue delays in the conclusion of the suit contrary to the legitimate expectation of the 1<sup>st</sup> respondent that the suit would be concluded expeditiously in line with the spirit of the *Small Claims Court Act*.
14. It was submitted on behalf of the 1<sup>st</sup> Respondent that the applicant filed a supplementary affidavit on 12<sup>th</sup> July 2022 without leave of court since when parties appeared before the court on 12<sup>th</sup> July 2022, counsel for the applicant informed the court that he did not need to file submissions and that the court could deal with the application based on the documents already filed. He did not seek leave to file a supplementary affidavit. The affidavit has thus been sneaked into the court record and should be disregarded.
15. According to the 1<sup>st</sup> Respondent, this court has had occasion to deal with applications for transfer of suits and cited *Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited* [2012] eKLR.
16. It was submitted that on an application for transfer of suit, the burden is on an application to make out a strong case for the proposed transfer and that want of jurisdiction is not a ground for transfer of a case. In this case, according to the 1<sup>st</sup> Respondent, the main ground advanced by the applicant is that the small claims court has no jurisdiction to make the award sought which cannot be a ground for the transfer sought and reliance was sought from *Ruth Gathigia Kamunya & another v George Kimani* [2015] eKLR.
17. Besides, it was submitted, the said suit seeks general and special damages and future medical expenses and there is nothing to demonstrate to the court that the award to be made would be more than 1 million.
18. It was re-emphasised that the applicant consciously elected to file the said suit before the small claims court. He had counsel on record and he is deemed to have been aware that the small claims court



has no jurisdiction to award more than Kshs. 1,000,000. The claim that the chief magistrate's registry proceeded to file the same under the small claims court is baseless since the applicant's advocates knew very well that the same was being filed in the small claims court and would have raised concerns regarding the same if they were so minded. The filing of the said suit in the small claims court was therefore deliberate.

19. It was noted that the said suit is fully heard and is awaiting judgment and that six witnesses testified. All this while, the applicant never sought the transfer yet he knew of the nature of reliefs he had sought. No reason has been advanced as to why he never sought the transfer before the hearing commenced. He had counsel on record who was well aware of the jurisdiction of the small claims court vis a vis his client's claim. Yet, he did not move the court for transfer early in the proceedings. His counsel cannot claim that he came to know of the extent of his client's claim when doing submissions.
20. It was submitted that at this stage, all that is remaining is for the small claims court to render judgment. Transferring the said suit to the magistrate's court will just delay its conclusion noting that proceedings have to be typed and it is not known what course the proceedings in that court will take. In the circumstances, the transfer sought will obviously be an affront to the overriding objective of the *Civil Procedure Act* and the spirit of the *Small Claims Court Act*. Regarding the essence of the overriding objective reference was made to the case of *Hunker Trading Company Limited v Elf Oil Kenya Limited* [2010] eKLR.
21. According to the 1<sup>st</sup> Respondent, transferring the said suit to the magistrate's court at this stage will obviously lead to inefficient use of the available judicial and administrative resources and will be a bottleneck to the expeditious conclusion of the matter.
22. It was contended that the respondents' defended the said case on the legitimate expectation and understanding that the claimant can only be awarded a maximum of Kshs. 1 million shillings. Transferring the said suit to the magistrate's court will be an affront to this legitimate expectation. Further, there is bound to be further undue delays in the conclusion of the said suit contrary to the legitimate expectation of the 1<sup>st</sup> respondent that the suit would be concluded expeditiously in line with the spirit of the *Small Claims Court Act*.
23. It was submitted that this application has no scintilla of merit and the order that commends itself is an order dismissing the application with costs to the respondents.

#### **<sup>nd</sup> and 3<sup>rd</sup> Respondent's Case**

24. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents relied on the affidavit sworn by Michael M. Maweu the advocates for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. According to him: -
  - i. The suit in MKS SCCC No. E123 of 2022 was filed in Court on 26/04/2022 as per a copy of notice issued by the said Small Claims Court on 26/04/2022 and served upon his clients by Applicant's Counsel alongside a Mention Notice.
  - ii. The matter came up in Court before the trial Small Claims Court Magistrate on 17/05/2022 (Pre-Trial), 06/06/2022 (abortive hearing), 14/06/2022 (part-heard), 20/06/2022 (hearing finalized) and 23/06/2022 (Submissions).
  - iii. At the request of my client's insurer M/s Madison General Insurance Co. Ltd the Applicant was examined by Dr. W.M. Wokabi on 19/05/2022 for the purpose of obtaining a second medical opinion on his pleaded injuries, and a copy of the ensuing Report dated 24/05/2022 was filed in Court and produced in evidence vide a Supplementary List/Bundle of Documents filed 06/06/2022.



- iv. A total of six (6) witnesses testified at the hearing that was conducted by legal Counsel Mr. Munyoki for and on behalf of the Applicant, and the parties thereupon filed respective final Submissions.
  - v. The Applicant admittedly filed his Written Submissions in the trial Court on 23/06/2022.
  - vi. It is evident from the Complaint, P3 Form, Medical Report exhibited by the Applicant together with his Written Statement/evidence before the Lower Court that the exact nature and gravity of bodily injuries that materially form the subject of his claim for compensation was never in doubt from inception of the suit.
25. In view of the foregoing, the deponent believed that: -
- i. The Applicant had the option to lodge his lawsuit in the Chief Magistrate's Court as reflected in his annexed pleadings, or in the Small Claims Court, but he knowingly and advisedly chose the latter.
  - ii. By making an informed decision to file his case in the forum that he did, and having maintained it as such to the conclusion of the hearing, the Applicant embraced and acquiesced to the statutory pecuniary jurisdictional limits of the Small Claims Court and is estopped from adopting a position that is evidently an afterthought.
  - iii. Paragraph 11 of the Applicant's Complaint bears a concession that the trial Court was/is clothed with requisite jurisdiction in all its forms which contention was not contested by any of the Respondents in their respective Defences but was common-ground. It is thus not factual that the trial Court is bereft of jurisdiction.
  - iv. Under the *Small Claims Court Act* as amended, the Applicant wilfully waived and is deemed to have surrendered on 26/04/2022 his right to claim/obtain any damages that would be in excess of Kshs. 1 Million.
26. The Court was urged to note that the main injury as stated by the Applicant is a fracture of the left radius/ulna and other soft tissue injuries, yet the authorities cited by the Applicant are misleading and distinguishable insofar as they relate to far much more serious injuries.
27. The deponent therefore believed that;
- i. This Application herein is mischievous in that the Applicant set out to have a fast-tracked hearing before the Small Claims Court and thereafter a Judgment by the Chief Magistrate's Court so as to 'jump the queue' as it were.
  - ii. The Orders sought, if allowed, will create a precedent that would be misused to sanitize forum-shopping and the abuse of Court process at the expense of the integrity of the Court.
  - iii. The said Respondents will be prejudiced by the grant of the Orders sought which may result in an undesirable fresh hearing of the already concluded suit yet costs have since been incurred therein.
28. According to the deponent, by maintaining that the trial Court is devoid of jurisdiction, the Applicant is unwittingly conceding that his said suit is a nullity ab initio which is not transferable to another Court, and this Court has no jurisdiction.
29. On behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, reliance was placed on section 12(3) of the *Small Claims Court Act* and it was submitted that the Applicant thereby waived any claim/entitlement in excess of



one million shillings and is estopped by statute from alleging otherwise. It was submitted that there is no evidence that the Court Registry compelled the Applicant to file the suit in the Small Claims Court, or that the Applicant raised any complaint on this with the Registry. Though his suit papers were clearly intitled “Chief Magistrates’ Court”, he consciously presented them at the Registry of the Small Claims Court where they were received and duly registered upon payment of the requisite filing fees. A Small Claims Court Case Number was allocated to the file whereupon a ‘Notice of Mention’ was extracted and served by Counsel, clearly and unreservedly embracing the jurisdiction of the said Court for all purposes, and all in the spirit of Section 48 of the Act which states that; -

Nothing in this Act precludes a person from lodging a claim that is within the Jurisdiction of the Court in any other Court if that person so elects to institute proceedings in that other Court to hear and determine that Claim.

30. It was submitted that the Applicant’s injuries as pleaded were never ambiguous insofar as his exhibited P3 Form, Medical Report and Plaint are concerned. A further Report by Dr. Wokabi speaks to the same, *mutatis mutandis*. The issue of pecuniary Jurisdiction, it was submitted, is a red herring that was never raised in the trial Court during Pre-Trial Case Management or on the numerous days the matter proceeded for hearing. It was conveniently and mischievously brought up at the tail end of the matter upon final Legal Submissions and prior to Judgment which now remains suspended courtesy of the Stay Orders herein. In the premises, the Respondents cannot be blamed for strongly suspecting a forum-shopping element to this Application, with intention and invitation to other litigants to inundate this Court with similar requests, going forward. According to the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents, the Application is a mere afterthought by an informed litigant who should know better and hence an abuse of due Court process. It was submitted that by the Applicant maintaining that the trial Court is devoid of Jurisdiction, the Applicant is conceding that his suit is thus a nullity *ab initio* and hence is not transferable to another Court. In this regard, the said Respondents relied on the holding in *David Karimi Ngirigacha v Kenya Industrial Estates Limited & Another* [2021] eKLR and *Gaikia Kimani Kiarie v Peter Kimani Kiramba* [2020] eKLR.
31. It was therefore submitted that this Court would have no jurisdiction to grant the Orders sought and that the Applicant has failed to satisfy any of the known parameters for the grant of the Application. The Court was urged to be guided by the principle that litigation must come to an end and to find that the Application is incompetent and is for striking out or dismissal.

### Determination

32. I have considered the application, the response as well as the submissions.
33. It was contended that the Applicant’s further affidavit ought not to be considered as it was filed without leave. While the Courts frown upon the failure by parties to comply with directions and depending on the magnitude of non-compliance and the prejudice cause thereby, as was held the Court of Appeal in *Trust Bank Limited v Amalo Company Limited* Civil Appeal No. 215 of 2000 [2002] 2 KLR 627 [2003] 1 EA 350, in which the Court cited its decision in *Central Bank of Kenya v Uhuru Highway Development Ltd. & Others* Civil Appeal No. 75 of 1998:

“The principle which guides the Court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit and errors should not necessarily deter a litigant from the pursuits of his right...The court is obliged to look at the documents on record even though filed out of time unless for a reason other than mere lateness, it considers it undesirable to do so.”



34. The law is therefore clear that the Court ought not to ignore documents on record even if irregularly filed unless the filing thereof has prejudiced the other party in material respect particularly where the other party may be compensated in costs. It has been said that seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See *Waljee's (Uganda) Ltd v Ramji Punjabbhai Bugerere Tea Estates Ltd* [1971] EA 188.
35. In my view and based on authorities the Court cannot ignore a document that forms part of the record even if irregularly filed as long as no prejudice is thereby caused. In this case, no prejudice has been alleged by the Respondents. Accordingly, I decline the invitation to ignore the said document.
36. Although the application was expressed to have been made under section 24 of the [Civil Procedure Rules](#), 2010 (sic), when it comes to transfer of cases to and from the Small Claims Court, the relevant provision dealing with “Power of Court to transfer proceedings” is rule 34 of the [Small Claims Courts Rules](#) which provides that:
1. Where a claimant files a claim outside the local limits of the jurisdiction of the Court nearest the respondent's ordinary place of business or residence, or where the transaction or event giving rise to the claim occurred, the respondent may apply to the Court in writing for orders that the proceeding be transferred—
    - a. to the court nearest the respondent's place of business, or nearest the place where the respondent ordinarily resides; or
    - b. to the court nearest the place where the transaction or event giving rise to the claim took place.
  2. The Court shall not transfer any proceeding on the request of a party under this rule unless—
    - a. the party making the request has disclosed reasonable grounds to the satisfaction of the Court to justify the transfer; and
    - b. before making its decision, the Court has heard the other parties in response to the request.
  3. Nothing in this rule prevents parties from requesting the Court to transfer any proceeding to any other station of the court by consent of the parties.
37. It is clear that under the aforesaid provision, it is only the Respondent who can apply for transfer of proceedings from the Small Claims Court and under clearly prescribed circumstances.
38. However, section 13(3) of the [parent Act](#) provides that:
- Subject to section 12(3), a higher court may transfer a claim to a Small Claims Court.
39. In cases falling outside rule 34 of the [Small Claims Rules](#), it is clear that the only Court that can exercise the powers to transfer proceedings to a Small Claims Court is a higher Court. Again, it is clear that under the said provision, the Court can only transfer the matter to the Small Claims Court and not from the Small Claims Court to another Court. The reason here must be because it is only the High Court that is clothed with jurisdiction to supervise the Courts Subordinate to it. While, for example, the Chief Magistrate's Court, being a Court higher than the Small Claims Court may, in the exercise of the powers under section 13(3) aforesaid and upon hearing the parties, transfer a matter before it to the Small Claims Court, it cannot under the guise of exercising the same power transfer a matter pending before the Small Claims Court to another Court.



40. Section 3 of the [Civil Procedure Act](#) provides as hereunder:

In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force.

41. It follows that where there is a special jurisdiction or power conferred by any other law, the [Civil Procedure Act](#) does not apply.

42. Section 12(3) of the [Small Claims Courts Act](#) is the one that provides for the pecuniary jurisdiction of the Court and states that:

Pecuniary Jurisdiction of the Court shall be one million shillings.

43. It is therefore clear that under the act and the rules those are the only provisions that permit for transfer of cases to and from the Small Claims Court. However, nothing bars a party from invoking the provisions of section 35 of the [Act](#) which provides that:

- (1) A claimant or joint claimant may, at any time before final judgment withdraw the claim.
- (2) The withdrawal of a claim by any person pursuant to subsection (1) shall not prejudice the hearing and determination of any counterclaim lodged by the respondent.

44. Similarly, nothing bars this Court, in the exercise of its supervisory jurisdiction from transferring a matter to and from the Small Claims Court where appropriate and where the justice of the case so requires. That is a power conferred upon this Court under article 165(6) of the [Constitution](#) and is exercisable either on own motion or on application by a party to the proceedings in question.

45. It was however held in [Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited](#) [2012] eKLR, that;

“In the case of *David Kabungu v Zikarenga & 4 Others* Kampala HCCS No. 36 of 1995 Okello, J stated as follows:

“Section 18(1)(b) of the [Civil Procedure Act](#) gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purpose of working injustice. 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... Since the expense which the plaintiff/applicant in this case is likely to incur in transporting and maintaining the numerous various senior public officers from Kampala to Kabale to attend and give evidence in court in this case is bound to be so prohibitive as to deny the applicants justice and the plaintiff/applicant has the right to choose his court, he should not be denied justice by forcing him to have his case heard in a court to which he would not by reason of expense produce his witnesses to prove his case.”

46. It is true that a matter filed before a tribunal that has no jurisdiction ab initio cannot be transferred since such a matter is a nullity and nullities cannot be cured. See *Macfoy v United Africa Co. Ltd* [1961] 2 ALL ER 1169 at 1172.

47. I therefore associate myself with the decision of Aburili, J in *Ruth Gathigia Kamunya & another v George Kimani* [2015] eKLR that;

“The answer to the above ancillary question lies in the established case of *Omwoyo v African Highlands and Produce Ltd* (2002) KLR 698 where Ringera J, referring to *Kagenyi v Musiram & Another* (1968) EA 48 by Sir Uldoma CJ held, in relation to section 18 of the Uganda Civil Procedure Act (similar to our Section 18 of Cap 21 Laws of Kenya) that:-

“An order for transfer of a suit from one court to another court cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. In that case, the appellant had sought to transfer a suit from the Magistrate’s court to the High court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court....”

The legal principle gleaned from the above decisions is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first instance in a court which does not have pecuniary jurisdiction.”

48. A similar position was adopted by Mativo, J (as he then was) in *David Karimi Ngirigacha v Kenya Industrial Estates Limited & Another* [2021] eKLR where he expressed himself as hereunder;

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal 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 and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer” ...It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further.”

49. Gacheru, J also adopted the same position in *Gaikia Kimani Kiarie v Peter Kimani Kiramba* [2020] eKLR where she held that:-

“... 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...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...”

50. However, an issue of jurisdiction may arise in one of two instances or both. The first scenario is where the Court has no jurisdiction to embark upon the investigation of the matter before it ab initio. In that case, there is nothing to be transferred. The second scenario is where though the Court was seized of jurisdiction at inception subsequent events, circumstances or revelations remove the dispute from the jurisdiction of the Court. This clarification was made succinctly by Madan, J (as he then was) in *Choitram and Others v Mystery Model Hair Saloon* Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525 where he held:

“Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make.”

51. The second scenario do occur for example where a suit is filed for general damages which are in the discretion of the Court. However, in the course of trial the Court is of the view that the damages that ought to be awarded outstrip the Court’s jurisdiction. For example, the injuries sustained at the inception of the case may not appear to be very serious but later it may turn out that as a result of the action that gave rise to the matter, the injuries have given rise to the risk of degeneration of the plaintiff’s health further such as by developing epilepsy. In that event, it would be unjust for the Court to decline to transfer the matter to a Court with jurisdiction to make the appropriate award.

52. In this case, it is contended that the actual nature of the injuries sustained by the Applicant became apparent during the submissions. It is true that the alleged discovery occurred at a very late stage of the proceedings. Where a transfer is likely to involve the removal of the matter from the trial magistrate and taking it to another magistrate, the Court would be reluctant to allow the transfer if to do so would prejudice the other parties. In this case, it is contended that the respondents’ defended the said case on the legitimate expectation and understanding that the claimant can only be awarded a maximum of Kshs. 1 million shillings. Transferring the said suit to the magistrate’s court, it was contended, will be an affront to this legitimate expectation. I am not convinced that in this case there was an express representation that the applicant would receive a lesser award than that which the law provides that he is entitled to. My decision is guided by the decision in *Republic v Nairobi City County & Another ex parte Wainaina Kigathi Mungai*, High Court Judicial Review Misc. case No. 356 of 2013; [2014] eKLR [paragraph 33] that:

“...the legal position is that legitimate expectation cannot override the law. This was the position in *Republic v Kenya Revenue Authority, ex parte Aberdare Freight Services Limited* [2004] 2 eKLR 530 where it was held:

‘...a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Judicial resort to estoppel in these circumstances may prejudice the interests of third parties. Purported authorisation, waiver, acquiescence and delay do not preclude a public body from reasserting its legal rights or powers against another party if it has no power to sanction the conduct in question or to endow that party with the legal right or inventory that he claims... Legitimate expectation is founded upon a basic principle of fairness that legitimate expectation ought not be thwarted – that



in judging a case a judge should achieve justice, weigh the relative ‘strength of expectation’ ...”

53. Where a claim is certain from inception and the claimant files the same before the Small Claims Court, he cannot at a later stage turn round and claim that due to the change in circumstances he believes that the matter ought to be heard by another Court. In that event his only option is to withdraw the claim and file a fresh in before the Court he believes has jurisdiction. However, the position may be different where the claim is uncertain at inception and its certainty only becomes apparent at a later stage of the proceedings since in that event, the Claimant cannot be said to have waived part of his claim when he was unaware of the extent of his claim.
54. Having said so, in this case, the matter is being heard before an adjudicator who is also a magistrate. Accordingly, even if the orders issued herein are granted, it would not necessitate the withdrawal of the suit from the trial magistrate.
55. Accordingly, the justice of the matter requires that the matter be transferred to the Chief Magistrate’s Court. Accordingly, I direct that the suit shall be registered as a Chief Magistrate’s Civil Suit and shall be allocated a new number in the register of Chief Magistrate’s Court. Upon that being done, the trial magistrate shall proceed to consider the evidence on record and arrive at her decision based thereon. In the event that the award is found to fall within the jurisdiction of the Small Claims Court, the costs, if any, will be as per the scale applicable to Small Claims Court.
56. The costs of this application will be borne by the Applicant in any event.
57. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 3<sup>RD</sup> DAY OF AUGUST, 2022.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

Mr Munyoki for the Applicant

Ms Kipruto for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents

CA Susan

