



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISCELLANEOUS APPLICATION NO E060 OF 2021

DAVID OSCAR OWAKO.....APPLICANT

VERSUS

CHARLES ODIENY a.k.a SAMUEL ORWA & 12 OTHERS.....RESPONDENTS

RULING

1. In his Notice of Motion dated and filed on 18th March 2021, the Applicant herein sought for orders for transfer of **Kisumu Chief Magistrate's Court Case No 242 of 2020** to the High Court for hearing and determination.
2. In his affidavit that he swore on even date in support of his application, he averred that he was the Plaintiff in **Kisumu CMCC No 242 of 2020** which involved several parties and the estate of his late father that was valued at more than twenty (20) Million (**sic**).
3. He stated that he was ordered by the then Chief Magistrate Hon Gesora on 15th February 2021 to file an appropriate application for the transfer of his suit to the High Court for hearing and determination as the Trial Court lacked jurisdiction.
4. He contended that this court had power to grant the orders sought for and that it was in the wider interest of justice as well as the principles of equity that the orders that he had sought be granted.
5. In opposition to the said application, on 10th May 2021 Charles Odieny also known as Samuel Orwa and Emily Anyango Nyagowa swore a Replying Affidavit as 1st and 2nd Respondents herein. The same was filed on 10th May 2021.
6. They averred that the Applicant's application was incurably defective *ab initio*, misconceived, bad in law as it had failed to disclose material and relevant information, it was made on grounds not satisfying the requirements of sections quoted including Section 8 of the Civil Procedure Act. They added that the application was incompetent as was supported by a fatally and incurably defective affidavit in particular paragraph 2 and did not comply with the provisions of Order 8 of the Civil Procedure Rules, 2010.
7. They pointed out that the Applicant had moved away from the subject matter of the suit and introduced a whole new matter which was not the objective of the suit. It was their contention that the suit herein arose due to the Applicant's hostile demeanor, aggression and alarming threats to harm the 2nd Defendant (**sic**) herein.
8. They asserted that the impugned suit **Civil Suit No 242 of 2020** was in fact lodged against the wrong parties as the 1st Plaintiff (**sic**) was just a caretaker and the 2nd Plaintiff (**sic**) was a tenant of the premises.
9. They were categorical that the application was founded on malice and that the grounds that were advanced by the Applicant were inapplicable to invoke the discretion and powers of this Court. They thus urged this court to dismiss the present application with costs to them.
10. On 22nd April 2021, Sarah Amondi Jumma, an Advocate at the Office of the Attorney General, swore a Replying Affidavit on behalf of the Respondents. The same was filed on 24th May 2021.
11. The State averred that the provision of the law cited by the Applicant did not support the application herein. It added that the High Court lacked jurisdiction and should not entertain this matter as it was not the right forum to deal with the conduct or misconduct of judicial officers while acting in their official capacity.
12. It termed the application herein as frivolous as the Plaintiff did not disclose any reasonable cause of action against the defendant (**sic**) and urged this court to strike out the same instead of transferring it.

13. The Applicant swore a Supplementary Affidavit on 12th May 2021. He filed the same on 28th May 2021. He did not make further averments regarding the prayers he had sought in his application. Rather, he levelled accusations against several judicial officers and law firms who had previously handled his matters.

14. He filed his Written Submissions dated 9th June 2021 on 10th June 2021. The 1st and 2nd Respondents' Written Submissions were dated 23rd June 2021 and filed on even date. The firm of M/S Otieno Yogo Ojuro & Co Advocates filed Written Submissions for non-identified Respondents. The same were dated and filed on 10th June 2021. The firm of M/S Ben Aduol Nyanga & Co Advocates filed Written Submissions on behalf of Charles Odieny also known as Samuel Orwa and Emily Anyango Nyagowa. The same were filed and dated 23rd June 2021. The Attorney General's Written Submissions were dated 14th July 2021 and filed on 16th July 2021.

15. Parties indicated to court that they would be relying on their filed Submissions. This Ruling therefore is based on the said parties' Written Submissions.

LEGAL ANALYSIS

16. The Applicant in his written submissions did not focus on the question of the transfer of suit from the Lower Court to this Court for lack of jurisdiction. He mainly focused on accusation of judicial officers whom he accused of failing to adhere to Banga low (**sic**) principles by delivering frivolous Rulings that denied him millions of shillings and made him into a beggar. He submitted that his claim was in the sum of Kshs 639,000,000/=. He argued that where a judicial officer misapplied the law, the same formed part of grounds of appeal and could not be expunged from the court records.

17. The 1st and 2nd Respondent submitted that the application should be struck off in the first instance as the said application was brought under the wrong Sections and orders of the law. They were emphatic that the law that dealt with transfer of suits was Section 18 of the Civil Procedure Act. They placed reliance on the case of **David Kabungu vs Zikarenga & 4 Others Kampala HCCS No 36 of 1995** which case expressly laid down the principles in regard to transfer of suits equivalent to our Section 18 of the Civil Procedure Act.

18. They argued that the Applicant had the burden of proof of providing sufficient reasons as to why the transfer was merited. They placed reliance among several cases the case of **Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another [2012]eKLR** and the case of **The Owners of Motor Vessel "Lillian S" vs Caltex Oil Kenya Limited (1989) KLR 1** in arguing that the application before this court ought to be struck off as it lacked merit and was baseless due to the fact that the court before which the said suit was filed had no jurisdiction to begin with hence the suit is incompetent and also a nullity in law and thus, there was nothing to transfer.

19. They further cited the case of **Wamathu Gichoya vs Mary Wainoi Magu [2015] eKLR** where the court held that if the suit filed is incompetent, the High Court lacked jurisdiction to effect a transfer.

20. The firm of Otieno, Yugo, Ojuro & Co Advocates submitted that the present application was an abuse of the court process and did not therefore file any affidavit as there was nothing to respond to. It stated further that it had not been named as a party in this application and only appeared as persons to be served. It asserted that the Applicant had continued to serve it yet it was not a party to the proceedings herein.

21. It also submitted that it was unable to make any substantive submissions in response to what the Applicant had filed. It was emphatic that the pleadings as filed was a clear abuse of the court process by a litigant who intended to put the court into ridicule. It was its case that it had never acted for the Applicant and its submissions are made purely due to the courts direction that whoever was served to file written submissions.

22. It asserted that from the submissions filed by the Applicant, it was clear that he did not know what prayers were in his application. It added that judicial time had been wasted on a matter that belongs to another forum. It urged the court to dismiss the said application with costs for being dragged into a matter it was not party to.

23. The Attorney General submitted that the present application was a mockery and a waste of judicial time. It also argued that the provision of the law cited by the Applicant did not support the orders sought. It was categorical that Order 8 of the Civil Procedure Rules 2010 provided for amendments of pleadings and not transfer, Section 3A and 3B related to the special jurisdiction of the court and therefore it was difficult to place a nexus between the prayers sought and the provision of law that apparently had been used to move the court.

24. It pointed out that although the Applicant claimed that his suit involves huge sums of money of over 200 Million (**sic**), nothing in his Affidavit or pleadings was attached to prove this assertion.

25. It was its case that the High Court is not the right forum to lodge complaints about the misconduct of the Judicial Officers, Judiciary Staff and Law firms that he had sued as Respondents, Deputy Registrar Nairobi/Kisumu, Executive Officer Kisumu Law Courts, Registry Staff Kisumu Law Courts, Judicial Service Commissioners, Nairobi, Minister for Lands, Registrar of Lands Ardi House, Law firms, Appellate bench, Duty Judge Court of Appeal, High Court judges.

26. It was emphatic that the Judicial Service Commission (JSC) was an independent commission created under the Constitution of Kenya 2010 more specifically under Article 171 of the Constitution to investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary, in the manner prescribed by an Act of Parliament (Judicial Service Act).

27. It added that the Advocates Complaint Commission was mandated to hear disputes between advocates and their clients. To buttress its point, it relied on the case of **Kiroket Ole Punyua vs Umash Ole Mwanik & 2 Others [2021] eKLR** where the court quoted with approval the case of **Speaker of the National Assembly vs James Njenga Karume [1992] eKLR** where the Court of Appeal held that where there was a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure

should be strictly followed.

28. Based on the above premise, it was emphatic that the Applicant had filed this matter in the wrong forum as well as following the wrong procedure as a complaint of his nature purely fell within the mandate of the Judicial Service Commission and instead of transferring the matter to this court, the application ought to be dismissed to enable the applicant trigger the right institution.

29. Notably, no technical objection can be raised to any pleading on the ground of want of form as stipulated in Order 2 Rule 14 of the Civil Procedure Rules, 2010. Whereas Order 50 Rule 10(1) of the Civil Procedure Rules stipulates that every order or statutory provision under which an application has been brought must ordinarily be stated, no application shall be refused by reason of failure to comply with the said Rule. Further, Order 50 Rule 10(2) of the Civil Procedure Rules states that no application shall be defeated on a technicality for want of form that that does not affect the substance of the application. Article 159(2)(d) of the Constitution of Kenya, 2010 also mandates courts to administer justice without undue regard to technicalities.

30. For the aforesaid reasons, this court was not persuaded by the Respondents' submissions that the present application ought to be dismissed for failure to cite the correct provision of the Civil Procedure Rules that the same had been brought under.

31. The power bestowed upon the High Court to transfer suits of a civil nature is provided for in Section 18 of the Civil Procedure Act (Cap 21) Laws of Kenya that stipulates thus:-

“(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”.

32. 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.

33. The Applicant herein did not attach any pleadings from the lower court to show how his claim was made up to fit within the ambit of Sections 11, 12, 13, 14, 15 and 17 of the Civil Procedure Act to persuade this court to find in his favour and grant the prayers that he had sought in his present application. He merely asserted that his claim was in the sum of Kshs 639,000,000/= in his Written Submissions.

34. Notably, what seemed evident in his pleadings were complaints against Judicial Officers, Judiciary Staff, Land Registrars, Minister for Lands, Judiciary Staff at Kisumu Law Courts and Advocates who had handled his matters before. This court agreed with the submissions by the various Respondents that this was therefore not a proper forum to consider his complaints against the aforesaid persons and the court agreed with the submissions by the Attorney General in this regard.

35. It is trite law that the burden of proof lies on a party applying for a case to be transferred from one court to another to make out a strong case to the satisfaction of the court that the application ought to be granted.

36. In its considered view, this court found and held that the Applicant had not made out his case in a proper manner befitting of the grant of the orders he sought as he failed to demonstrate that the Trial Court lacked jurisdiction to hear and determine his case.

DISPOSITION

37. For the foregoing reasons, the upshot of this Court's decision was that the Applicant's Notice of Motion application dated 18th March 2021 and filed on even date was not merited and the same be and is hereby dismissed with costs to the Respondents who responded to the present application save for the Attorney General. This court deviated from the general principle that costs follow the event in this case of the Attorney General for the reason that it would be unjust and unfair to award costs to the government against its citizen.

38. Having gone through the pleadings in the file herein, this court strongly recommends that the Attorney General considers instituting proceedings to declare the Applicant herein a vexatious litigant.

39. It is hereby recommended that the Applicant gets legal assistance to prosecute his claim.

40. In the meantime, it is hereby directed and ordered that from the date of the Ruling herein, the Applicant herein will only file further pleadings, affidavits and any documentation, in whatever form, in respect of the complaints raised herein and in this matter with the leave of court.

41. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF NOVEMBER 2021

J. KAMAU

JUDGE