



**Osano & another v Miyogo (Miscellaneous Application E019 of 2023)  
[2023] KEELC 19981 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19981 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
MISCELLANEOUS APPLICATION E019 OF 2023  
FM NJOROGE, J  
SEPTEMBER 22, 2023**

**BETWEEN**

**STELLA KWAMBOKA OSANO ..... 1<sup>ST</sup> APPLICANT**

**JESTEL AGENCIES LTD ..... 2<sup>ND</sup> APPLICANT**

**AND**

**JEPHTER MARINGO MIYOGO ..... RESPONDENT**

**RULING**

1. The applicant in the instant application seeks orders that CMCC No E057 of 2023 Stella Kwamboka Osano v Jepther Maringo Miyogo & another be withdrawn from the subordinate court and transferred to this court for trial and final disposal. The parties agree that the suit property is of value higher than Kshs 20,000,000/=. The respondent however objects to the application and has filed a replying affidavit stating that since the suit in the lower court was instituted in a court lacking in jurisdiction it is a nullity ab initio, that the court lacks jurisdiction to transfer such a suit and the orders prayed for can not issue.
2. The parties complied with the order to file written submissions for the disposal of the motion.
3. The only issue arising in the application is whether this court has jurisdiction to transfer the suit in the lower court to itself for hearing and disposal. No law is cited in the application. However, proceedings regarding transfer of suit are governed by section 18 of the *Civil Procedure Act*. That section provides as follows:

“ 18. 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  - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed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.”

4. This court is empowered by the above provisions to withdraw a suit from a lower court and to transfer the same to itself. What if the court below had no jurisdiction? Does that ipso facto bar such transfer?
5. The applicant submits that the provisions of section 18 ought to be taken in conjunction with the overriding principles under sections 1A and 1B of the Act and cites *James Gacheru Kariuki & 19 others v County Government of Mombasa & 56 others* [2019] eKLR to urge the adoption of a purpose approach to the provisions rather than the literal approach. It is urged that the court ought to harmonize subsequent provisions of the law with the objective underlying earlier provisions. Citing *Vijinia Wantbiga Mbiti v Nthiga M'Mbanya Kivevia* [2019] eKLR the applicant urges that the act of transfer is exercise of judicial discretion; that the court should consider where the pecuniary value of a subject matter was, as in the present instance, discovered to be higher only after the suit was filed in the lower court. The applicants also argue, citing the decision in *Crest Security Services Ltd v Multiple ICD Kenya Ltd* [2020] eKLR and *Acqualine Distributors Ltd v Coastal Bottlers Ltd* [2020] eKLR that where no prejudice is demonstrable a matter ought to be transferred from the subordinate court to the High Court for trial and disposal.
6. The respondent submitted on the constitutional nature of the doctrine of stare decisis in Kenya, citing *Geoffrey M Asanyo & 3 others v Attorney General* [2020] eKLR, *Kidero & 5 others v Waititu & Others* SC Pet No 18 of 2014 and *Dodhia v National Grindlays Bank Ltd and Another* 1970 EA 195. He reiterated what I have already observed as above, that no law has been cited for the application; he cited the case of *Samuel Kimunya Gachuhi T/A Sakiga Estate v Nanga Kiboto Farmers' Co-Operative Society* 2017 eKLR and *Gaikia Kimani Kiarie v Peter Kimani Kiramba* [2020] eKLR and *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR and *West Kenya Sugar Co Ltd v Matayo Ingoshe & others* [2021] eKLR for the proposition that a court has discretion to order withdrawal of a suit and transfer to itself



for disposition only if the matter was initially filed in a court possessed of jurisdiction, yet the applicant has admitted that their suit was filed in a court without jurisdiction. He states that it is plain that there is nothing to transfer in the present case.

7. The respondent is emphatic that the doctrine of stare decisis ought to be upheld and has relied on various decisions even from the Supreme Court of Kenya on the matter. I have noted that though all the decisions that the applicants and the respondent has filed are from the High Court and courts of equal status, the respondent has in his submissions through the *West Kenya Sugar Co Ltd case* (supra) correctly brought to the fore the most recent position espoused by the Court of Appeal regarding transfer of suits initially filed in courts devoid of jurisdiction, to wit, that such a transfer application ought to be declined. In the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR the court observed as follows:

“With that I return to the issue of jurisdiction and to the words of section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

8. In the case of *Phoenix of EA Assurance Ltd v SM Thiga T/A Newspaper Service* [2019] eKLR (CA) it was stated as follows:

“2. In common English parlance, ‘jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.”

9. The rule in *Owners of Motor Vessel "Lillian S"* is that a preliminary objection should be raised at the earliest opportunity in any proceedings and it has been so raised by the respondent. The need for the subordinate court to determine that issue has been taken away by the applicant’s own concession that the lower court lacks jurisdiction.
10. The matter before the lower court is still pending and an objection regarding jurisdiction has been raised before the court by the respondent herein which I think had not been determined by that court by the time the instant application was made. The grant of the present application would thwart the objection and ruin the respondent’s chance of having the objection heard and determined by that court. It would deny the subordinate court the chance to examine the evidence placed before it and determine whether the objection is merited or not.
11. In the *Phoenix case* (supra), before the matter was set down for hearing, the respondent filed before the High Court a notice of motion application under sections 17 and 18 of *Civil Procedure Act*, requesting that the Nairobi Principal Magistrate’s Court suit be transferred to the High Court for “trial and disposal”. The reason given for the application was that the applicant’s advocate had “inadvertently” filed the suit before the Principal Magistrate’s Court but it had since dawned on him that the aggregate sum “likely to be awarded to the plaintiff in case of success was well over the pecuniary jurisdiction of



the Principal Magistrate’s Court, which was Kshs 125,000.00.” The application was heard ex parte by Aluoch J (as she then was) and she gave the order sought, allowing the transfer of the suit to the High Court. Five years later, the respondent applied for leave to amend the plaint under to particularized the claim and the special damages claimed amounted to Kshs 4,034,425.00. The appellant then opposed the motion, raising the issue of lack of jurisdiction and limitation of time, stating that the suit was incompetent and a non-starter as the same was transferred from a court lacking jurisdiction to hear and determine the same in the first instance. In its amended defence the appellant, while denying the respondent’s claims, reiterated that the suit was erroneously transferred from a court without jurisdiction and the High Court did not therefore have jurisdiction to entertain the matter and so filed a chamber summons seeking striking out of the amended plaint for the reason that it was void ab initio for failure to comply with sections 18 and 19 of the [Civil Procedure Act](#). Dismissing the application, Lesiit J found that the subordinate court had jurisdiction to hear the suit in the first instance because the appellant had acquiesced to the transfer as it had not contested the suit at the earliest opportunity, and further that the appellant could not be allowed to impeach the said transfer fifteen (15) years later. The appellant then appealed, positing that even where there is consent of the parties, such consent cannot confer jurisdiction. In the appeal decision, citing the *Motor Vessel Lillian “S” case* (supra) the court delivered itself as follows:

“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 *Phoenix decision* (supra) quoted with approval the decision in [Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel](#) (2016) eKLR in the following words: -

“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. As in *Phoenix* (supra) both parties are in agreement that the present matter exceeded the pecuniary jurisdiction of the subordinate court where the matter was filed in the first instance.
14. How about the argument by the applicant that the act of transfer is exercise of judicial discretion; that the court should consider favourably an application to transfer where the pecuniary value of a subject matter was, as in the present instance, discovered to be higher only after the suit was filed in the lower court; that where no prejudice is demonstrable, a matter ought to be transferred from the subordinate



court to the High Court for trial and disposal; that the courts have taken the school of thought favouring transfer, which opinion was rooted in a circumspect and a harmonized interpretation of section 18 of CPA in conjunction with article 159 of the Constitution and sections 1A and 1B of the CPA?

15. To the issue of need to exercise discretion and of the need for harmonization of the provisions cited, I must state that that has already been settled by the *Phoenix decision* (supra) where it is stated that “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.” This court must also distinguish between exercise of “discretion” and of “jurisdiction”. Having regard to the case law cited herein above, the pronounced gravity of the error of filing a suit in a court bereft of jurisdiction is beyond salvage by way of vaccination with the contents of article 159 2(d) as it is not a mere procedural issue. That leaves this court with no question of exercise of discretion in this matter but only that of exercise of jurisdiction and without any anchor upon which to exercise jurisdiction in the applicant’s favour, the application at hand can not be granted.
16. To the issue of potential prejudice, I can only observe that a valuation report commissioned before suing showing value that was believed to be below Kshs 20,000,000/= would have demonstrated due diligence on the part of the applicant but it was not availed and no valuation report was availed by the appellant after the objection. Further, the respondent is on record as having commissioned his own valuation report at his own expense. It is therefore inaccurate to state that no prejudice would be occasioned in the circumstances where the respondent has gone all out to avail a valuation report in support of the objection on jurisdiction for every reasonable input is to be deemed valuable.
17. Considering the holdings in the Court of Appeal decisions in the cases of Phoenix of EA Assurance Ltd v SM Thiga T/A Newspaper Service 2019 eKLR and Equity Bank Ltd v Bruce Mutie Mutuku T/A Diani Tour & Travel 2016 eKLR this court lacks jurisdiction to grant the orders sought by the applicant and the notice of motion dated April 25, 2023 is hereby dismissed with costs to the respondent.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 22<sup>ND</sup> DAY OF SEPTEMBER, 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

