



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 23 OF 2016

ZEPHANIA NGAIRA ANGWEYE.....PLAINTIFF

VERSUS

ROGERS SENAJI MULEMI.....1ST DEFENDANT

BARCLAYS BANK OF KENYA LTD.....2ND DEFENDANT

RULING

1. **Dr. Khaminwa** who is the learned counsel for the Plaintiff approached this Court and made an oral application seeking transfer of the suit to the Mombasa High Court for hearing and determination. He submitted that the matter had been heard by Ogola J who had been transferred to Mombasa. The plaintiff had closed his case and counsel submitted that the matter be transferred to Mombasa since Ogola J is familiar with the demeanour of the witnesses and the greater evil is to have the case start de novo before another Judge and he argued that it is better it be heard by Justice Ogola so that he can finalize it.

2. **Mr. Ondieki** learned counsel for the defendant opposed the application and argued that there is an appeal pending before the Court of Appeal over the lack of jurisdiction of this court from hearing this matter. He argued that the subject matter is a parcel of land within Kakamega where both the Plaintiff and Defendant hails from and where there is an ELC Court to deal with the matter. He argued that if the matter cannot be taken to Nairobi then it be transferred to Kakamega Law Courts but if it is taken to Mombasa there will be expenses to be incurred.

3. After considering the counsels submissions, I find that I have to deal first with the issue of jurisdiction of the High Court to transfer a suit from itself to another High Court and vice versa. The law, as was stated by Nyarangi JA in *The Owners of Motor Vessel "Lillian S" vs. Caltex Oil Kenya Limited (1989) KLR 1*, is:

“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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

4. Article 165(3)(a) of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Article 162(2) on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. It is therefore clear that the High Court no longer has original and unlimited jurisdiction in all matters as it used to have under the old Constitution. However, the jurisdiction of the High Court can only be limited as provided by the Constitution itself and therefore I find that the court has jurisdiction to grant the prayer sought. It is also noted that the Defendants request for transfer of suit to the ELC Kakamega was declined by Kimondo J and later Ogola J and since then the Plaintiff’s case has since been closed and what is now remaining is the Defendant’s evidence to be tendered.

5. After satisfying myself that the court has the requisite jurisdiction, I shall address the merit of the application. In the case of *Hangzhou Agrochemicals Industries ltd –Vs Panda Flowers Ltd (2012) eKLR* Justice Odunga addressed conditions to be considered in determining whether or not to grant an order transferring a suit, thus:

“ ..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”.

6. What the court has to consider is whether the applicant has made out a case to justify the grant of the orders sought. 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. The matter was dealt with in extenso by Emukule, J in *Rapid Kate Services Limited vs. Freight Forwarders Kenya Limited & 2 Others* [2005] 1 KLR 292 where he expressed himself thus:

Whereas under rule 5(2) of Order 46 the Court has a wide and flexible discretion to order that a case be tried in a particular place, that discretion may however be exercised upon cause being shown, and that cause shall have regard to the convenience of the parties, and of the witnesses, the date of when the trial shall take place, and the circumstances of the case. The Court’s power to transfer proceedings from one Court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings.

7. Order 47 rule 6 of the Civil Procedure Rules provides as follows:

(1) Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such place as the court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.

(2) The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:

Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.

8. There are also sections 1A and 1B of the Civil Procedure Act which are expressed in the following terms:

1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

9. The Overriding Objective provided for under sections 1A and 1B is meant for the attainment of justice. It is clear therefore that it is a matter of balancing the interests of the parties with the ultimate aim of doing justice. In my view therefore, the High Court is perfectly entitled, where it so deems appropriate, to direct that a matter filed in one place be heard by the same Court sitting at a different place.

10. In the present case, it is not disputed that the matter was heard by Judge Ogola, and if the matter is to start afresh before a new judge it will slacken the good ground already attained towards the finalization of the matter. The defendant appears not amenable to the transfer on the ground that there is a pending appeal. I find that to be the more reason why it ought to be concluded faster so as not to compromise the appeal. Based on the material placed before me, I cannot decide one way or the other whether transfer would be appropriate in the circumstances. However the overriding objective aforesaid enjoins the Court to aim towards the timely disposal of proceedings. Further, since I am not and yet Judge Ogola is seized of all the relevant facts in this matter it is only fair that the matter be dealt with by him. The balance of convenience calls upon this court to direct that the matter be heard by Learned Justice Ogola.

11. In the premises, I direct that this suit be heard by the High Court sitting in Mombasa. Accordingly, this file will be transferred to

Mombasa High Court Registry where further proceedings will continue from where they had reached before Ogola J.

12. Costs of the application shall be in the cause.

It is so ordered.

Dated and Delivered at **Machakos** this **28th** day of **March, 2019**.

D.K. KEMEI

JUDGE