REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

MISC. APPLICATION NO. 308 OF 2018

ROSE MBITHE NDAMBUKI.....APPLICANT

VERSUS

1. PETER KIMATU WAMBUA

2. BENJAMIN NZIOKI

3. JULIUS MAKALI.....RESPONDENTS

RULING

1. The Applicant has filed a notice of motion dated 12th September, 2018 seeking the transfer of Machakos CMCC No. 1536 of 2010 and all proceedings therein to Mavoko Law Courts for trial and disposal.

2. The motion is based on the grounds on the body of the motion and the supporting affidavit of the applicant. She stated that the subject matter of the suit is land situate in Mlolongo in Mavoko Sub-county, Machakos County. That Mlolongo falls within the jurisdiction of Mavoko Law Courts which was established after the suit was filed. That it is convenient and expedient for all the parties that the suit be heard and determined at the Mavoko Law Courts. She stated that she resided in Ngong Town and Mavoko Law Courts would be nearer to her. That she believes the said court would also be convenient for the 1st respondent who works in Thika Town and the 3rd respondent who resides in Mlolongo within Mavoko sub-county and that the 2nd respondent is deceased.

3. In contention thereto, the 1st respondent filed grounds of opposition that the High Court has no jurisdiction to entertain the application. That the application as drawn is incompetent, defective and ought to be dismissed. That the application has been brought after a very long period and that the applicant is guilty of laches as no attempt has been made to explain the delay. That the application is a mischievous afterthought calculated to delay the hearing and conclusion of the suit in Machakos CMCC No. 1536 of 2010 thereby obstructing the course of justice. That the Chief Magistrates' Court at Machakos has jurisdiction to hear and determine the suit in Machakos CMCC No. 1536 of 2010.

4. In support of her case, the applicant cited section 18 of the Civil Procedure Act. It was submitted that it was held in **Aberdare Investments v. Bernard Wachira & 5 others (2014) eKLR** that the High Court has power to transfer a matter under section 17 and 18 of the Civil Procedure Act. That in **Rapid Kate Services Limited v. Freight Forwarders Kenya Limited & 2 others (2005) 1KLR 292**, the court addressed conditions to be considered in determining whether or not to grant an order transferring a suit. That the court has to consider several factors ranging from interest of litigants, administration of justice and also expenses to be incurred. That it is therefore in the interest of justice that this court transfer the matter to Mavoko Law Courts. That at the outset the applicant filed this suit in Machakos Court, since at the time of first filing this suit, the only court around was Machakos court and Mavoko Law Court had not been established. That the balance of convenience calls upon this court to have the matter heard where the cause of action arose which is nearer the place of residence of the applicant and the 1st respondent and actual place of residence of the 3rd respondent. That it is in the interest of justice that the above matter be transferred to Mavoko Law Courts.

5. The 1st respondent submitted that Article 165 (5) of the Constitution expressly ousts the jurisdiction of the High Court to hear and determine any dispute relating to an interest in land as that jurisdiction is reserved for the Environment and Land Court which has the jurisdiction under the Environment and Land Court Act to handle the application. That the issue of the jurisdiction of this court vis à vis that of the Environmental and Land Court was litigated all the way to the Supreme Court in **Republic v. Karisa Chengo (2017) eKLR**. That it is settled that this court cannot exercise the jurisdiction that the applicant is inviting it to exercise and the application having been presented to the wrong forum must fail in limine. That even if this court were to consider the merits of the application, it would still fail for the reason that the applicant has not placed sufficient material before the court to enable it to determine whether the order sought is merited. He contended that the pleadings in the suit sought to be transferred are not annexed and the court has not been told at what stage the suit sought to be transferred has reached. That the suit sought to be transferred was filed in court in the year 2010. That it is therefore 8 years down the line

and would best meet the ends of justice to have the case finalized rather than to initiate other process of transferring it to another court. That had the applicant been sincere about her application, there is no reason why it is brought 8 years after the filing of the suit. That no attempt has been made to explain the inordinate delay in filing this motion. In support of his case, the 3rd defendant relied on **Sustainable Management Services v. New Mitaboni F.C.S. (2017) eKLR**.

6. I have given due consideration to the application and shall preliminarily address the issue of jurisdiction raised by the 1st respondent. The procedural law on transfer and withdrawal of suits by the High Court is provided for under section 18 of the Civil Procedure Act which stipulates:

> **"(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—**
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> **(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**
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> **(b) Withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—**
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> **(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**
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> **(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.**
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> **(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".**

7. In view of the provision therein, the question that comes to mind is whether or not this court has jurisdiction to transfer and or withdraw a land matter. The 1st respondent is of the view that this court has no such jurisdiction since the matter in question deals with land which falls within the jurisdiction of the Environment and Land Court. It was particularly argued that Article 165 (5) of the Constitution expressly ousts the jurisdiction of the High Court to hear and determine any dispute relating to an interest in land. Article 165 (5) of the Constitution provides thus:

> **"(5) The High Court shall not have jurisdiction in respect of matters-**
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> **a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**
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> **b. falling within the jurisdiction of the courts contemplated in Article 162 (2)."**

Article 162 (2) provides:

> **"Parliament shall establish court with the status of the High Court to hear and determine disputes relating to-**
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> **a. employment and labour relations; and**
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> **b. the environment and the use and occupation of, and title to land."**

8. According to Black's Law Dictionary 10th Edition, Jurisdiction is defined as "*A court's power to decide a case or issue a decree*." In my understanding, the jurisdiction referred to in Article 165 (5) is with regard to determination of the issues in dispute therein. It is therefore my view that, a technicality such as the transfer of a matter relating to land as in the circumstances in this case is not barred by the said provision since the court can exercise its incidental concurrent jurisdiction. Judge Ngugi aptly discussed what should inform the interpretation of section 14, 15 and 18 of the Civil Procedure Act with a view to arriving at substantive justice in **Pamoja Women Development Programme & 3 others v. Jackson Kihumbu Wangombe & another (2016) eKLR**. The judge stated:

> **"9. The question presented, then, is singular and straightforward: can the High Court transfer a suit to the Environment and Land Court"**
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> **10. The parties did not cite to me any authorities to support their respective positions. However, I am aware of some decisions of the High Court that have held that much as sections 1A and 1B of the Civil Procedure Act has softened the rigidity of the Kagenyi Case stranglehold, the High Court cannot transfer suits to Equal Status Courts. Three such cases include: Rob De Jong & Another –Vs- Charles Mureithi Wachira [2012] eKLR, Joseph Mururi v Godfrey Gikundi Anjuri [2012] eKLR and Wycliffe Mwangaza Kihugwa v Grainbulk Handlers Limited [2014] eKLR.**
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> **11. It is true that my perspective on the question of when the High Court can order a transfer of a suit filed in the "wrong"**

court has evolved. In 2012, in a case filed in Machakos, I took the hard-line position – following Kagenyi Case – that a suit filed in the "wrong" magistrates' court could not be saved and had to be struck out. That was a case that implicated section 18 of the CPA. More recently, in Esther Mugure Karegi v Penta Tancom Ltd (Kiambu Civil Misc. App. No. 19 of 2016, my attitude evolved and ordered the transfer of such a suit. One of the reason for the evolution in my thinking is the shift in our jurisprudence towards more functional as opposed to formalist approach to questions of jurisdiction. I explained this evolution in the Esther Mugure Karegi Case thus:

I would agree that the liberating light of the provisions of Article 159(2) of the Constitution interpreted liberally and generously would inform our interpretation of sections 14, 15 and 18 of the Civil Procedure Act. To my mind, freeing the interpretation from the constraints of technicality and eager to do substantive justice would lead to a conclusion that sections 14 and 15 are procedural sections aimed at guiding parties on the appropriate place for suing. Suing in the "wrong" court as far as geographical location is concerned does not, however, necessarily make the suit a "nullity." Such a suit may be a suitable candidate for transfer under section 18 of the Civil Procedure Act to the appropriate Court. It is important to point out, however, even under this liberal interpretation not all suits will be automatically transferred. Among other things, in my view, the High Court will consider the reasons for filing the suit in the "wrong" court in the first place. Where there is evidence of bad faith or improper motives, for example, the Court may refuse to transfer such a suit and leaving it to endure objections under section 16 of the Civil Procedure Act.

12. The question for me, therefore, is whether I should follow these High Court decisions or take a different stance since I am not aware of any decision by the Court of Appeal directly on the issue and the parties before me did not cite any.

13. I begin with two background questions: what was the intention of Kenyans in creating the two Article 162(2) Courts" Second, if section 18 of the Civil Procedure Act was being written now, how would it read" I make the preliminary point that section 18 of the CPA neither permits nor prohibits the High Court to transfer suits to the Equal Status Courts. Therefore, one can only rely on the section by analogy.

14. Kenyans desired specialized courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts.

15. Kenyans' objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenyans did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits. This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit. I see no useful purpose that is served by this other than punishing a party that acted in good faith. This would be an appropriate course of action where it can be shown that the Plaintiff acted in bad faith in suing in the wrong court but not where the Plaintiff acted in good faith. There has been no allegation or showing that the Plaintiff acted in bad faith here. Indeed, it is the Court and the Defendants who raised the issue for the first time and upon reflection the Plaintiff concluded that jurisdiction probably lies in the Environment and Land Court. They then, without any delay, made the current application.

16. I agree there is no substantive concurrent jurisdiction shared between the High Court of Kenya and the two Article 162(2) Equal Status Courts. Indeed our Constitution advertently aimed to isolate the jurisdiction of the Equal Status Courts and prohibit the High Court from exercising jurisdiction in areas of specialization of these Courts. However, I believe the constitutional architecture provides for incidental concurrent jurisdiction. For example, there is no longer any serious questions that the two Equal Status Courts have case-wide jurisdiction to hear and determine any additional other issues raised or pleaded in a case which is primarily on their area of specialization even if those issues normally fall outside their jurisdiction. This is the reason Equal Status Courts can deal with any issues raised respecting the violation of the Bill of Rights for example.

17. In my view, this incidental concurrent jurisdiction includes the ability of both the High Court and the Equal Status Courts to deal with certain procedural or administrative questions that present quasi-judicial issues where the Court in question is requested to act in the interests of justice or due administration of justice. This is where I would locate the ability of any of the three superior courts of cognate jurisdiction to transfer to the counterpart superior court any case filed before it that would more appropriately be adjudicated in the cognate superior court. Under this incidental concurrent jurisdiction, the High Court was able, for example, to transfer certain matters to the Environment and Land Court and the Environment and Labour Relations Court initially.

18. It is, of course, quite possible to abuse and misuse this incidental concurrent jurisdiction. Hence, it must be exercised with caution and always with the conscious reminder that every Court must beware that jurisdiction is bequeathed by the People of Kenya and as such it is usurpation of the Constitution to aggrandize the Court's jurisdiction using judge-craft or innovation.

19. At the same time, however, Courts must act to give our Constitution meaning and life that is keeping with the lived realities of Kenyans. To paraphrase a famous American legal aphorism which found its orality in the stirring dissent of Justice Robert H. Jackson in Terminiello v City of Chicago, 337 U.S.1 (1949), our Constitution is not a suicide pact. Like Justice Jackson in expressing apprehension that a rigid and dogmatic reading of the US Bill of Rights might destroy the very society it was meant to govern, we must worry here that an ultra-formalistic reading of the constitutional bequests of jurisdictions to various Courts could easily lead to much substantive injustice and a return to mechanical jurisprudence that Kenyans loathed in the pre-2010 period of our constitutional adjudication. We must, to paraphrase Justice Jackson again, temper doctrinaire logic on the jurisdiction issue with a little practical wisdom.

20. For me, that practical wisdom which we must bring to the strident doctrinaire logic that seemingly flows from Article 162(2) is one that permits the High Court in circumstances and context such as the one in this case to transfer it to the Environment and Land Court where primary jurisdiction lies. I believe that there is no constitutional subversion in the act of channeling the suit to the rightful Court. If anything, this furthers access to justice and eschews the use of technicalities as the golden pivot for adjudicating disputes. I find no categorical bar in the Constitution to this form of redemptive jurisprudence to prevent substantive injustice."

9. There being no express provision on whether or not this court can transfer an Environment and Land or Labour and Relations matter, I find that this court can exercise its incidental concurrent jurisdiction to withdraw and or transfer the matter as long as the applicant gives sufficient reasons to warrant a transfer or withdrawal.

10. The principles to be considered by a court while exercising its discretion to transfer cases were laid in a Ugandan case of **David Kabungu v. Zikarenga & 4 Others Kampala HCCS No. 36 of 1995** vastly appreciated by the Kenyan courts. It was held as follows in the said case:

"Section 18 (1) of the Civil Procedure Act gives the court 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 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 purposes of working injustice. What the court has to consider is whether the applicant has made a case to justify it in closing doors of the court on which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction…It is a well established principles 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 our 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 expenses, interest of justice and possibilities to undue hardship and if the court is left on doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused…"

11. In **Hangzhou Agrochemicals Industries Ltd v. Panda Flowers Ltd (2012) eKLR** Odunga J., had this to say in relation to the conditions to be considered in determining whether or not to transfer a suit:

"…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 interest 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."

12. The applicant claims that hearing the case at Mavoko would be convenient and cost effective for her and the defendants. The 1st defendant on the other hand contends that the motion is not brought in good faith due to the lateness with which it has been brought. He claims that the suit was filed in the year 2010 and it is not explained why the Applicant filed this application 8 years down the line. I note the applicant has not annexed the pleadings in the subordinate court case. This court is thus unable to know when the suit was filed and the current status due to the said failure. However I note that the applicant has not rebutted that fact and therefore an inference is made that the 1st respondent's allegation as to the date of filing is true. I take judicial notice that Mavoko Law Courts was officially opened on 29th June, 2012 and thus this application has been brought close to eight (8) years after the opening of Mavoko Law Courts. It is not clear why the applicant waited for eight (8) years to make this application if indeed she was pressed by the alleged inconvenience. I discern an afterthought in the plaintiff's action and in the circumstances find that no sufficient reasons have been given to warrant the transfer of the suit. The applicant cannot sit on her laurels for that long to make such a belated move. It is fair and just to let the case already before the Machakos Chief Magistrate's court to continue to conclusion. Taking it to another court would further cause delay which is not good for all the parties herein as all are deemed to be interested in finalizing the matter. In the circumstances, I find no merit in the application and the same is dismissed with costs to the Respondents.

It is so ordered.

Dated and delivered at Machakos this 19th day of June, 2019.

D.K.KEMEI

JUDGE