



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**MISCELLANEOUS CIVIL SUIT NO 623 OF 2018**

**JOHN KENYATTA ONCHIRI.....APPLICANT**

**(Legal and personal representative of the estate of Pauline Kaseya)**

**VERSUS**

**DR FRANK ENDERE.....1<sup>ST</sup> RESPONDENT**

**ST MARY'S MISSION HOSPITAL LANGATA.....2<sup>ND</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant's Notice of Motion application dated 6<sup>th</sup> November 2018 and filed on 23<sup>rd</sup> November 2018 was brought pursuant to Article 50(1) of the Constitution, Sections 1A,1B,3A and 18 of the Civil Procedure Act and all the enabling provisions of the law. Prayer No (1) was spent. It sought the following remaining orders:-

**1. Spent.**

**2. THAT the suit filed by the Applicant against the Respondents being Chief Magistrates Civil Case Number 2836 of 2016 be transferred to this Honourable Court for hearing and determination.**

**3. THAT cost of the Application be provided for.**

2. His Written Submissions and List and Bundle of Authorities were dated and filed on 28<sup>th</sup> February 2019. The 2<sup>nd</sup> Respondent's Written Submissions were dated and filed on 1<sup>st</sup> April 2019. The 1<sup>st</sup> Respondent did not participate in the proceedings herein despite having been served by registered mail. Leave to serve by way of substituted service was granted by this court on 2<sup>nd</sup> May 2019.

3. Parties asked this court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

**THE APPLICANT'S CASE**

4. The Applicant swore his Affidavit in support of his application on 6<sup>th</sup> November 2018.

5. He stated that the damages that are likely to be awarded to him on account of medical negligence by the Defendants were likely to exceed the pecuniary jurisdiction of the Magistrate's Court which currently stands at Kshs 20,000,000/= for the Chief Magistrate.

6. It was his contention that the Respondent would not suffer any prejudice and thus urged this court to grant him the orders he had sought in his application.

**THE RESPONDENT'S CASE.**

7. In response to the present application, the 2<sup>nd</sup> Respondent's Chief Executive Officer, Dr Gabriel Njue, swore the Replying Affidavit on

behalf of the 2<sup>nd</sup> Respondent herein.

8. The 2<sup>nd</sup> Respondent contended that this court lacked jurisdiction to transfer the case in the lower court to itself. It further stated that the Applicant had not demonstrated that the general damages he would be awarded would exceed Kshs 20,000,000/=. It pointed out that there was also a possibility of the general damages being lower than Kshs 20,000,000/=.

9. It averred that the Applicant was forum shopping and that the present application was an abuse of the court process as the same amounted to an afterthought having been filed more than two(2) years after the suit in Chief Magistrate's court was filed.

10. It therefore urged this court to dismiss the said application with costs to it.

### **LEGAL ANALYSIS**

11. The Applicant invoked Section 18(1)(b)(i) of the Civil Procedure Act which empowers the High Court to transfer a suit filed in a subordinate court to itself. He relied on the case of **Wycliffe Mwangaza Kihungwa vs Grainbulk Handlers Ltd [2013] eKLR** in which it was held that the High Court has power to transfer a suit from a subordinate court to itself or to another subordinate court for hearing and disposal even where the suit had been filed in a subordinate court that had no jurisdiction to try the same.

12. He also relied on the case of **Amani Mara Ltd vs Ashif Ayub Suleiman & Another [2017] eKLR** where it was held that a Chief Magistrate's Court has pecuniary jurisdiction not exceeding Kshs 20,000,000/= as provided for in Section 7(1)(a) of the Magistrate's Court's Act.

13. On its part, the 2<sup>nd</sup> Respondent relied on the case of **Josiah M.R. Kariuki vs Simon Gichangi Kabugi [2017] eKLR** where Ngaah J held that an order for transfer of a suit from a subordinate court will not be available if it was demonstrated that a petitioner had deliberately chosen to suppress facts for mischievous, fraudulent, or sinister purposes and/or ulterior motives.

14. It reiterated its contentions that the Applicant ought to have filed its case in the High Court because the Magistrate's Court Act came into effect in 2016.

15. It also placed reliance on the case of **Wycliffe Mwangaza Kihungwa vs Grainbulk Handlers Ltd** (Supra) and **Boniface Waweru Mbiyu vs Mary Njeri & Another [2005] eKLR** but did not expound how the same were relevant to its case.

16. It is important to point out that the High Court does not withdraw cases from the subordinate courts, *suo moto* or on application of any party unless there is reason to do so. Sufficient reason must be given as the hierarchical nature of courts ensures that each court deals with the cases it has pecuniary or territorial jurisdiction to deal with. This avoids forum shopping.

17. Section 18 (1)(b)(i),(ii) and (iii) of the Civil Procedure Act states 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) try or dispose of the same; or**

**i. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**

**ii. retransfer the same for trial or disposal to the court from which it was withdrawn.**

18. An order for transfer therefore, has to be grounded on solid facts. The claim herein was one for damages. As the 2<sup>nd</sup> Respondent correctly pointed out, the damages are not cast in stone. The amount awarded is at the discretion of a trial court. One court may be more liberal in awarding general damages while another may be conservative.

19. The only common guideline that must be adopted by those courts is that the damages awarded must not be inordinately low or inordinately high and/or manifestly low and/or manifestly excessive so as not to represent the correct assessment to be made and invite interference by an appellate court. The damages must be comparable to other damages that have been awarded by other courts in cases with similar facts.

20. As can be seen hereinabove, in claims for torts, it is not possible to tell the exact amount of damages to be awarded. A party may have filed suit in a subordinate court but upon further reflection, it may determine that the suit should have been filed at the High Court due to the damages it was likely to be awarded. The extent of the likely damages should be discernible by the High Court based on the facts that have been presented before it. It must be certain that the subordinate court has no pecuniary jurisdiction to hear the matter. However, that is not to say that those are the exact damages that should be awarded by the High Court.

21. No party should therefore be prevented from presenting its case in the best way it knows how. At all times, a court should restrain itself

from refusing to grant an order for transfer of suit from the subordinate to itself unless it can be shown that the value of the claim is *prima facie* within the jurisdiction of a Chief Magistrate's Court that has pecuniary jurisdiction of upto Kshs 20,000,000/= as provided for in Section 7 of the Magistrate's Courts Act.

22. In addition, it should not grant an order for transfer if it can be demonstrated that the same is for purposes of forum shopping or where an opposing party is likely to suffer prejudice.

23. In determining whether or not to transfer a case from a subordinate court either to itself or to another subordinate court for disposal, a High Court should also consider whether there has been inordinate delay in bringing an application for transfer of the suit. If there has been delay that is likely to be prejudicial to an opposing party, it must reject an application for transfer of a suit from a subordinate court. The converse is also true. If there has been no delay and/or an opposing party will not suffer any prejudice, the High Court should freely transfer the suit as applied for.

24. In this case, the suit in the subordinate court **Chief Magistrates Court Case No 2836 of 2016 John Kenyatta Onchiri (Legal and personal representative of the Estate of Pauline Kaseya) vs Dr Frank Endere & St Mary's Mission Hospital Langata** was filed in 2016. The present application herein was filed in 2018. A period of two (2) years was long. However, it could not be said to have been inordinately long or prejudicial to the 2<sup>nd</sup> Respondent as no pre-trial directions had been taken or the suit fixed for trial before the present application was filed.

25. The only prejudice this court could see was the 2<sup>nd</sup> Respondent facing escalated costs in defending the suit herein. Having said so, the 2<sup>nd</sup> Respondent was shielded and/or insulated from abnormally high costs if the Applicant was to be successful in his suit due to the fact that in the event the High Court was to award him damages which were within the jurisdiction of a subordinate court, it could direct that the costs to be awarded are paid on a lower scale.

26. Paragraph 58 of the Advocates Remuneration Order, 1962 stipulates that:-

**“In causes or matters which, having regard to the amount recovered or paid in settlement or the relief awarded, could have been brought in a resident magistrate's or other subordinate court, costs on the scale application to subordinate courts only shall be allowed unless the judge otherwise orders.”**

27. It was therefore the considered view of this court that the High Court is empowered to transfer a suit from a subordinate court to itself or transfer it to another subordinate court for hearing and determination if a basis for the same had been laid down and demonstrated.

28. It found the facts in the case of **Josiah M.R. Karuri vs Simon Gichangi Kibugi** (Supra) to have been distinguishable from the facts of this case because in the cited case, the value of the estate could be easily discernible from the asset inventory and was not dependent on any other assessment like a claim for damages that are to be assessed by a trial court following a breach of a tort.

#### **DISPOSITION**

29. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 6<sup>th</sup> November 2018 and filed on 23<sup>rd</sup> November 2018 was merited and the same is hereby allowed. Costs shall be in the cause.

30. It is so ordered.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of November 2019**

**J. KAMAU**

**JUDGE**