



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**MISCELLANEOUS APPLICATION NO. 280 OF 2016**

PETER OUMA .....PLAINTIFF/APPLICANT

**VERSUS**

MUGO DAVID .....1<sup>ST</sup> DEFENDANT/RESPONDENT

WAINANA GEOFFREY .....2<sup>ND</sup> DEFENDANT/RESPONDENT

SIMON GACHERU KARIUKI .....3<sup>RD</sup> DEFENDANT/RESPONDENT

**RULING OF THE COURT**

1. By an Application dated 16/10/2016 the Plaintiff/Applicant has sought for the following reliefs:-

***(a) That Suit No. PMCC 128 of 2015 filed at Kangundo Principal Magistrate's court be hereby transferred to the Chief Magistrate Milimani commercial Court.***

***(b) The costs of the Application be in the cause.***

2. The Application is supported by an annexed affidavit sworn by Musili Mbiti, Counsel for the Applicant sworn on even date. The Application is further supported by the following grounds:-

***(a) That the suit arose from a road traffic accident on or about 9/4/2014 involving the Applicant and the Respondent's motor vehicle registration number KBV 699 Z along Kangundo road.***

***(b) That the Applicant later filed suit at Principal Magistrate's Court at Kangundo being Civil Suit No. PMCC. No. 128 of 2015.***

***(c) That before the suit could take off, the Respondents Advocates raised a preliminary objection challenging the geographical jurisdiction of the Kangundo Principal Magistrate's Court to handle the matter and which thus compelled the Applicant to move to the High Court for an order of transfer to the Chief Magistrate Milimani Commercial Courts for final determination.***

***(d) That it is just and for expeditious determination of the suit to be transferred to the Chief Magistrate Milimani Commercial Court.***

3. The Application is opposed by the Defendant (Respondents) on the following grounds of opposition:-

***(a) That the suit as filed in the lower court was defective ab intio and it is an abuse of the process of the Court.***

***(b) This Honourable Court does not have jurisdiction to transfer a suit that was filed in the lower court without jurisdiction in the first instance.***

4. Parties herein opted not to file written submission and sought to rely on the pleadings namely the affidavit in support and grounds of opposition.

5. The power of this Court to transfer cases instituted in subordinate Courts is contained in the provisions of Section 18(1) and (2) of the Civil Procedure Act which provide as follows:-

**18(1)** On the Application of any of 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 proceedings 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 of 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) Re-transfer the same for trial or disposal to the Court from which it was withdrawn.***

**18(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.

6. The Applicant has sought for transfer of KANGUNDO PMCC No. 128 of 2015 to Milimani Commercial Court Nairobi on the ground that Kangundo Law Courts does not have the territorial or geographical jurisdiction to try the suit. The Applicant further avers that the mistake had been due to the Applicant's Advocate and that the same should not be visited upon the Client and that in the interest of justice and fair play, the matter be transferred to the Chief Magistrate's Court at Milimani. The Respondent vehemently opposed the request for transfer on the ground that the suit had been filed in a Court without jurisdiction in the first instance.

7. I have considered the Application by the Plaintiff/Applicant and the grounds of opposition by Counsel for the Defendant/Respondent as well as the cases cited. It is not in dispute that the suit namely KANGUNDO SPMCC No. 128 of 2015 had been filed before a Court that lacked the necessary territorial jurisdiction to hear and determine it. It seems from the averments in the Applicant's affidavit in support of the Application the issue of the court's lack of jurisdiction to try the matter had been raised by Respondents Counsel and that the Applicant was thus advised to approach the High Court for an order of transfer of suit. The Objection raised before the lower Court seems to have been upheld but that the Court did not strike the suit but stayed it pending the filing of the present Application. Indeed the issue of jurisdiction is a core issue and goes to the root so much that where a court does not have jurisdiction to try a case, then it must down its tools. The famous Ugandan case of KAGENYI =VS= MUSIRAMO & ANOTHER [1968] EA 48 established the principle that the High Court has no jurisdiction to transfer a suit from a court that had no jurisdiction in the first place to hear and determine the suit to another court with jurisdiction. This case has been cited with approval by the Kenyan High Courts in various cases such as in CHARLES OMWATA OMWONYO =VS= AFRICAN HIGHLANDS & PRODUCE CO. LTD – NBI HC MISC APPL. NO. 308 of 2002 (unreported). Also the same principle was held in the Court of Appeal case of KENYA SEED CO. LTD =VS= JOSEPH BOSIRE – NBI CA NO.72 of 2002 (unreported).

8. As observed that Kangundo Principal Magistrate's Court and confirmed by the Applicant that it did not

have the territorial jurisdiction to hear and determine the suit, it follows therefore that the Applicants Application dated 16/10/2016 lacks merit. The same is ordered dismissed with costs to the Defendants/Respondents.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **29<sup>th</sup>** day of **September, 2017**.

**D. K. KEMEI**

**JUDGE**

**In the presence of:-**

Mr. Mbithi for Plaintiff

No appearance for Defendant

C/A: Kituva