



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. APPLICATION NO. 19 OF 2016

ESTHER MUGURE KAREGI.....PLAINTIFF

VERSUS

PENTA TANCOM LIMITED.....DEFENDANT

RULING

1. Does a Magistrates' Court established under Article 169 of the Constitution and the Magistrates' Court Act, 2015 have territorial jurisdiction throughout Kenya or is its local jurisdiction limited? That is the question presented by the Notice of Motion dated 28/07/2016 brought by the Applicant in this case. In it, the Applicant seeks the following principal prayer:

THAT the Honourable Court be pleased to take SRMCC No. Gatundu 17 of 2011 (Esther Mugure Karegi v Penta Tancom Limited) to itself and transfer it to the Chief Magistrate's Court in Thika for hearing and final determination.

2. The law is clear: a court – even the High Court with all its majestic and unlimited inherent authority to beef up its given statutory and constitutional authority – cannot transfer a case which was instituted in a Court which had no jurisdiction in the first place. This was the holding in the celebrated case, ***Kagenyi v Musirango & Another 1968 EA 43***, Sir Udo Udoma stated that an order for the transfer of a suit from one court to another cannot be made unless the suit has in the first instance been brought to a court which had jurisdiction to try it. The position in ***Kagenyi v Musirango*** was adopted by Justice Ringera in ***Omwoyo v African Highlands & Produce Co Ltd (2002) 1 KLR 698*** where he also stated that the High Court cannot transfer a suit where the initial court did not have the jurisdiction to entertain the case. Justice Ouko reiterated the same position in ***Joseph Karisa Katsoma & 3 Others v Samuel Charo Marabu (2005) eKLR***. A few other cases in Kenya have followed suit. I believe the legal proposition – of the impossibility of transferring a suit which was instituted in a Court without jurisdiction – remains unassailed.

3. What has changed, however, is how the High Court has answered the question whether a magistrate's court established by law in Kenya has territorial jurisdiction throughout Kenya or whether its territorial jurisdiction is limited. Several cases, including ***Justus Kyalo Mutunga v Labh Singh Harnam [2012] eKLR*** and ***Mohamed Sitaban v George Mwangi Karoki*** have interpreted the law to come to the conclusion that all Resident Magistrates' Courts in the Republic have jurisdiction throughout the country. As such, a suit filed in any such Court even contrary to the dictates of section 15 of the Civil Procedure Act (stipulating place of suing) can be transferred to another Magistrate's Court. Differently put, a suit which is not filed within the local limits of the Magistrate's Court where either the cause of action arose or where the defendant reside, can still be transferred to the appropriate Magistrate's Court for disposal under the provisions of section 18 of the Civil Procedure Act.

4. The reasoning relied on by these authorities is exemplified in the following paragraph by Justice Ringera in the *Sitaban Case*:

Section 3(2) of the Magistrate’s Court Act provides that a Court of the Resident Magistrate (which is defined to include a Senior Principal Magistrate’s Court) has jurisdiction throughout Kenya. Such a court is not the subject of the local territorial jurisdiction contemplated by section 15 of the Civil Procedure Act, in my opinion, section 15 of the Civil Procedure Act applied only to courts lower than the Resident Magistrate Court. I am fortified in that view by the fact that the Magistrates Court Act, Cap 10 of the Laws of Kenya, was enacted in 1967 long after the Civil Procedure Act. The Legislature was therefore aware of the provisions of section 15 of the Civil Procedure Act and the hallowed rule of statutory construction that where two provisions in different statutes conflict, the provision in the latter statute is deemed to amend the earlier provision must be applied. Accordingly, I find that the Bungoma Court had jurisdiction to entertain the suit and the rule that a suit filed in a court without jurisdiction is a nullity and cannot be transferred is inapplicable in the circumstances of this case. There may be sound administrative reasons for filing suits in administrative Districts in which the defendant resides as the cause of action but those reasons cannot oust a statutory jurisdiction.

5. It would appear, therefore, *Sitaban Case* and others with similar reasoning are pegged on the interpretation of section 3(2) of the Magistrate’s Court Act, 1967. The reasoning is two-fold: one, that the Magistrates Court Act is the substantive Act which confers jurisdiction on Magistrates’ Courts while the Civil Procedure Act merely provides for procedure in the courts. As such, the provisions of the former trump the later on the substantive question of jurisdiction. However, there is now a slight complication: the Magistrates Court Act, 1967 has since been repealed and has been replaced by the Magistrates Court Act, 2015. The new Magistrates Court Act does not contain a clause similar to Section 3(2) of the repealed Act. Instead, it simply provides at section 5 that:

A magistrate’s court shall be subordinate to the High Court and shall be duly constituted when presided over by a chief magistrate, a senior principal magistrate, a principal magistrate, a senior resident magistrate or a resident magistrate.

6. Then, it provides the following respecting civil jurisdiction at section 7:

- (1) A magistrate’s court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—
 - (a) twenty million shillings, where the court is presided over by a chief magistrate;
 - (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
 - (c) ten million shillings, where the court is presided over by a principal magistrate;
 - (d) seven million shillings, where the court is presided over by a senior resident magistrate;
or
 - (e) five million shillings, where the court is presided over by a resident magistrate.

7. Where does that leave matters? I have noted a number of cases which even prior to the enactment of the Magistrates Court Act sought to depart from the Kagenyi rule through the application of the Oxygen Principles in the Civil Procedure Act. Exemplifying this trend is the following paragraphs from *Wycliffe Mwangaza Kihugwa v Grainbulk Handlers Limited* [2014] eKLR, a decision by Justice Mary Kasango:

I agree with the approach adopted by **Waweru, J.** in the cited cases. It is my considered view that the holding in the **Kagenyi Case** has perhaps been overtaken by the development in law. The overriding objectives of the Civil Procedure Act contained in **Sections 1A** and **1B** of the Act as

well as the principles of exercising judicial authority enshrined in **Article 159 (2)** of the Constitution of Kenya now enjoin this court to perform its duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities.

In my view, the High Court can now transfer a suit to another competent court even where that suit had been, in the first instance, brought to a court which had no jurisdiction to try it. However such transfer must be in compliance with **Section 18** of the Civil Procedure Act and the Constitution of Kenya.

8. I am not sure I would go as far as holding that the High Court can transfer a suit which was filed in a court which had no jurisdiction in the first instance. However, 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.

9. Needless to say, this liberal interpretation to sections 14, 15 and 18 of the Civil Procedure Act is based on the assumption that Parliament did not, by omitting an equivalent to section 3(2) of the repealed Magistrates Court Act, 1967 to signal that resident magistrates courts no longer have jurisdiction throughout the Republic. This is a question that the parties herein did not address directly and I have not benefitted from submissions by the parties. Its full import, therefore, will await a proper case presented to the Court.

10. In the present case, I have noted that the Respondent is not opposed to the application to transfer the suit and the parties are agreed that it is an appropriate one for transfer. I have also noted the grounds for the transfer are not improper. I will therefore allow the application. Accordingly, the Notice of Motion dated 28/07/2016 is allowed with the result that **SRMCC No. Gatundu 17 of 2011** is hereby transferred to the Chief Magistrate’s Court in Thika for hearing and final determination. Costs will be in the course.

Dated and Delivered at Kiambu this 12th Day of October, 2016.

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JOEL NGUGI

JUDGE