



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 190 OF 2010**

**ZABLON KAMAU KIARIE.....PLAINTIFF**

**VERSUS**

**ERASTUS GITHUA KIHITO.....1<sup>ST</sup> DEFENDANT**

**AMOS KINYANJUI.....2<sup>ND</sup> DEFENDANT**

**AND**

**EVEREADY EAST AFRICA LIMITED.....THIRD PARTY**

**RULING**

1. Before me is the third party's preliminary objection dated 6<sup>th</sup> February, 2012 seeking to strike out this matter on grounds that:
  - a. *the suit having been lodged in a subordinate court which lacked jurisdiction, the same is a nullity in law; and*
  - b. *the suit having been lodged in a subordinate court which lacked jurisdiction, the same is a nullity in law, incapable of being transferred to the superior court.*
2. The plaintiff filed grounds of opposition dated 22<sup>nd</sup> October, 2012 in response to the preliminary objection. The grounds are that; the preliminary objection has no merit and is an abuse of the court process; the subordinate court did have jurisdiction over the matter as at the time the suit was being transferred to the High Court; the reason for the transfer to the High Court was in anticipation that on determination of the suit, award of the prayers sought by the plaintiff would exceed the then jurisdiction of the subordinate court; the transfer of the suit was effected even before the suit could be set down for hearing and the claim was then, inter alia, general damages and special damages of KShs. 40,305/- and the preliminary objection offends the provisions of Section 1A & 1B of the Civil Procedure Act and Article 159 of the Constitution of Kenya and ought to be dismissed with costs.
3. At the hearing of the Preliminary Objection, Mr. Njoroge Learned Counsel for the 3<sup>rd</sup> party submitted that the suit was filed before a court which lacked pecuniary jurisdiction thereby it was incapable of being transferred. Counsel was not certain about the maximum pecuniary jurisdiction of the court in which the matter was filed. He submitted that there was no suit to be transferred. He stated that by the time of filing of the suit, the actual figure claimed was not specified. He cited ***Kangenyi v. Musiramo and Another (1968) E.A.***

4. Mr. Osoro, Learned Counsel for the plaintiff submitted that the preliminary objection was unmeritorious since the third party entered appearance but did not file a defence; that no directions have been taken; that an order of transfer was not challenged; that the defendant had no objection to the transfer and that this court will be sitting on an appeal.
5. I have considered the parties submissions. This court's power enunciated under Section 18 (1) (b) (ii) and (2) of the Civil Procedure Act to transfer a matter to a court with competent jurisdiction is not contended. What falls for this court's determination is whether or not the court in which the suit was filed had jurisdiction to try the matter, if not, whether or not this court can transfer a matter filed in a court without competent jurisdiction.
6. Justice Ibrahim (as he then was) in ***Rob De Jong & Another v. Charles Mureithi Wachira (2012) eKLR*** adopted the holding in ***Kangenyi case*** (supra) and held as follows:

***“...if a matter was filed in a court without jurisdiction then the suit is a nullity and there is nothing capable of being transferred.”***

7. The enactment of Section 1A & 1B of the Civil Procedure Act synchronised with Article 159(2) (d) of the Constitution of Kenya which imposes on the courts to refrain from being bogged down by technicalities at the expense of substantive justice has however led to a change to the above jurisprudence.
8. I quote with approval my brother Waweru J's holding in ***Grace Thogori Komo v. Dan Njagi Ndwiga (2013) eKLR*** where he departed from ***Kagenyi's case*** (supra) stating as follows:

***“It is conceded that Nairobi CMCC No. 6966 of 2012 was filed in the wrong court as that court did not have jurisdiction to hear and determine it by virtue of the provisions of section 2 of the Magistrate's Courts Act, Cap 10. That being the case, what is the sensible thing to do? Is it not to take the case to the right court?...”***

9. The upshot is that the preliminary objection dated 6<sup>th</sup> February, 2012 is dismissed with costs abiding the outcome of this suit. Orders accordingly.

**Dated, Signed and Delivered in open court this 23<sup>rd</sup> day of January, 2015.**

**J. K. SERGON**

**JUDGE**

In the presence of:

N/A for the Plaintiff

N/A for the Defendant

Miss. Mathai h/b for Ebosso for the 3<sup>rd</sup> party