



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL DIVISION

MISCELLANEOUS NO. 18 OF 2015

RUTH GATHIGIA KAMUNYA and ANASTACIA WANJIKU KAMUNYA (Suing as the administrator of the Estate of

SUSAN WAMBUI KAMUNYA).....APPLICANT

VERSUS

GEORGE KIMANIRESPONDENT

RULING

Before me is a Notice of Motion dated 9th January 2015 supported by the affidavit of Pauline Muhanda Advocate (sic) but sworn by Irene Mugure Nderitu (Sic).

The application brought under the provisions section 3A & 18 of the Civil Procedure Act and all other enabling Laws seeks from this court an order that Thika CMCC Suit No 936 of 2014 filed by the applicants/plaintiffs Ruth Gathigia Kamunya and Anastacia Wanjiku Kamunya be transferred to the Chief Magistrate's Court at Milimani, Nairobi for hearing and final disposal.

The grounds upon which the said Notice of motion is predicated are that the cause of action arose out of an accident which occurred along Thika road Roysambu area which the applicants believed was within the local jurisdiction of Thika Law Courts only to learn later after the defendant/Respondent George Kimani raised an objection to the jurisdiction of Thika Court that indeed the accident occurred within the territorial jurisdiction of Milimani Law Courts, Nairobi.

Further, that the transfer sought will save both the Courts time and that of the parties to the suit and that the Respondent does not stand to suffer any prejudice if the said orders are granted as it is in the interest of justice that the orders sought are granted.

The Respondent is not opposed to this application as he really believes that Thika Law Courts have no territorial jurisdiction to hear and determine the suit as filed. According to Mr. Ngecho advocate for the Respondent, albeit the Magistrate's Court Act confers countrywide jurisdiction to the Chief Magistrate's Courts, the territorial jurisdiction is limited as the Civil Procedure Act is clear as to where a suit should be instituted either where the cause of action arose or where the defendants reside.

Miss Muhanda Advocate was equally in agreement that indeed only Milimani Chief Magistrate's Court's has the jurisdiction to hear and determine the suit which was erroneously filed in Thika Chief

Magistrate's Courts.

I have anxiously considered this matter and the issue for determination is whether Thika Chief Magistrate's Court has the territorial jurisdiction to hear and determine the suit as filed whose cause of action allegedly arose at Roysambu along Thika Super Highway, an area that is said to fall within the territorial jurisdiction of the Chief Magistrate's Court at Milimani Law Courts Nairobi.

And the ancillary question is whether the legislative enactments of the provisions of Sections 17 and 18 of the Civil Procedure Act envisaged a situation where the High Court would transfer a suit from one court which has no jurisdiction to another court which has jurisdiction to hear and determine the dispute in question.

The applicable law that confers jurisdiction to Magistrates Courts is Section 3 (2) of the Magistrates Courts Act Cap 10 Laws of Kenya which stipulates that:

“The Resident Magistrate's Court shall have jurisdiction throughout Kenya”.

However, Section 15 of the Civil Procedure Act Mandates that suits shall be instituted in a court within local limits.

The above two provisions of the Law then seem to conflict and confuse litigants who are forever raising issues of territorial jurisdiction of Magistrate's Courts to try disputes that arose outside the territorial areas of those courts and in the instant case, it is clear that the applicants could not determine the geographical boundary between Nairobi and Thika at the time of filing suit.

Assuming for one moment as conceded by both counsels for the parties, that Thika Chief Magistrate's Court lacks territorial jurisdiction to hear and determine the dispute as filed, would this court then transfer the same to the court that has the necessary jurisdiction to determine the suit from a court that has no jurisdiction?

The answer to the above ancillary question lies in the established case of **Omwoyo Vs African Highlands and Produce Ltd (2002) KLR 698** where Ringera J, referring to **Kagenyi Vs Musiram & Another (1968) EA 48** by **Sir Uldoma CJ** held, in relation to section 18 of the Uganda Civil Procedure Act (similar to our Section 18 of Cap 21 Laws of Kenya)

that:-

“An order for transfer of a suit from one court to another court cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. In that case, the appellant had sought to transfer a suit from the Magistrate's court to the High court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court....”

The legal principle gleaned from the above decisions is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first instance in a court which does not have pecuniary jurisdiction.

However, the case here concerns territorial jurisdiction.

Getting back onto the question whether Thika Magistrate's Court has territorial jurisdiction and if not, whether I can order for a transfer of the suit from therein to Nairobi Milimani Law Courts, it is worth noting that the Civil Procedure Act, in its long title it is expressed that **“An act of Parliament to make provision for procedure in Civil Courts.**

In other words, it is not the legal instrument that confers jurisdiction upon Magistrate's Courts since the jurisdiction of Magistrate's courts is governed by the Magistrate's Courts Act Cap 10 Laws of Kenya which express in the long title **“An Act of Parliament to establish Magistrates Courts to declare the**

jurisdiction and provide for the procedure of such courts; to provide for appeals in certain cases and for purposes connected therewith or incidental thereto”.

The date of commencement of the Magistrates Courts Act is 1st August 1967 whereas that of the Civil Procedure Act is 31st January 1967 whereas that of the Civil Procedure Act is 31st January 1924.

Therefore, in as much as Section 15 of the Civil Procedure Act appear to be in conflict with Section 3 (2) of the Magistrate’s Court Act the rules of Statutory interpretation provide that where there is a conflict between two statutes, assuming there is any, then the Magistrate’s Courts Act is deemed to have amended the Civil Procedure Act.

Thus, how would the Resident Magistrate’s Court which is defined Under section 2 of the Magistrate’s Court Act to include Senior Resident Magistrate, Principal Magistrate, Senior Principal Magistrate and Chief Magistrates Court, have jurisdiction throughout Kenya, whereas section 15 of the Civil Procedure Act dictate that suits shall be instituted in whose local jurisdiction the cause of action arose?

Ringera J (as he then was) in a decision in **Mohamed Sitaban Vs George Mwangi Karoki CA No. 13/2002** expressed himself thus, concerning the above perceived conflict:

“Section 3 (2) of the Magistrate’s Courts 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 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 Magistrates’ Court. I am fortified in that view by the fact that the Magistrate’s Courts 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 provisions 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 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 the statutory jurisdiction”.

A similar situation arose in **Doshi Enterprises Ltd Vs Oriental Steel Fabricators & Builders NRB HCC 627/2001** where Mwera J, cited with approval by Odunga J in **Justus Kyalo Mutunga Vs Labh Singh Harnam (2012) eKLR** in the **Doshi** case (Supra) Mwera J was of the opinion that the filing of a case outside the jurisdiction of both parties contrary to the mandatory provisions of section 15 of the Civil Procedure Act does not make it a nullity because Section 15(b) of the Act adds that a court may give leave for the filing away from the local limits or the defendant may acquiesce in such institution.

Similarly, in **John Wekesa Maraka Vs Patrick Wafula Otunga**, opined that:

“I do not think Section 15 of the Civil Procedure Act was meant to apply to Resident Magistrates Court. Most probably it was intended to apply to District Magistrates’ Courts defined under Section 6 of the Magistrate’s Courts Act. Even if it were to be said that the provision of Section 15 were to apply to the Resident Magistrate’s Court, the position in my view will not change because the law is well settled that where there is a conflict of between two statutes, the provision in the latter statute would be deemed to have amended the earlier provision. The Magistrates Courts Act was enacted later than the Civil Procedure Act. It is therefore evidently clear that the Webuye Court had jurisdiction to entertain the suit. The learned Senior Resident Magistrate therefore misapprehended the point when she held that she had no jurisdiction to hear the matter. For the above reasons, the appeal must succeed.”

The learned judge in the above case overturned the Magistrate's order striking out the suit for want of territorial jurisdiction and restored the plaint and remitted it back to Webuye Resident Magistrate's Court for hearing and determination. I have no reason to depart from the above decisions of my predecessors and add that in this case, as the suit in Thika was not instituted before a subordinate court to the Resident Magistrate's court, and as the substantive law that confers jurisdiction on Magistrate's Court is the Magistrate's Courts Act Cap 10 and not the Civil Procedure Act, it is manifestly clear that Thika Chief Magistrate's Court has the territorial jurisdiction to hear and determine the suit as instituted.

And whereas I hold the position that in cases where a suit is instituted in a court that lacks jurisdiction to entertain the claim, the suit therefor is a nullity and incapable of being transferred to a court of competent jurisdiction, I disagree with both Miss Muhanda and M. Ngecho Advocate's submissions and contentious that the suit in question as filed in Thika Chief Magistrates Court, was filed in a court that lacked the geographical jurisdiction to hear and determine the same.

If there was serious opposition to this application. I would have dismissed it. However, I am inclined to grant it for reasons that both parties to the suit reside in Nairobi, including their advocates on record who ordinarily work for gain and practice law in Nairobi which, in my view, is administratively convenient and would save on costs for both parties to the suit, as envisaged in section 1A & 1B of the Civil Procedure Act.

In the end, therefore, the applicants notice of motion dated 9th January 2015 is allowed with the result that Thika Chief Magistrate's Court and Suit 936 of 2014 be and is hereby withdrawn and transferred to the Milimani Commercial Chief Magistrate's Court, Nairobi for hearing and final disposal. No orders as to costs.

Dated, Signed and delivered at Nairobi this 24th day of March 2015.

R.E. ABURILI

JUDGE

24/3/2015