



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO.373 OF 2015”B”

SIMON NJOGU KARIITHI.....1ST APPLICANT

PAUL NJOROGE KARITHI.....2ND APPLICANT

VERSUS

CLETI KEMBIO KIMAIYO.....RESPONDENT

RULING

By an application dated 8th September 2015 the applicants Simon Njogu Kariithi and Paul Njoroge Karithi seek from this court orders that:

1. This court do determine whether Milimani Nairobi CM’s Court has jurisdiction to hear and determine CM CC 6151 of 2014 and CM CC 6152 of 2014 and or in the alternative, this court do transfer CM CC 6151/2014 and CM CC 6152/2014 from Nairobi Milimani Chief magistrate’s court to Naivasha Chief Magistrates court.

The application is based on the grounds that albeit the applicants’ advocates believe that the said suits were instituted in the correct court pursuant to Section 14 of the Civil Procedure Act, the respondent’s advocate insists on raising a preliminary objection that the CM’s court at Nairobi has no territorial jurisdiction to hear and determine those suits, the cause of action having arisen along Nairobi-Naivasha road at Kinungi area. The application is supported by an affidavit sworn by Mr Kimani Githongo J advocate sworn on 8th September 2015 reiterating the above two grounds as summarized and on a more detailed account indicating that the defendant works at GSU Headquarters Nairobi in Ruaraka and that witnesses from his Insurance Company are in Nairobi. Further that nonetheless the court has powers under Section 18 of the Civil Procedure Act to withdraw suit from one court to another court of competent jurisdiction and to avoid unnecessary delay in the prosecution of the matter due to the preliminary objection it is fair that this court determines the two issues of transferability and or jurisdiction of the CM’s Court at Nairobi. The applicants annex copies of pleadings and documents filed in the lower court.

The application is opposed by the respondent’s counsel who filed very terse grounds of opposition this morning contending that the Milimani Commercial Courts lack jurisdiction to hear the stated suits and therefore the suits are a nullity, citing Nyarangi JA in **Owners of Motor Vessel ‘Lilian S’V Caltex Oil Kenya Ltd [1989] KL 191** and that a suit that is a nullity ab initio is incapable of being transferred to another court of competent jurisdiction.

In addition, that the entire suits in the lower court are based on quick sand and not even Article 159(2) of the Constitution can save the applicants as the suit was fatally defective and the act of transferring the said cases to another court would not only be bad but incurably bad. He relied on **Bonface Waweru Mbiyu V Nancy Njeri & Another Nairobi HC Miscellaneous Application 639/2005** (unreported) no copy supplied where it was held inter alia that “...where a matter is filed in a wrong court, such matter has no capacity to be transferred to any other court.....”

The respondent’s counsel further maintained that the application was misconceived, bad in law, untenable and an abuse of the court process. The parties advocates argued the application orally in court this morning with Mr Kimani relying entirely on the grounds and supporting affidavit urging the court to grant the orders sought in the affidavit whereas Miss Chepkurui holding brief for Mr Arusei relied entirely on the grounds of opposition filed this morning urging the court to dismiss the application.

I have urgently considered the application grounds, supporting affidavit and annexures. I have also considered the respondent’s grounds of opposition. The only issue for determination is whether Milimani CM’s court has jurisdiction to hear and determine the two cases CM CC 6151/2014 and CM CC 6152/2014 and if not, can this court order for transfer of the said suits to Naivasha Chief Magistrate’s Court for hearing and final determination.

The High Court is empowered under Section 18 of the Civil Procedure Act Cap 21 Laws of Kenya to withdraw and transfer any suit pending before a lower court to itself or to another court of competent jurisdiction to hear and determine it. However, the court can only transfer a matter which was in the first instance filed before a court that was competent to hear and determine the suit.

That is the spirit of Section 18 of the Civil Procedure Act and as was espoused in the case of **Omwoyo V African Highlands and Produce Ltd [2002] KLR 698 Ringera J citing Kagenyi V Musiramo & Another [1968] EA 48** by Sir Udoma CJ 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 been brought to a court which has jurisdiction to try it.”

In that case, the appellant had sought to transfer suit from the magistrates court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court.

In the instant case, however, the challenge relates to territorial or geographical jurisdiction of Milimani Chief Magistrates court to hear and determine a suit whose cause of action arose along Nairobi-Naivasha road.

Section 3(1) of the magistrate’s courts Act Cap 10 Laws of Kenya establishes the Resident Magistrates court which shall be a court subordinate to the High Court and shall be duly constituted when held by a Chief Magistrate, a Senior Principal Magistrate , a Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate’s court shall have jurisdiction throughout Kenya. Cap 10 is the substantive law that confers jurisdiction on the magistrates courts whereas the Civil Procedure Act, Cap 21 Laws of Kenya is the procedural law in civil disputes in civil courts Section 12 of the Civil Procedure Act provides that subject to pecuniary or other limitation prescribed by any law, suits shall be instituted where subject matter is situate. However, where suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limit of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of the two court (Section 14 Cap 21).

In addition, Section 15 of the Civil Procedure Act is clear that subject to the limitation aforesaid every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant or each of the defendants actually or voluntarily resides or carries in business or personally works for gain or have acquiesced in such institution of suit or the cause of action wholly or in part, arises . Under Section 17 of Cap 21, where a suit may be instituted in any one or more of the subordinate courts

and is instituted in one of those courts any defendant may apply or the court may on its own motion transfer it to another court and the High Court shall after considering objections shall determine in which of the several courts having jurisdiction the suit shall proceed.

Then Section 18 gives the High Court power to order, at any stage of the proceedings for withdrawal and transfer of any suit pending in any court subordinate to it and either try and dispose it or transfer it for trial or disposal to any court subordinate to it and competent to try it. What is clear from the above provisions of the Civil Procedure Act which are elaborate is that suits should be instituted either where the cause of action arose or where the defendant ordinarily resides or carries on business subject to pecuniary jurisdiction.

On the other hand, the Magistrates Court Act is clear under Section 3(2) that the Resident or Magistrates court has countrywide jurisdiction meaning that a suit can be instituted in any part of the Resident or Chief Magistrate's Court in any part of the Republic notwithstanding where the defendant resides or where the cause of action arose.

That being the case, what is required of this court is to understand the rationale for the Civil Procedure Act provisions that confine the filing of suits in court where the cause of action arose or where the defendant or defendants ordinarily or voluntarily reside, thereby tending to create a conflict in two pieces of legislation.

In my view, there is no conflict in the said Cap 10 Magistrate's Courts Act, and Cap 21 of the Civil Procedure Act. The two pieces of legislation were enacted at different times and whereas the Civil Procedure Act as earlier stated is a procedural law, the Magistrates Courts Act is the substantive law establishing the magistrates courts and conferring it with geographical as well as pecuniary jurisdiction to hear and determine disputes. It therefore follows that this court would adopt the provisions of the substantive law to be superior to the procedural law. Even if that were not to be the case, this court would employ the principles applicable in statutory construction among them, the rule of precedence that the statute that was enacted latter would have the effect of amending the earlier statute.

In this case, the Civil Procedure Act was enacted on 31st January 1924 whereas the Magistrates Courts Act was enacted on 1st August 1967.

In both cases, the dates given are the actual commencement dates. It therefore follows that in as much as Section 15 of the Civil Procedure Act commands the spirit that appears to be in the conflict with Section 3(2) of the Magistrates Courts Act, the Magistrate's Courts Act having been enacted later than the Civil procedure Act, is deemed to have amended the Civil Procedure Act. I am also persuaded by the holding by Ringera J (as he then was) in **Mohamed Sitaban V George Mwangi Karoki in HCCA 13/2002** where the Learned Judge in considering the perceived conflict between the above two provisions in the two statutes stated:

“ Section 3(2) of the Magistrates Courts Act provided 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 a Resident Magistrates Court. I am fortified in that view by the fact that the Magistrate's Court Act Cap 10 of the Laws of Kenya, was enacted in 1967 long after the Civil Procedure Act.

The legislative 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. Accordingly, I find that the Bungoma Court had jurisdiction to entertain the suit and the rule that suit filed in a court without geographical 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 had arisen in **Doshi Enterprises Ltd V Oriental Steel Fabrications & Buildres Nairobi HCC 627/2001** and Mwera J, with approval by Odunga J in **Justus Kyalo Mutunga V Labb Singh Harnam [2012] e KLR** agreed that the filing of a case outside the geographical 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 Civil procedure Act adds that a court may give leave for the filing away from the local limits or the defendant may acquiesce in such situation.

A similar situation arose in John **Wekesa Maraka V Patrick Wafula Otunga** (Sergon J). This court in **Ruth Gathigia Kamunya & Another V George Kimani [2015] e KLR** cited with approval all the above decisions and also agreed with Honourable Sergon J that Section 15 of the Civil Procedure Act was not meant to apply to Resident Magistrate’s Court. The learned Judge stated:

“I do not think Section 15 of the Civil Procedure Act was meant to apply to Resident Magistrate’s Court. Most probably it was intended to apply to District Magistrate’s Courts defined under Section 6 of the Magistrate’s Court, the position in my view will not change because the law is well settled that where there is a conflict between two statutes, the provision in the latter statute would be deemed to have amended the earlier provision. The Magistrate’s Courts Act was enacted later than the Civil Procedure Act. It 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.”

This court does subscribe to the principle of law that indeed, where a suit is filed in a court that lacks jurisdiction to hear and determine that suit, then the suit would be a nullity, as was held in the celebrated and often quoted decision of Nyarangi JA in **Owners of Motor Vessel “Lilian S” V Caltex Oil (K) Ltd [1989] KLR 1** that:

“Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction”

And that is the basis upon which the respondent herein is challenging this application and the suit pending before Milimani Chief Magistrate’s Court, wherein it is contended that the cause of action arose in Naivasha and therefore Milimani Chief Magistrate’s Court has no territorial jurisdiction to hear and determine the suit which is void ab initio hence, this court cannot transfer suit from a court that has no jurisdiction to another court that has jurisdiction as was held in **Bonface Waweru Mbiyu V Mary Njeri and Another Nairobi HC Miscellaneous Application 639 of 2005** cited by the respondent.

The respondent maintains that the suit in the lower court is grounded on quick sand and not even Article 159(2) of the Constitution can salvage it; and that this application is therefore misconceived bad in law, untenable and constitutes an abuse of the court process.

In my view, the respondent’s terse position is overtaken by events as per my exposition above. Furthermore, even if it was not the issue of the Resident Magistrate’s Court having countrywide jurisdiction in matters wherein it has competent pecuniary jurisdiction to hear and determine, I would still hold that Section 14 of the Civil Procedure Act is applicable as it has not been denied by the respondent herein, that he, at the commencement of the subject suit or currently actually and voluntarily resided or worked for gain within the jurisdiction of Milimani Chief Magistrates court in Nairobi and that he works at the General Service Unit. It follows that either way, the Milimani Chief Magistrate’s Court has the territorial jurisdiction in the suit since the defendant lives and personally works for gain within the jurisdiction of Milimani Chief Magistrate’s court. And for convenience of the parties to the said suit, bearing in mind the overriding objectives of the Civil Procedure Act as espoused in Sections 1A and 1B of the Civil procedure Act, it would be a traversery of justice to transfer the suit

from Milimani Chief Magistrates Court to Naivasha Chief Magistrate's Court.

The overriding objective of the Civil Procedure Act and the Rules made thereunder is to facilitate the just expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. The court is also called upon, in exercising its powers under the Act or interpretation of any of its provision, seek to give effect to the overriding objective specified in Subsection 1 of Section 1A of the Civil Procedure Act.

The court under Section 1B of the Civil Procedure Act is mandated to further the overriding objectives of the Act to handle all matters presented before it for the purpose of attaining the following aims:-

- a. The just determination of the proceedings;
- b. The efficient disposal of the business of the court;
- c. The efficient use of the available judicial and administrative resources;
- d. Timely disposal of the proceedings, and all other proceedings in the court, as a cost affordable by the respective parties; are
- e. The use of suitable technology.

Parties knock on the doors of justice seeking for justice which the courts must be ready to administer without undue regard to procedural technicalities and which justice must be administered expeditiously and without undue delay. This delay is a constitutional imperative that this court cannot escape. What is being challenged is territorial jurisdiction and the challenger has not disputed any facts laid bare that he works for gain and resides in Nairobi where it will be convenient and cost effective for him to attend the hearing. There is no justification why this case cannot be heard and determined by a Nairobi court. Furthermore, there is no merit in the challenge to the jurisdiction of the Nairobi Milimani Chief Magistrate's Court to hear and determine the suit. This court is conscious that parties to suits and particularly in running down claims do not enjoy the luxury of having sufficient resources to globe trot. Majority of plaintiffs cannot even afford to pay their advocated briefs, and for the defendant GSU Officer a public servant, the same situation is likely to apply, albeit he may be represented by his insurance company lawyer. To take this case to Naivasha is to deny justice to the parties and to cause them to incur more expenses unnecessarily, since even their respective advocates addresses provided to this court show that they practice law in Nairobi City County.

It is for those reasons that I would allow the applicant's 1st limb of the application dated 8th September 2015 and hold that the Chief Magistrates Court at Nairobi has jurisdiction to hear and determine CMCC 6151 and CMCC 6152 of 2014 filed at Milimani Nairobi Chief Magistrate's Court. I decline to grant the 2nd prayer for transfer being the alternative. I make no orders as to costs of this application as the applicant simply sought an opinion of this court and albeit opposed, the opposition is hereby appreciated for building jurisprudence of the court but rejected as lacking in merit.

Those are orders of this court.

Dated, signed and delivered in open court at Nairobi this 12th day of November 2015.

R.E. ABURILI

JUDGE