



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Application 27 of 2013

GRACE THOGORI KOMO..... APPLICANT
VERSUS
DAN NJAGI NDWIGARESPONDENT
R U L I N G

1. The Applicant has sought by this application (**notice of motion dated 23/01/2013**) an order to withdraw **Nairobi CMCC No. 6966 of 2012** from that court and transfer the same to this court for hearing and determination. The Applicant is the plaintiff in the suit while the Respondent is the defendant.
2. The application is made under **section 18(1)(b)(i)** of the **Civil Procedure Act, Cap 21 (the Act)**.
3. The grounds for the application appearing on the face thereof and in the supporting affidavit annexed thereto include –
 - (i) That the suit was filed in the lower court inadvertently.
 - (ii) That the lower court subsequently ruled, correctly, that it had no jurisdiction to deal with the matter.
 - (iii) That it is fit and proper that the suit be brought to the right court.
4. The Respondent has opposed the application by replying affidavit filed on 4th February 2012. The main point taken is that this court has no jurisdiction to transfer a suit from a court that had no jurisdiction in the first place to hear and determine it.
5. I have considered the submissions of the learned counsels appearing. Learned counsel for the Respondent relied upon the well-known Ugandan case of ***Kagenyi – vs – Misiramo & Another [1968] EA 48***. That case was adopted by our **Court of Appeal** in the case of ***Omwoyo – vs – African Highlands Ltd [2002] KLR 698***. The principle in the said Ugandan case has been followed consistently by the **High Court of Kenya** and the **Court of Appeal**.
6. The new **sections 1A and 1B** of the Act introduced the **overriding objective** of the Act and the **Civil Procedure Rules** made thereunder. That overriding objective is **to facilitate the just, expeditious, proportionate and affordable resolution** of the civil disputes governed by the Act. Parties to such proceedings and their advocates are under a statutory duty to assist the court to further that overriding objective.
7. The **Constitution of Kenya, 2010** introduced the constitutional principle that in exercising judicial authority the courts and tribunals shall be guided by the principle, among others, that **justice shall be administered without undue regard to procedural technicalities**.

8. The issue therefore has arisen whether, in light of the said overriding objective and constitutional principle, the law founded on the aforesaid Ugandan case is good law any longer. Should a suit be struck out merely because it is in the wrong court or should it just be transferred to the right court?

9. I had occasion to consider this very issue in *Nairobi HC Miscellaneous Civil Application NO. 357 of 2010, John Mwangi Karanja – vs – Alfred Ndiangui (Unreported)*. In a ruling dated 12th May 2010 I delivered myself as follows –

“It has been settled law for many years now that this court has no jurisdiction under section 18 of the Act to transfer a case from one subordinate court to another if the original court had no jurisdiction in the first place to hear and determine the suit. This jurisprudence was founded upon the well-known Ugandan case of *KAGENYI –VS- MUSIRAMO & ANOTHER [1968] EA 43* where it was held that whereas section 18 of the Ugandan Civil Procedure Act (which is identical to section 18 of our own Civil Procedure Act) gives the High Court a general power of transfer of all suits, which power may be exercised at any stage of the proceedings, even *suo motu*, by the court, an order for transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it.

This case has been cited with approval by many judges of this court, including myself. See for instance *LINDA ALAL OCHIENG’ & ANOTHER –VS- MOSES MAINA & ANOTHER, MILIMANI H.C. MISC. APPLICATION NO. 1088 OF 2005 (UNREPORTED)*.

The Court of Appeal also appears to have approved the principle of law involved. See the case of *KENYA SEED CO. LTD. -VS- JOSEPH BOSIRE, COURT OF APPEAL, NAIROBI CIVIL APPEAL NO. 72 OF 2002 (UNREPORTED)*.

With the enactment of sections 1A and 1B of the Civil Procedure Act, the time has perhaps now come for this matter of transfer of suits to be looked at afresh. These sections provide as follows:-

1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall 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) the timely disposal of the proceedings, and all other proceedings in the Court at a cost affordable by the respective parties; and*
- (e) the use of suitable technology.*

It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction.

If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated? What prejudice would any party suffer in that event? After all, the overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1))!

The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions....

To my mind therefore, the principle of law regarding transfer of cases under section 18 of the Civil Procedure Act originating in the Ugandan case of *KAGENYI -VS- MUSIRAMO*(*supra*) is no longer good law, particularly in light of sections 1A and 1B of the Civil Procedure Act, and should no longer be persuasive authority to this court. On my part I refuse to be persuaded by it.”

10. 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 and expeditious thing to do? Is it not to take the case to the right court?

11. I will in the circumstances allow the application. Nairobi CMCC No. 6966 of 2012 is withdrawn from the Chief Magistrate’s Court, Nairobi and transferred to this court for hearing and disposal. The Respondent shall have the costs of this application as it was the Applicant who went to the wrong court in the first place. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2013

H. P. G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY 2013