



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION**  
**MISCELLANEOUS CIVIL APPLICATION 7 OF 2011**  
**EDWARD MURANGIRI MUGAMBI..... PLAINTIFF**  
**VERSUS**  
**HABIB BANK LTD..... DEFENDANT**

**R U L I N G**

By this application, the Plaintiff seeks to transfer to the High Court for hearing and determination the case filed in the Chief Magistrate's Court at Kiambu as **Civil Case No. 342 of 2009**. The application is made by a Notice of Motion expressed to be taken out under Sections 3, 3A, 17 and 18 of the Civil Procedure Act, and Order 48 Rules 2, 3 and 4 and Order 50 Rule 1 of the Civil Procedure Rules.

The application is based on the grounds that the suit deals with Real Estate Property valued at over 3 million shillings. This sum exceeds the pecuniary jurisdiction of the Chief Magistrate' Court at Kiambu and therefore that court lacks jurisdiction to hear and determine the suit. The Plaintiff contends that it is in the interest of justice that the application be allowed as prayed.

During the hearing of the application, Mr Mwangi for the Applicant argued that this court's power to transfer a suit under Sections 17 and 18 of the Civil Procedure Act is not limited in any way. The suit was a commercial dispute and that there would be no prejudice if the suit is brought to this court. He submitted that under the new Civil Procedure Rules, the technicality of procedures is no longer the pre-occupation of the court. The court should therefore interpret these rules to ensure sustenance of suits. He therefore called upon the court to interpret Sections 17 and 18 in such a manner as to facilitate the transfer.

Opposing the application, Mr M N Mwangi for the Defendant submitted that there was no suit to be transferred. The suit was filed in a court without jurisdiction and that court directed that an application for transfer be made within 45 days. He also argued that the application seeking the transfer was filed out of time and submitted that the suit should be struck out. He therefore urged the court to dismiss the application altogether.

In reply, Mr Mwangi for the Applicant submitted that the application was filed within the time allowed by the court and urged this court to move in the direction of the new philosophy.

After considering the pleadings and the submissions, the main issues to be determined are whether this court has jurisdiction to transfer a suit from one court which is seized of it but has no jurisdiction to

another court which is vested with jurisdiction. A supplementary issue is whether the application for the transfer was filed on time.

It is common ground that the court in which the suit was filed lacks pecuniary jurisdiction to try and determine that suit. Where a matter is filed in a court which has no jurisdiction, then there is no suit, properly so called, which has been filed. Consequently, there is no suit, so to speak, to be transferred in this instance. In the Ugandan case of **KAGENYI v MISIRAMO & ANOR** [1968] EA 48, 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. Sir Udo Udoma, C.J., held in relation to Section 18 of the Uganda Civil Procedure Act, a provision which is *in pari materia* with Section 18 of our Act, that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. The case before this court is on all fours with that Ugandan case.

In the Kenyan case of **OMWOYO v AFRICAN HIGHLANDS & PRODUCE CO., LTD** [2002] 1 KLR 698, Ringera J., as he then, was faced with a similar situation. Taking a cue from the Ugandan case, the learned Judge held 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 place in a court which does not have the pecuniary and/or territorial jurisdiction to try it. The Nairobi Resident Magistrate's Court in which the suit had been filed did not have a jurisdiction to entertain the Plaintiff's suit as the lowest court of competent jurisdiction to hear it was the Kericho Magistrate's Court. That is the same case as in this matter.

Since the suit filed in the Chief Magistrate's Court in Kiambu was not competent, it was therefore non-existent and there is nothing to transfer from that court. And if there is nothing to be transferred, it matters not whether the application was filed within or out of time. The supplementary issue therefore does not arise.

One of the grounds upon which the application was based was that it is in the interest of justice that the same be allowed as prayed. It may be in the interests of justice but where a court has no jurisdiction to do something, it cannot do it merely because it is in the interest of justice. I share Justice Ringera's sentiments in **OMWOYO'S CASE** that the interests of justice are best served by upholding the law and not bending it to suit the individual circumstances of cases before the court.

For the above reasons, I find that the Plaintiff's application has no merit and it is thereby dismissed with costs to the Defendant.

**DATED and DELIVERED at NAIROBI this 26<sup>th</sup> day of April, 2012**

**L NJAGI**

**JUDGE**