

JUSTUS KYALO MUTUNGAPLAINTIFFS/APPLICANT

VERSUS

LABH SINGH HARNAM..... DEFENDANT/RESPONDENT

RULING

In this matter the applicant has invoked the Court's jurisdiction under Order 50(1) (sic) of the Civil Procedure Rules, sections 3A, 4 and 18(1) of the Civil Procedure Act seeking the Court's indulgence to transfer ***Kajiado SRMCC No. 250 of 2012*** between the parties herein to Nairobi Chief Magistrate's Court for hearing and determination as well as an order providing for costs.

The applicant's, from the supporting affidavit sworn by his advocate, **Ngugi Njuguna**, is that the said suit arose from an accident which, from the initial investigations was thought to have occurred along Nairobi-Namanga Road, Kajiado County. However, it was later realised that the accident in fact occurred along Mombasa Road on the Mombasa-Nairobi Highway opposite the Nation Newspapers Plant hence the Kajiado Senior Resident Magistrate's Court lacks territorial jurisdiction to hear the matter whose cause of action, according to the deponent, arose within Nairobi. As the plaintiff believed that the defendant's premises are situate in Kajiado, it is deposed that the filing of the suit in Kajiado was in good faith and that the orders sought herein are in the interest of justice and meant to save the court's time.. It is further contended that the grant thereof will not occasion any prejudice since the cause of action still exists.

The respondent, on the other hand oppose the application and they have done so through a replying affidavit sworn by **George Ombati**, its advocate on 27th June 2012. According to the deponent, although the suit was filed in the SPM's Court in Kajiado, the cause of action did not arise thereat and the defendant neither has its registered office nor a branch office in Kajiado. According to the deponent, the suit cannot therefore legitimately be transferred from the Court that had no jurisdiction to one of competent jurisdiction. Despite several promptings from the defendant on the issue the plaintiff, according to the deponent, never took any remedial measure hence he is guilty of laches. The deponent is hence of the view that the said suit should be struck out and/or dismissed. The supporting affidavit is also attacked by the deponent on the ground that the deponent of the supporting affidavit is not competent to depose to the matters of fact contained therein. It is further deposed that according to the said supporting affidavit the plaintiff's suit was filed before the said accident occurred. Since it is admitted that the said suit was filed in a Court which has no jurisdiction, it is deposed that the only cure open to the plaintiff is to withdraw the same with costs and filed a fresh suit in the appropriate court.

The application was prosecuted by way of written submissions. In his submissions, the plaintiff, apart from reiterating the contents of the supporting affidavit, states that the provisions under section 18(a) of the Civil Procedure Act, the Court has powers to transfer a suit from the subordinate court to another court which has jurisdiction. According to the applicant, section 18 has not placed a limitation on the jurisdiction of the High Court and hence the Court has the jurisdiction to transfer the said suit. Quoting the case of **Corner Holiday Inn Ltd vs. Andrew Kuria Wangunyu [2006] eKLR**, it is submitted that placing of limitations by the Court on the powers of the court to transfer suits will amount to clogging of determination of cases between parties who come to court for justice. According to the applicant, lack of jurisdiction by the Court at Kajiado is a good reason for the application to transfer the suit for reasons that the plaintiff could not determine the geographical boundary between Kajiado and Machakos at the time of filing the suit. The Court is further urged to promote the Constitutional provisions by not submitting him to procedural technicalities thereby denying him speedy justice.

On behalf of the respondent, it is submitted that since it is submitted that the Kajiado Court has no territorial jurisdiction, the suit was a nullity *ab initio*; that the plaintiff's erroneous belief that the defendant's premises are situated in Kajiado County is not a sufficient reason to revive a dead suit; that the applicant was given opportunity to remedy the error but did not take it up until the respondent applied

for the dismissal of the suit for lack of jurisdiction; and that the claim has been denied in its entirety. Relying on the cases of **Kagenyi vs. Musiramo & Another Misc Cause No 39 of 1967**; **Manandu Kitonga vs. Salim NBI HCCA No. 2 of 1976**; and **Savings and Loan Kenya Ltd vs. George Sirengo Masafi HCMA No. 1209 of 2006**, it is submitted that once a suit has been instituted in a court which lacks capacity to try it, it must be deemed to be a non-starter, it cannot be transferred.

The Civil Procedure Act, it is expressed in its preamble, is “An Act of Parliament to make provision for procedure in civil courts”. The Civil Procedure Act, therefore, is not the instrument that confers jurisdiction upon the subordinate courts since the jurisdiction of the subordinate courts is governed by Magistrates Courts Act which is “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 this Act was 1st August 1967 while that of the Civil Procedure Act was 31st January 1924. Even under the rules of statutory interpretation, if there was a conflict between the two pieces of legislation, and in my view there is none, the Magistrates Courts Act is deemed to have amended the Civil Procedure Act. Section 3(2) of the former expressly states that the Resident Magistrate’s Court shall have jurisdiction throughout Kenya.

The said provision was considered by **Ringera, J** (as he then was) in the case **Mohamed Sitaban vs. George Mwangi Karoki Civil Application No. 13 of 2002** in which the learned Judge expressed himself as follows:

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

A similar scenario prevailed in **Doshi Enterprises Limited vs. Oriental Steel Fabricators & Builders Nairobi (Milimani) HCMA No. 627 of 2001** in which **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) thereof adds that a Court may give leave for the filing away from the local limits or the defendant may acquiesce in such institution.

In the present case, the suit sought to be transferred was instituted in a Senior Resident Magistrate’s Court, a Court not subordinate to the Court of Resident Magistrate. On the authority of the above decisions, it is manifestly clear that the Kajiado Court is clothed with the territorial jurisdiction to hear and determine the suit. Whereas I agree that in cases where a case is filled in a Court that has no jurisdiction to entertain the matter, the suit is thereby rendered a nullity, I do not agree with both counsel in this suit that the suit in question was filed in a court with no territorial jurisdiction to try it.

Since there is no serious opposition to the application other than on the issue of jurisdiction, I am inclined to allow the application Accordingly, the Notice of Motion dated 12th June 2012 is allowed with the result that **Kajiado SRMCC No. 250 of 2010** is hereby transferred to the Chief Magistrate’s Court, Nairobi for hearing and final determination.

Ruling read, signed and delivered in Court this 30th day of July 2012.

G.V. ODUNGA

JUDGE

In the absence of the parties.