



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Miscellaneous Application 255 of 2012**

**JOSEPH MUCHOKI KINJA.....1<sup>ST</sup> APPLICANT**  
**SAMUEL NGUMI NJOROGE.....2<sup>ND</sup> APPLICANT**  
**SIMON CHEGE P N.....3<sup>RD</sup> APPLICANT**  
**JOHN ITUME KIRURI.....4<sup>TH</sup> APPLICANT**  
**All suing as the officials of Emmanuel Pentecostal Church of Kenya Mung'aria**

**VERSUS**

**SIMON NGUGI KAMAU.....1<sup>ST</sup> RESPONDENT**  
**JOSHUA N NG'ANG'A.....2<sup>ND</sup> RESPONDENT**  
**NICHOLAS MUREITHI WAMBUI.....3<sup>RD</sup> RESPONDENT**  
**PAUL NJOROGE.....4<sup>TH</sup> RESPONDENT**  
**FRANCIS NJOROGE.....5<sup>TH</sup> RESPONDENT**  
**ZACHARY NJUGUNA.....6<sup>TH</sup> RESPONDENT**  
**REGISTRAR OF SOCIETIES.....7<sup>TH</sup> RESPONDENT**

**RULING**

The applicants herein have moved the Court by way of a Notice of Motion dated 19<sup>th</sup> April 2012 seeking primarily orders that Thika Chief Magistrate's Civil Suit No. 551 of 2011 be transferred to this Court for trial and determination.

The application is supported by an affidavit sworn by **John Muchohi Kinja** on behalf of the other applicants on 19<sup>th</sup> April 2012. According to the deponent, during the proceedings in the said suit, it became necessary to join the Registrar of Societies as a party to the proceedings as some orders were touching on registration and removal of officials. On perusal of the documents and the fact that the Registrar has come on record and has filed a replying affidavit it is, according to the applicants, only fair

and just that the matter be heard and determined by this Court. It is further sought in the affidavit that the requisite notice under the Government Proceedings Act be dispensed with.

On being served with the application the 1<sup>st</sup> to the 6<sup>th</sup> respondents (hereinafter referred to as the respondents) filed a replying affidavit sworn by **Simon Ngugi Kamau** on 8<sup>th</sup> June 2012 in which it is deposed that the application is a non-starter, fatally defective and an abuse of the process since the court has no jurisdiction to transfer the suit which according to the said respondents is a nullity hence the only option available is to withdraw the same. According to the said respondents this application is intended to clothe the suit with jurisdiction when there was none. It is further deposed that the provisions of the Government Proceedings Act being mandatory in nature cannot be waived. According to them the cause of action arose in Kandara within Thika Law Courts and it would be unduly increasing the cost of litigation to have the witnesses travel to Nairobi for the hearing of the suit.

The application was not opposed by the 7<sup>th</sup> respondent.

According to the applicant's submissions', the suit was initially filed against the 1<sup>st</sup> respondent seeking to restrain him from ordaining pastors of Emmanuel Pentecostal Church of Kenya, Mung'aria. Subsequently it became necessary to join the said Registrar since there were counter applications affecting the said registrar. Since section 108 of the Societies Act describes the court as the High Court while section 18 thereof provides that any dispute be referred to the High Court, it is submitted that the Court has jurisdiction under section 18 of the Civil Procedure Act to transfer the said suit to the High Court. In support of their submissions the applicants have referred to **Mwangi Mwaura vs. Jonah Nganga Mwaura Nyeri Misc. Application No. 56 of 2010; Private Development Company Limited vs. Rebecca Ngonyo & Another;** and **Charles Wainaina Njehia vs. Barclays Bank of Kenya.**

In the 1<sup>st</sup> to 6<sup>th</sup> submissions, it is contended that although section 18 of the Civil Procedure Act donates to the court the discretion to order a suit to be transferred, it is well settled principle that before a court can order transfer of a suit the suit to be transferred must be competently before the court in that the Court must have been vested with the jurisdiction to hear and determine the suit. The respondent in support of this line of submissions refer to **Mwangi Mwaura vs Joshua Ng'anga Nyeri HCMA No. 56 of 2010.** In this case it is submitted by the applicant that the lower Court has no jurisdiction to hear and determine the case before it and are seeking for the waiver of the requirement for compliance with section 13A of the Government Proceedings Act. It is submitted that under section 18 of Cap 108, the only time a dispute goes to the High Court is when the Registrar has cancelled the registration of the society as a result of the failure by the members to resolve the dispute. It is submitted that in the present case, the Registrar has neither cancelled the registration of Emmanuel Pentecostal Church of Kenya nor made an order under the aforesaid section 18 and therefore the matter before the lower court is competently before it. It is the respondent's submission that the section does not specifically state that the proceedings be instituted in the High Court and the present application is merely meant to delay the proceedings in the lower court and increase costs of litigation by the respondents who being residents of Kandara in Muranga will be highly prejudiced if the matter is transferred to the High Court. On the issue of section 13A of the Government Proceedings Act, it is submitted that the applicants cannot cure the failure to comply therewith by transferring the suit to the High Court. In conclusion, it is submitted that no sufficient cause for the transfer of the suit has been shown and the application ought to be dismissed with costs.

It is trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as "transfer". In other words, courts can only transfer a cause whose existence is recognised by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further. That is the law.

As was held by **J B Ojwang, J** (as he then was) in the **Boniface Waweru Mbiyu vs. Mary Njeri & Another Nairobi HCCC No. 639 of 2005:**

**“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.**

However, whether or not the Court has jurisdiction may depend on the facts and circumstances of a case. Where a cause of action, for example arises from injuries sustained in a road accident circumstances may arise during the course of the proceedings which tend to show that, taking into account the nature of the injuries sustained, the amount of damages likely to be awarded may exceed the jurisdiction of the subordinate court with the result that were that suit to be heard and determined in that court the outcome thereof is likely to occasion a miscarriage of justice. In such cases the suit may properly be transferred to the High Court since the value of the subject matter was not determinable at the time of the filing of the suit and hence it cannot be said that the subordinate court lacked jurisdiction *ab initio*. In other words the damages are at large. I therefore associate myself with **Koome, J** (as she then was) in **Jane Wachira Kamau vs. Musa K. Kipkios [2006] eKLR** in which the learned Judge held that where the substratum of the case changes during the pendency of the suit due to the acts of the respondent, which deprives the lower court of the jurisdiction, the Court has power to transfer the suit. It was precisely for the same reason that **Ouko, J** in **Rachel Isanda vs. Jane C Cheruiyot & Another Nakuru HCMCA No. 36 of 2009** invoked the provisions of section 18 aforesaid to transfer a suit from the subordinate Court to the High Court.

In the present case it is alleged that at the time the suit was filed the lower court had jurisdiction. This state of affairs changed when the Registrar of Societies was joined as a party to the suit since the suit could no longer be entertained by the Subordinate Court. Although the respondents’ contention is that a case filed in a Court without jurisdiction is incapable of being transferred, in their submissions they seem to admit that the lower court has jurisdiction and they do not see why the suit ought to be transferred. They however take issue with the existence of a cause of action before the registration of the society is cancelled. In other words they contend that the suit would be prematurely brought to the High Court. Whether or not the case would be premature is not for this Court in this application to determine. If it turns out that the suit is premature and that there is no cause of action disclosed against the respondents at this stage, nothing would prevent the respondents from taking up the issue. The circumstances herein are, in my view, distinguishable from cases where the court lacks jurisdiction *ab initio* in which case the same is a nullity and is incapable of being transferred.

On the issue whether the respondents stand to be prejudiced by the transfer of the said case, it is my view, and it has been held that there is one panacea which heals every sore in litigation and that is costs. Seldom, if ever, do you come across an instance where a party has made a mistake in his pleadings which has put the other side to such disadvantage or that it cannot be cured by the application of that healing medicine. See **Waljee’s (Uganda) Ltd vs. Ramji Punjabhai Bugerere Tea Estates Ltd [1971] EA 188.**

It is therefore my view and I so find that the circumstances of this case merit transfer to the High Court and accordingly the Notice of Motion dated 19<sup>th</sup> April 2012 is allowed. The costs of the application are awarded to the 1<sup>st</sup> to 6<sup>th</sup> respondents.

However, the applicants also purported to apply for dispensation of service of the notice required under the Government Proceedings Act. Suffice it to state that there was no such application in the Motion itself. A party cannot pray in affidavit an order not sought in the application itself. Accordingly that prayer, if one can call it a prayer, is incompetent and is disallowed.

Dated at Nairobi this 16<sup>th</sup> day of November 2012

**G.V ODUNGA**  
**JUDGE**

Delivered in the presence of

Mr Murage for the Applicants

Miss Kariithi for Mr Gachau for the 1<sup>st</sup> to 6<sup>th</sup> Respondents