

Procedure Act can only be made **“from one court of competent jurisdiction to another court of competent jurisdiction.”** I agree with the learned judge because Jurisdiction is not just a simple matter of procedure but a substantive and fundamental issue that clothes the court with the legality to accept and try a dispute. The pecuniary, territorial or other jurisdiction conferred in a court cannot therefore be remedied by a removal and transfer to another court. Sir Udo Udoma in Kagenyi -vs- Musiramo [1968] E.A. 43 at 46 stated as follows in addressing this question;

“In their commentary at p 131 on the provisions of section 24 of the Indian Code under the title “Jurisdiction”, the editors of MULLA state quite categorically and without dubiety that the section gives a general power of transfer of all suits, appeals or other proceedings which may be exercised at any stage of the proceeding even suo motu by the court without any application by any party. The editors further state that an order for the transfer of a suit from one court to another cannot be made under section 24 of the Indian Code, unless the suit has been in the first instance brought in a court which has jurisdiction to try it; and that if, after the transfer is made, the parties without objection join issues and go to trial upon the merits, the order of transfer cannot be subsequently impeached. I am of the opinion that the above commentary by the editors of MULLA is sound and unimpeachable. This point was considered by the Privy Council in Ledgard and Another-vs- Bull ([1886] A.C. 648), which was an appeal from the High Court of the North-West-Province of Bengal. The case itself concerned patents and both the High Court of Bengal and the Privy Council had to deal and construe the Patent Law Amendment Act 1852, section 41 as to the sufficiency of particulars of infringement. Although, in the course of its judgment, the Privy Council overruled the High Court, that the particulars given by the plaintiff were a sufficient compliance with the Act, it nevertheless dismissed the appeal and the suit for want of jurisdiction in the High Court to try the case.”

6. In dismissing the Application for transfer of the suit the learned judge stated as follows:-

“In the result, this application is refused. It is dismissed because the subject matter of the application on the admission and showing of the applicant having been instituted in a court without jurisdiction, namely, the court of a magistrate grade II, Bukoto, Kabula, it is incompetent for this court to transfer the same to the High Court for hearing and determination. Costs of this application to the respondents. Order accordingly.”

7. Before the present Application suffers the same fate, counsel for the Applicant raised two other issues which I should deal with; the first was with regard to order VII Rule 9 of the Civil Procedure Rules. That Rule was not invoked in the present Application but nonetheless was referred to in submissions. To my mind **“transfer of a suit”** is quite different from **“return of a plaint”** which is the basis for Order VII Rule 9 aforesaid. The only common factor in both and with relevance to the present Application is that no suit can be transferred nor can a Plaint be returned if the original court had no jurisdiction to receive it in the first instance.

8. Secondly and as a corollary to the above, counsel referred me to **L.N. 300/2007**;(Practice Directions Relating to the filing of Suits, Applications and References in Proper Courts.) The Directions were issued by the Hon. the Chief Justice pursuant to powers conferred on him by section 65(3) of the Constitution and in pursuance to sections 11 to 18 of the Civil Procedure Act. One of the directions is that where any suit is filed in the wrong court, then the court may return the Plaint under Order VII Rule 9 aforesaid **“without prejudice to any other powers that it may possess under the law to strike out the pleadings as an abuse of court process.”** The Directions did not in any way change the law as I have expressed above neither did it confer jurisdiction where none by law exists.

9. Lastly, the Application is a cunningly crafted one to escape the rigours created by the law relating to jurisdiction. Mercifully for the Applicant, limitation of time has not caught up with her claim and she can still file a fresh suit in a court clothed with proper jurisdiction.

10. As for the Application dated 4.10.2007, its death knell has been sounded and it is hereby dismissed with costs to the Respondents.

11. Orders accordingly.

Dated and delivered at Machakos this 20th day of February, 2008

ISAAC LENAOLA

JUDGE