

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Misc Civ Appli 540 Of 2004

BISHOP CHRISTOPHER NDUNGU

(Suing as the trustee Streams of Life Ministries Church).....APPLICANT

VERSUS

ANDREW ABUNGU alias CHRISTOPHER ABUNGU OUMA

(Sued as Trustee Bethel Fellowship International Church).....RESPONDENT

RULING

The applicant made an application under the provisions of **Section 3A and 18 of the Civil Procedure Act** seeking to have Nakuru Chief Magistrate's Court Civil Case No. 2021 of 2004 to be transferred to the Busia Chief Magistrate's Court for hearing and final determination. The grounds in support of the application are that the applicant is contending that he filed the suit at Nakuru in person without the benefit of advice from counsel. He later learnt that the court which was properly seized with jurisdiction was the Busia Chief Magistrate's court. He therefore urges this court to allow his application to transfer the said suit to Busia Chief Magistrate's court. The application is supported by the annexed affidavit of Bishop Christopher Ndungu. The application is opposed. The respondent has filed grounds in opposition to the said application. He has stated that this court lacked jurisdiction to transfer a case from one subordinate court to another if the suit was filed in the first court without jurisdiction. He stated that the application being bad in law, should be dismissed with costs.

At the hearing of the application, I heard the submissions which were made by Mr. Gai, learned counsel for the applicant. He submitted that this suit should be transferred from the Chief Magistrate's Court Nakuru to the Senior Resident Magistrate's Court Busia. He submitted that the parcel of land which was the subject matter of the suit was in Busia District which is within the territorial jurisdiction of the Senior Resident Magistrate's Court Busia. He further submitted that although the Nakuru Chief Magistrate's court had jurisdiction to hear and determine the case due to the fact that the agreement for the sale of the said parcel of land was entered into in Nakuru, it would be just and proper if the said suit is transferred to the Busia Senior Resident Magistrate's Court for hearing and final disposal. He submitted that the applicant had filed the suit at the Nakuru Chief Magistrate's Court in good faith. Mr. Gai submitted that **Section 18 of the Civil Procedure Act** empowered this court to transfer a suit from one court to the other without any restriction.

Mr. Karanja for the respondent opposed the application. He submitted that the applicant ought to have filed the suit before the Busia Senior Resident Magistrate's Court instead of filing it at Nakuru Chief Magistrate's Court. He submitted that under the provisions of **Section 12 and 15 of the Civil Procedure Act**, the Nakuru Chief Magistrate's Court lacked jurisdiction to hear a suit involving land which is in Busia District. He therefore submitted that this court could not transfer a suit from a court which lacked jurisdiction to a court which has jurisdiction. Mr. Karanja relied on several decided cases in support of his submissions. He urged this court to dismiss the application with costs.

I have considered the rival arguments which were made before me by Mr. Gai and Mr. Karanja. The issue for determination by this court is whether this court has jurisdiction to grant the order of transfer sought. It is conceded by both parties that the applicant ought to have filed in the first place, filed the suit now pending before the subordinate court at Nakuru at the Busia Senior Resident Magistrate's Court. This is because the subject matter of the suit is land which is in Busia District (*See Section 13 of the*

Civil Procedure Act). The applicant however filed the said suit before the Chief Magistrate's Court Nakuru. The said court lacked territorial jurisdiction to hear and determine the said suit.

The applicant has realized his mistake and would like to make amends by applying to this court to transfer the said suit from a court without jurisdiction to a court which has jurisdiction. The applicant has submitted that this court has jurisdiction under **Section 18 of the Civil Procedure Act** to transfer any suit from one subordinate court to the other. The respondent on the other hand has submitted that this court lacks jurisdiction to grant the said application by the applicant to transfer the suit from the Chief Magistrate's Court Nakuru to the Senior Resident Magistrate's Court Busia.

The issue in dispute in this application was considered by Ringera J. (as he was then) in the case of **Omwoyo –vs- African Highlands & Produce Co. Ltd. [2002]1KLR 698**. He stated at page 699 as follows:

“That being the case, the sole issue for determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. (In) Kagenyi –vs- Misiramo & Anor [1968] EA 48, Sir Udoma Udoma CJ held in relation to section 18 of the Uganda Civil Procedure Act – a provision which is in pari materia with section 18 of our code – 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. In that case 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. And in the very early case of Mendonca –vs- Rodrigues [1906-1908] 2 KLR 51, Hamilton J. held that the High court did not have power to order a transfer of a suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local jurisdiction of the lower court in which it had been filed. The principle of law to be gleaned from this authorities is 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 pecuniary and/or territorial jurisdiction to try it.”

I agree with the reasoning of the court in the above case. The applicant cannot apply to transfer a suit which was filed in a court which had no jurisdiction to a court which has jurisdiction. The applicant cannot purport to cure a mistake which he made when he filed the suit in a court which lacked jurisdiction. It is no excuse that the applicant, being a layman, had filed the said suit because he was not aware of the court in which he was to file the suit.

In the circumstances of this case, I agree with the submissions made by the respondent that this court lacks jurisdiction to transfer the said suit from the Chief Magistrate's Court Nakuru to the Senior Resident Magistrate's Court Busia. **Section 18 of the Civil Procedure Act** does not give this court unfettered discretion to transfer suits from one subordinate court to the other. Before this court can order the said transfer, it must be satisfied that the court where the suit was first filed had jurisdiction to hear and determine it.

The application filed by the applicant therefore lacks merit and is hereby ordered dismissed with costs to the respondent.

DATED at NAKURU this 31st day of March, 2006.

L. KIMARU

JUDGE