



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1237 of 2005**

**NICHOLAS AWANDO ..... PLAINTIFF**

**VERSUS**

**TECHLA WANZUU ..... DEFENDANT**

**RULING ON**

**A PLELIMINARY OBJECTION**

1. The notice of the Preliminary Objection states:-

“1. That the suit was first filed in a court without jurisdiction to hear and determine the suit.

2. The subsequent transfer of the suit to this court does not cause the effect of filing a suit in a court without jurisdiction in the first instance.”

3. It shall therefore be sort that the suit transferred to this court and any application brought there under be struck out with cost.

II: Background of the Preliminary Objection

2. On 17.6.04, it is alleged that one Erick Otieno Arrando (now deceased) was walking along commercial street in Nairobi when an agent or servant of Techla Wanzuu Munyao (the defendant herein) run down the deceased thereby sustaining him fatal injuries.

2. On the 20.12.04 Nicholas Awado Otieno filed suit as the father and legal representative of the estate of Erick Otieno (deceased)

This suit was filed at the High of Kenya at Kisumu.

4. The defendant entered appearance and filed defense in which he/she noted the various mistakes and errors in the plaint. Eg That the plaintiff was described as having been knocked down and died and yet the plaintiff is alive and has infact filed this suit. Nonetheless what is more relevant is the defence Para 20 dated 20 January 2005 that states:-

“The Jurisdiction of this Honourable court is totally denied. The cause of action arose in Nairobi within the jurisdiction of the High Court at Nairobi and as such this should have been filed at Nairobi. The

defendant hereby gives notice that it shall apply for the suit to be dismissed on the grounds that the High court at Kisumu does not have jurisdiction to hear this suit.”

5. On the 23 September 2005, the then advocate for the defendant filed a notice of motion dated 6 September 2006 seeking orders of the court at Kisumu to:-

“Transfer this suit for hearing before the High Court of Kenya at Nairobi”

The application was filed under section 3A C.P.A. and section 15 C.P.A. Order L r1 and order XLVI rule 5 (2) CPR.

6. When the parties appeared before the trial judge for hearing an order was made that:-

“The matter be transferred to Nairobi High Court for hearing and determination” Let the parties make necessary arrangement to expediate the hearing of the suit by the High Court Nairobi”

7. The suit was transferred to the High Court of Kenya at Nairobi on the above orders. The defendant filed a notice of change of advocate to act for them in Nairobi. The plaintiff in turn applied to amend his plaint which amendment was agreed to bring the parties with the leave of the court on 25 July 2006 to reflect that it was the deceased and not the plaintiff (administrator) who had been run down.

8. On the date fixed for hearing of this suit of 4.12.06, the advocate for defendant raised the Preliminary Objection that is the subject matter of this suit. His reasoning being that if the plaintiff had filed suit in Kisumu and if in the first instance the suit so filed was filed in the wrong court having no jurisdiction then you cannot transfer a case to another court as this would amount to an illegality.

9. The advocate for the defendant argued that the High Court has inherited jurisdiction and therefore the suit is correctly before the High Court of Kenya Nairobi.

10. The advocate for the defendant was relying on the case law of Kagenyi v Musiramo & Another (1968) E.A. 43.

In the above case a suit was filed in the subordinate courts. On realizing the trial magistrate had no jurisdiction to hear the suit, the plaintiff through his advocate applied to transfer the suit to the High Court which had more monetary and enhanced value. The High Court held that where the suit was first filed in a court having no jurisdiction you cannot then transfer the said suit to the High Court.

### III Issue in question

11. The issue in question herein is that of the jurisdiction of the High Court. In the above case law of Kagenyi v Musiramo & Another (supra) it was dealing with section 18(u) of the Civil Procedure Rules as to the transfer of the suits. This position as held in the decision of that case is correct.

12. What we are dealing in this case is section 15 of the Civil Procedure Act that reads:-

“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local terms of whose jurisdiction

a) \_\_\_\_\_

b) \_\_\_\_\_

c) \_\_\_\_\_

Explanation: (1) \_\_\_\_\_

(2) \_\_\_\_\_

(3) \_\_\_\_\_

Illustrates (a) (i)

(b) (ii)”

13. This section 15 applies to the subordinate courts only and not the High Court of Kenya. It means that where a suit is filed it should as far as possible be within the court nearest to where the cause of action arose. This through, the magistrates courts, from the Resident Magistrates, may have jurisdiction all over Kenya they are precluded to hear cases that is not within their vicinity. In the recent case law of Ngari Kanyoro v Patrick Njunia Kariithi Nairobi Hccc780/98. The cause of action arose in central province where the plaintiff cyclist was alleged to have been involved in an accident with a motor vehicle. The suit was filed at the Nairobi High Court of Kenya. During the course of further pleading/proceeding being filed seeking to dismiss he suit for want of prosecution the advocate for the plaintiff attempted to transfer the suit to the subordinate courts at Nairobi. This application was withdrawn when the advocate for the plaintiff noted the subordinate courts at Nairobi had no jurisdiction to hear the suit as they lacked jurisdiction under section 15 of the Civil Procedure Act. That the case should be transferred to the course within central Province say Karatina or Nyeri subordinate courts.

The advocate withdrew her application for transfer.

In the case law of:-

Sameul Kenneth Odendaal & the Official Receiver V Richard Gray (1960) EA 263

The then Supreme Court (our High court today) sitting in Nairobi made orders of a decree for the sale of a mortgage property situated in Naivasha district to n appeal to the court of appeal, one of the issues the arose was whether the supreme court sitting a Nairobi had jurisdiction over suits in respect of land at Naivasha but the said suit filed in Nairobi whether therefore the suit be filed at the Supreme Court at Nakuru and not Nairobi.?

It was held in the said case that he was only one Supreme Corut in Kenya with Jurisidciton through out Kenya. The Supreme court sitting at Nairobi “had jurisdiction through out Kenya to make a decree for the sale of property situated in the Naivasha District.”

The said court of appeal relied on the case law

Riddlenbager & Another V Robson & Others (158) EA 375

That dealt with the same issue. In the said case it was dealing with libel action brought In Kenya alleging publication elsewhere an he issue f services arose. The question then arose of jurisdiction. As to whether the Supreme Court had jurisdiction to hear the case where a foreign company and foreigners are concerned.

It was held that jurisdiction is conferred not only over matters but also over persons who are within the closing including strangers and foreign

“That Section 15 only applies to subordinate courts.”

In Kenya as well he stated below the Supreme Court is only one. In India they have several High Courts.

14 Seciton 15 therefore applies to the magistrates courts only. It does not apply to the High corut. This is because he High Court has limited jurisdiction. In India, the seciton 15 that applies to the

jurisdiction restricts the suits being filed to the High Court and as such you cannot file a suit if the cause of action arose in a different area. This provision does not apply to Kenya although the rules committee may wish to consider this in order to stop litigants going to various High courts in the country to obtain orders and or fishing for judges. A good example heard only by the High court and not the magistrates court who have no jurisdiction to hear adoption cases. Litigants would go to any High Court in Kenya to file suit because section 15 does not restrict the litigants as to when to file suit as it does the magistrates courts.

15. The High Court of Kenya at Kisumu therefore had jurisdiction to hear suit and had jurisdiction. What the High Court at Kisumu did not have powers to do is that of transferring a suit. There is no power by a High court judge to transfer a High Court case from one High Court to another High court. The only situation this would arise was during the summons for directions state when the parties would state the place and time they wished for suit to be heard (see decision of Bosire J Nairobi on this point). The judge or deputy registrar would therefore indicate the High Court where such case would be heard. The other situation is that of consolidation of the suit with another in a different High Court or magistrates courts. This again would be done during summons for directions. Unfortunately, this case load management and pre-trial proceeding were repealed by the rules committee as not being necessary. As such parties do not have an option to seek directions as to the place and time of hearing.

16. What therefore is an illegality is the transfer of the suit to Nairobi High Court for hearing; yet if it was a transfer to the magistrates courts from the High Court at Kisumu section 18 would apply which powers the court has. If the said transfer is from the subordinate courts to the High court on the question of pecuniary value then the case law of Kagenyi v Musiramo & Another (supra) would apply meaning that such suit would not be transferred by the court on the question of jurisdiction.

I would accordingly uphold this Preliminary objection. The transfer from one High court to another is not provided for by the law but in the situation that we are in our rules it would not cause any prejudice to the parties. Nonetheless this suit stands struck off with no orders as to costs.

Dated this 5<sup>th</sup> day of November 2006 at Nairobi.

M.A. ANG'AWA

JUDGE

A. Awino for Awino & Co. Advocates for the plaintiff

T.O. Okundi for Okundi & Co. Advocates for the defendant