



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oduor v Ofula (Environment and Land Miscellaneous Application  
E006 of 2021) [2022] KEELC 96 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 96 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2021**

**AY KOROSS, J**

**JUNE 2, 2022**

**BETWEEN**

**JOAN ATIENO ODUOR ..... APPLICANT**

**AND**

**MAURICE OFULA ..... RESPONDENT**

**RULING**

**Applicant's Case**

1. Within the provisions of Article 159 of the *Constitution*, Sections 1A, 1B, 3A and 18 of the *Civil Procedure Act*, the applicant filed a motion dated 7/12/2021 in which she sought the following reliefs;
  - a. The applicant's suit in Siaya ELC SPM No.2021 pending between the parties be transferred to Ukwala Principle Magistrates' Court for hearing and determination.
  - b. Costs be in the cause
2. The motion was supported by the grounds set out in the motion together with the affidavit of the applicant's counsel Moses J.A. Orenge. His main ground was that the respondent had filed a notice of preliminary objection challenging the territorial jurisdiction of the subordinate court and it would be in the interests of justice if the suit in the subordinate court was transferred to Ukwala Principal Magistrates' court for hearing and determination.

**Respondent's Case**

3. The respondent filed grounds of opposition dated 10/12/2021 on three grounds;
  - a. The motion was incompetent, an abuse of the court process and a waste of judicial time because the suit in the trial court offended the provisions of Section 14 and 15 of the *Civil Procedure Act*.



- b. The court lacked jurisdiction to transfer a suit originating from a subordinate court with no jurisdiction.
  - c. There was a ruling pending in the subordinate court.
4. Together with the grounds of opposition, he filed a list of authorities in which he annexed the decision of *Gaikia Kimani Kiarie v Peter Kimani Kiramba* [2020] eKLR. When this matter came before me on 8/3/2022, the respondent informed the court that the lower court had struck out the suit for want of jurisdiction. This court directed him to file an affidavit availing a copy of the ruling; which he did.

### **Analysis and Determination.**

5. I have carefully considered the motion, grounds in support, supporting affidavit, grounds of opposition and the respondent’s replying affidavit and in view of the determination of the lower court that it lacked jurisdiction to entertain the suit, there is nothing left to transfer and as it stands the motion that is the subject of this ruling has been overtaken by events.
6. However, I am of the humble opinion that it would prudent for this court to address its mind on whether it has jurisdiction to transfer a suit from one subordinate court to another if the court of first instance lacked jurisdiction.
7. The statutory underpinning for transfer of suits by the high court and courts of equal status is Section 18 (1) of the *Civil Procedure Act* which provides as follows;
- “On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—(a)transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (b)withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter; (i)try or dispose of the same; or (ii)transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (iii)retransfer the same for trial or disposal to the court from which it was withdrawn”.
8. By virtue of this provision of law, could this court transfer the suit from Siaya Senior Principle Magistrates’ Court to Ukwala Principle Magistrates’ Court? My answer is in the negative. I say so because the subordinate court in the first instance did not have jurisdiction to handle the matter.
9. It is settled law that jurisdiction is everything and without it, the court must down its tools because the proceedings before it is a nullity and there is nothing left to transfer. The Court of Appeal rendered itself on this principle as follows in the case of *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tours & Travel* [2016] eKLR:
- “In numerous decided cases, courts, including this court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.
10. This position of law has been upheld in a line of court decisions including that of the Court of Appeal of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] eKLR which cited with approval the case of *Joseph Muthee Kamau & another v David Mwangi Gichure &*



*another* [2013] eKLR. This decision went further and gave recourse to litigants who found themselves in the unfortunate circumstances of filing suits in the wrong court as follows;

“If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction”

11. The upshot is that it is my finding that the motion has been overtaken by events and even if it had not of which it has, I would have found the motion unmeritorious. The respondent filed responses to the motion and because it is trite law that costs follow the event, I award him costs.
12. Ultimately, I make the following disposal orders: -
  - a. a. The notice of motion dated 7/12/2021 is hereby dismissed with costs.
  - b. b. Costs to the respondent.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 2<sup>ND</sup> DAY OF JUNE 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

*2/6/2022*

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Mr. Ochanyo for the respondent

N/A for the applicant

Court assistant: Ishmael Orwa

