



**Mukolwe v Musebe (Miscellaneous Application E164 of 2024)  
[2024] KEHC 9093 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9093 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
MISCELLANEOUS APPLICATION E164 OF 2024**

**DK KEMEL, J**

**JULY 23, 2024**

**BETWEEN**

**EMMA MUKOLWE ..... APPLICANT**

**AND**

**NOEL KADOGO MUSEBE ..... RESPONDENT**

**RULING**

1. The Applicant herein filed a notice of motion dated 16<sup>th</sup> July, 2024 brought under certificate of urgency under Article 161 of the [Constitution of Kenya](#), Section 1A, 1B,3A and 63 (e) of the [Civil Procedure Act](#), Order 51 Rule 1 of the [Civil Procedure Rules](#) and all enabling provisions of the law seeking principally and order that Webuye Spmcc No. E099 of 2024 be transferred to Butali Principal Magistrate’s Court for hearing and final disposal and that costs be in the cause.
2. The application is supported by the grounds on the face thereof and by the supporting affidavit of Emma Mukolwe sworn on even date. The Applicant’s gravamen is *inter alia*; that the applicant filed suit and an application under certificate of urgency being Webuye SPMCC NO. E099 of 2024; that at the time the Applicant was filling the suit she was acting in person and was not aware that there was a court at Butali which has the territorial jurisdiction; that the applicant upon appointing the firm of M/s Reece Mwani and Co Advocates and upon perusal of the pleadings they noted that there is need to have this matter transferred to Principal Magistrate’s Court Butali for hearing and final determination; that the Respondent has raised a preliminary objection that the Webuye Law Courts lacks the territorial jurisdiction yet there is need to have the case determined on merit; that the applicant was born and brought up at the ancestral home at Ndivisi within the jurisdiction of Webuye Court hence the reasons as to why she filed the application at Webuye; that the dispute in the case is a burial dispute where the deceased’s body/remains lie at Orthopedic Mortuary Kakamega and that his ancestral land is in Webuye known as Ndivisi/Muchi/2233; that this court has jurisdiction to transfer the suit in Webuye Spmcc No. E 099 of 2024 to Butali Principal Magistrate’s Court for hearing and final determination on merit; that the applicant and the entire family stands to be prejudiced if the orders sought are not



granted; that no party shall suffer prejudice should orders sought be issued as the matter shall be heard and determined on merit; that the orders sought ought to issue to prevent the ends of justice from being defeated; that the application has been brought timeously and in good faith.

3. The Application was vehemently opposed by the Respondent who filed a replying affidavit sworn on 17<sup>th</sup> day of July, 2024 wherein she averred *inter alia*; that she is the only surviving spouse to the late Hendricos Macos Mukolwe who is the subject matter in Webuye Spmcc No. E009 of 2024 which is the subject matter of the instant application and that there is a chief's letter to that effect.; that the matter before the trial court is at the submissions stage on an interlocutory application filed by the applicant herein against her seeking restraining orders where the applicant is enjoying interim restraining orders against her; that the matter before the trial court is scheduled for mention for submissions next week on 23.7.2024 due to the urgency of the matter; that the instant application herein lacks merit and is only a ploy by the applicant to delay the disposal of the matter before the trial court since the applicant is enjoying interim orders against her; that the applicant herein has stated clearly that she resides within the jurisdiction of Webuye Law Courts and that the deceased in the matter before the trial court has his ancestral land in Webuye; that the applicant herein should therefore submit her submissions in the matter before the trial court and allow the trial court to make ruling both on her preliminary objection and her application pending before that court where she is enjoying restraining orders against her; that the instant application therefore lacks merit and is simply to delay justice in the matter before the trial court which matter is extremely urgent since it is affecting the rights to bury the deceased and hence, the application should be dismissed.
4. The application was canvassed by way of written submissions. Both parties duly filed and exchanged submissions which were a reiteration of their rival standpoints.
5. Learned counsel for the Applicant was of the view that the court has power to transfer the suit in Webuye Spmcc No. 009 of 2024 to be heard and determined at Butali Principal Magistrate's Court which power is bestowed upon this court by virtue of Section 18 of the *civil Procedure Act* that stipulates this:

“18. Power of the High Court to withdraw and transfer case instituted in subordinate court.

1. 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 such notice, the High Court may at any stage-
  - a. Transfer any suit, appeal or other proceedings 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 proceedings pending in any court subordinate to it and thereafter-
    - i. try to dispose of the same; or
    - ii. transfer the same for trial or disposal to any court subordinate to it and competent to try it and dispose of the same; or



- iii. retransfer the same for trial or disposal to the court from which it was withdrawn.
  2. where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of any order of transfer either retry it or proceed from the point at which it was transferred or withdrawn."
6. Learned counsel for the Applicant relied on several authorities which he cited and urged this court to allow the application in the interest of justice and fairness as the Applicant stands to suffer great loss and prejudice.
7. The Respondent's counsel filed submissions dated 19.7.2024. It was submitted that the Respondent duly raised a preliminary objection on grounds that the trial court lacks the territorial jurisdiction to hear and determine the matter. It was also submitted that the Applicant should not jump the gun but to submit on the preliminary objection so that the trial court can determine the matter. It was further submitted that the Applicant is a step-daughter of the deceased while the Respondent is the only legal spouse of the deceased and thus entitled to bury the deceased. It was finally submitted that the present application is meant to delay the matter and hence the application should be dismissed.
8. I have given due consideration to the application, rival affidavits and the submissions. It is not in dispute that the parties herein are related in that the Applicant is a step-daughter of the Respondent and that the matter relates to a dispute over the burial of the remains of the deceased who was the Respondent's husband and father to the Applicant. It is also not in dispute that the Respondent resides within the jurisdiction of Butali Principal Magistrate's court and the place where the remains of the deceased are intended to be interred. It is also not in dispute that the Applicant resides in Ndivisi area within the jurisdiction of Webuye Senior Principal Magistrate's court. It is also not in dispute that the Respondent has already filed a preliminary objection regarding the Webuye Senior Principal Magistrate's court's jurisdiction to entertain the matter and which is pending directions on 23.7.2024. I find the only issue for determination is whether the application has merit.
9. It is trite that jurisdiction is the cornerstone of any litigation so that without jurisdiction, a court has no authority to entertain a suit that is not properly before it. See *Owners of the Motor Vessel "Lillian S" v Caltex Oil (K) Ltd* [1989] eKLR where Nyarangi JA held that jurisdiction is everything and without it, a court cannot move one step further and hence it should down its tools. A similar position was held in the case of *In the matter of the Interim Independent Electoral Commission* Constitutional Application No. 2/2011 where the court held that assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, statute law and principles laid down in judicial precedent.
10. Under the provisions of section 15 of the *Civil Procedure Act*, every suit ought to be instituted in a court within the local limits of whose jurisdiction the respondent or each of the defendants actually or voluntarily resides at the commencement of the suit or carries on business or works or where the cause of action accrued or arose. If it is a monetary claim, the court with the requisite monetary jurisdiction as prescribed under the Magistrate's Court Act will entertain the matter. However, if the court where the suit is filed has no territorial or pecuniary jurisdiction, any party can apply to the High Court for transfer of such a case to the right court with jurisdiction. A lower court without jurisdiction can strike out a suit for want of jurisdiction on its own motion or on being moved by either party.



11. Section 18 of the *Civil Procedure Act* empowers the High Court to transfer a case from one subordinate court to another. As noted above, a suit ought to be entertained in a court of the lower grade that is competent to try it. Under section 11 of the *Civil Procedure Act*, it is also incumbent upon for an applicant to present good grounds to support transfer of a case from one subordinate court to another.
12. Circumstances that would move a court to grant the order sought were considered in the case of *David Kabungu v Zikarenga and 4 Others* Kampala HCCS No.36 of 1995 where it was held as follows:

“Section 18 (1) (b) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo motto by the court without applications by any party. The burden lies on the applicant to make out a strong case for transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction. It is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused..... Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused.”
13. Further to the above guidelines, the court is also bound to consider the motive or character for transfer of suits from one court to another. In the present case, the dispute between the parties is on the place of burial of the remains of their family member. Whereas the applicant is vouching for burial in Ndivisi area of Webuye where the deceased’s first wife’s remains are interred, the respondent is pitching camp within Butali area where she hopes to inter the remains of the deceased. That is the crux of the dispute. It would also imply that the Butali area is where the Respondent resides and which is within the jurisdiction of Butali law courts.
14. In the case of *Hangzhou Agrochemicals Industries Ltd v Panda Flowers* [2012] eKLR the court held:

“..... the court should consider such factors as the motive and character of the proceedings, the nature of the relief or remedy sought, the interest of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of undue hardship. If the court is left in doubt as to whether under all the circumstances, it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise depends largely on the facts and circumstances of a particular case.”
15. Considering the provisions of section 18 of the *Civil Procedure Act* and the principles in the aforesaid cases, iam inclined to allow the application for reasons that the Respondent and Applicant are members of one family and currently tussling on the place of burial of their loved one in which the Respondent is the surviving widow and resident of Butali while the Applicant is a resident of Ndivisi.



In the event the matter is resolved in favour of the Respondent then the burial will take place at Butali area and vice versa. In both scenarios, the issue of convenience and expense must be factored. It is noted that the two places namely Butali and Ndivisi are not that far off as they fall within a distance of about 30 kilometers which is not that inconvenient for the parties herein and hence the transfer is merited. The parties' right to access justice under article 48 of the *constitution* must be protected. I find it is fair and just to grant the request for transfer so that the parties can adjudicate the dispute appropriately and conveniently. It is believed that as the burial is yet to take place, mourning must be taking place at the home of the Respondent as the surviving widow and as such, it is appropriate that the matter be dealt with at Butali law courts as it will be administratively convenient and would save costs for both parties to the suit. I find that there is no point in letting the parties canvass the preliminary objection in the lower court at Webuye since the application for transfer has been presented to this court for consideration. Proceeding in the lower court at Webuye will further increase costs for no reason. The parties must thus abandon the same and then wait to prosecute the suit in the new court at Butali Principal Magistrate's court.

16. In the result, the Applicant's application dated 16.7.2024 is allowed with the result that Webuye Spmcc No.E099 of 2024 be and is hereby withdrawn and transferred to Butali Principal Magistrate's Court for hearing and final disposal. As the parties are members of one family, there will be no order as to costs.

**DATED AND DELIVERED AT BUNGOMA THIS 23<sup>RD</sup> DAY OF JULY 2024**

**D.KEMEI**

**JUDGE**

In the presence of:-

Mukabani for Applicant

Mulupi for Respondent

Kizito Court Assistant

