



**Kakai v Amukobole & another (Miscellaneous Civil Application  
E036 of 2022) [2023] KEHC 2133 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2133 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
MISCELLANEOUS CIVIL APPLICATION E036 OF 2022**

**DK KEMEL, J  
MARCH 16, 2023**

**BETWEEN**

**CHARLES MAYUNGU KAKAI ..... APPLICANT**

**AND**

**DANIEL IMBAYI AMUKOBOLE ..... 1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide a Notice of Motion dated 14<sup>th</sup> March, 2022 brought pursuant to the provisions of section 18 of the [Civil Procedure Act](#), the applicant sought the following orders;
  - a. That Bungoma CMCC No. 30 of 2018 (Charles Mayungu Kakai Vs Daniel Imbayi & the Attorney General) be and is hereby transferred to Webuye law courts.
  - b. Costs of the application be in the cause.
2. The application is premised on the grounds contained on the face of the motion and the applicant's supporting affidavit. The grounds in support are brief and are as follows;
  - a. The applicant is the plaintiff in the suit sought to be transferred (Bungoma CMCC 30 of 2018) while the Respondents are the Defendants.
  - b. The 1<sup>st</sup> defendant resides within Webuye Town where the cause of action arose and who has objected to the territorial jurisdiction of Bungoma law courts to hear the suit.
  - c. No party shall be unduly prejudiced if the orders sought are granted as the same shall serve the interest of justice.
3. The 1<sup>st</sup> respondent opposed the application vide replying affidavit dated 18<sup>th</sup> July, 2022 wherein he deponed inter alia; that the application is frivolous and vexatious; that despite the parties being



residents of Webuye town, the applicant chose to institute his claim in Bungoma Law Courts; that the instant application is calculated at circumventing the issue of jurisdiction as raised in the respondents' defence; that the applicant has waited for inordinately long before instituting the application while aware from the beginning that the court lacked jurisdiction and had even been pointed out by the court three years ago. He prays that the application be dismissed.

4. The application was disposed of by way of written submissions. The applicant filed his while the respondent did not.
5. The applicant submits that in paragraph 14 of the statement of defence, the respondents dispute the jurisdiction of the court and that the court later raised the issue of lack of jurisdiction suo moto and that the parties agreed to stand over the matter generally to enable the applicant proffer the instant application and that it is therefore ironical for the respondents to turn around and oppose the application and to raise the issue of preliminary objection which has never been filed.
6. I have given due consideration to the rival affidavits and the submissions tendered herein. The principal order sought herein is that of transfer of suit from one subordinate court to another. The legal provisions governing such transfer is section 18 of the *Civil Procedure Act* which provides;
  - (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 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.
  - (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 an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.
7. The *Civil Procedure Act* under section 16 provides as follows as regards the place of suing; -

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

  - (a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
  - (b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or



(c) the cause of action, wholly or in part, arises

8. It is common ground that the plaintiff and the 1<sup>st</sup> respondent both reside in Webuye and that the suit therefore ought to have been instituted at the first instance in the court at Webuye as that is the place in which the cause of action is said to have occurred.

9. The circumstances in which a court may transfer a suit was discussed in the case of *David Kabungu v Zikarenga & 4 others*, Kampala HCCS NO. 36 of 1995, it was held;

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 moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the 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 the 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 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...

10. In our jurisprudence, there are a number of factors to be considered before an order of transfer of suit is made. These considerations were discussed in the case of *Hangzhou Agrochemicals Industries Ltd. v Panda flowers Ltd* [2012] eKLR the court held: -

..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests 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 expense, interest of justice and possibilities 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 it depends largely on the facts and circumstances of a particular case.

11. The court is bound to give effect to the overriding objectives under section 1A(1) of the *Civil Procedure Act*;

For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;



- (c) the efficient use of the available judicial and administrative resources;
  - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
  - (e) the use of suitable technology:
12. In the instant case, I am alive to the dictates of Article 159 of the Constitution which mandates this court to administer substantive justice without undue regard to procedural technicalities that would impede access to justice by litigants. The record of the lower court shows that the court had already raised the issue of jurisdiction on its own *suo moto* and had directed the parties to move the High Court appropriately. It seems the parties took a bit of time to do so and hence the period the respondents are now raising as inordinate delay. As the respondents had been waiting for the present application to be lodged as directed by the trial court, I am inclined to exercise my discretion and grant the application sought. I find it fair and just that the matter be transferred to Webuye law courts for determination as that is where both parties reside and work for gain as well as the place where the cause of action arose
13. For the above reasons, I find merit in the applicant's application dated 14<sup>th</sup> March, 2022. The same is allowed as prayed.

**DATED AND DELIVERED AT BUNGOMA THIS 16TH DAY OF MARCH 2023.**

**D. KEMEI**

**JUDGE**

**In the presence of**

Waswa for Were for Applicant

No appearance Chepkonga for 1st Respondent

No appearance Attorney General for 2nd Respondent

Kizito - Court Assistant

