



REPUBLIC OF KENYA



**Misiko & 11 others v Kamau & 7 others (Miscellaneous Civil Application
E068 of 2021) [2023] KEHC 2079 (KLR) (20 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION E068 OF 2021**

**DK KEMEL, J
MARCH 20, 2023**

BETWEEN

**GEOFFREY MISIKO (CHAIRMAN IDPS) 1ST APPLICANT
BENARD S. KILUI 2ND APPLICANT
JAMES MUUYI 3RD APPLICANT
SIMON WAFULA MUNYOLE 4TH APPLICANT
SILAS OMUTABA 5TH APPLICANT
CAROLYNE MECHUMO 6TH APPLICANT
SOLOMON CHESETO 7TH APPLICANT
BETTY WEPUKHULU 8TH APPLICANT
CATHERINE NANDAKO CHEPKONGIN 9TH APPLICANT
PATRICK NEKESA NATEMBEYA 10TH APPLICANT
PENINA WANJALA 11TH APPLICANT
NANCY TINDI 12TH APPLICANT**

AND

**DOMINIC NDUNG’U KAMAU 1ST RESPONDENT
KCB BANK BUNGOMA 2ND RESPONDENT
BRANCH MANAGER KCB BANK BUNGOMA 3RD RESPONDENT
KENYA COMMERCIAL BANK LTD 4TH RESPONDENT
THE COMPANY SECRETARY (KCB) 5TH RESPONDENT
COUNTY COMMISSIONER (BUNGOMA COUNTY) 6TH RESPONDENT**



RULING

1. By an amended Notice of Motion application dated October 1, 2022 and filed in Court on November 23, 2022, the Applicants sought orders for the withdrawal of the Civil Suit No 03 of 2018 from the Senior Principal Magistrate's Court at Kimilili and transfer the same to this Court for hearing and determination; this Court to issue other orders as it may deem fit, just and expedient for the ends of justice and the costs of the application be paid by the Respondents.
2. The application was brought under Articles 22 (1), 27 (1, 4, 5), 50 (1), 258 and 259 of the Constitution of Kenya 2010, Rules 3(2), 4(a)(b), 7 and 28 (a) of the (Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules 2006; Order 51 Rule 1, Sections 1A, 1B, 11, 15, 17, 18, 63(e) & 89 of the Civil Procedure Act, The Prevention, Protection and Assistance to IDP and Affected Communities Act No 56 of 2012, the Constitution and all other enabling provisions of law.
3. The application is premised on grounds inter alia; that on January 4, 2018, the 1st Plaintiff/Applicant filed a Civil Suit No 3 OF 2018 at Kimilili Law Court against the Respondents herein seeking inter alia; injunctive orders restraining the 3rd and 4th Respondents from making any payments to Kimilili Ebenezer (IDPs) on the ground that the said members of Kimilili Ebenezer IDPs are fake IDPs; that the 2nd, 3rd and 4th Respondents herein being the fiduciary for the Government of Kenya (Department of Interior) through the letter dated October 31, 2017 were instructed to pay/compensate a total of 3, 576 IDPs based in Bungoma County but fraudulently began paying persons who were not vetted and approved as genuine IDPs; that the vetting exercise of the IDPs was conducted by the Provincial Administration with the help of village elders; that the names of those vetted and approved were forwarded to the 5th Respondent herein who subsequently forwarded the same names to the Principal Secretary for Special Programs for onward forwarding to the National Consultative and Coordination Committee which has since been disbanded because of corruption; that on realizing that the 2nd, 3rd and 4th Respondents were paying fake IDPs, the 1st Plaintiff/Applicant herein was authorized by the Mt Elgon-Kimilili IDPs while acting in person to file the said Civil Suit No 03 of 2018 in the Principal Magistrate's Court at Kimilili; that while filing the said Civil Suit, the 1st Plaintiff/Applicant being a non-legal practitioner and no-conversant with the provisions of Section 7 of the Magistrate's Court Act No 26 of 2015 did file the said suit in the wrong forum and if he had the benefit of legal representation the same would have been filed in the High Court which has pecuniary jurisdiction to entertain the same; that the original Complaint was silent on the disputed sum set to be paid out to the IDPs; that in the course of hearing the same suit, it became apparent that not all the monies had been disbursed to the 3rd Respondent (Kshs 178, 800,000/=) to compensate a total of 3, 576 genuine IDPs based in Bungoma County and that more than 62 million had been illegally withheld by the 3rd Respondent.
4. The application is further supported by the affidavit sworn by Geoffrey J Misiko, the Chairman of Mt Elgon-Kimilili IDPs sworn on unindicated date. He reiterated the grounds stated in the body of the application. The key ground in the affidavit is that he was not conversant with the provisions of section 7 of the Magistrate's Court Act No 26 of 2015 when he filed the said suit and if he had legal representation, he would have filed the same suit in the proper forum, which was High Court. He further averred that in the course of hearing the suit, it became apparent that the 3rd Respondent failed



to disclose that not all the money, Kshs 178,800,000/= was paid and that more than Kshs 62,000,000/= is being illegally withheld by the 3rd Respondent. It was further elaborated that the amount of special damages now claimed exceeds the pecuniary jurisdiction of the Principal Magistrate's Court hence the need to have the suit transferred to this Court.

5. In response and opposition to the instant application, the 1st and 3rd Defendants/Respondents filed grounds of opposition dated November 22, 2021. The grounds can be summarized to be that the power of transfer of a case to the High Court for hearing may only be exercised if the Court before which the suit is filed is a Court vested with competent jurisdiction and that the matter was filed before Court lacking the pecuniary jurisdiction which mistake cannot be excused as an ordinary mistake to be cured by the filing of the instant application and the same should be dismissed with costs.
6. On the other hand, the 4th and 5th Defendants/Respondents filed grounds of opposition dated February 7, 2022 alleging that this Court lacked jurisdiction to entertain the application as filed and that the same did not demonstrate sufficient grounds to warrant the transfer. This Court was urged to dismiss the application before it with costs.
7. Directions were taken to the effect that the application be canvassed by way of written submissions. On perusal of the Court record, it is clear that only the 1st and 3rd Defendants/Respondents filed submissions. They submitted that under section 18 of the *Civil Procedure Act*, High Court has supervisory jurisdiction to withdraw or transfer to itself or to other Courts subordinate to it for trial and final disposal of suits instituted in the subordinate Courts. It was further submitted that a Court could not issue a transfer of suit from one Court to another unless the suit had been filed in a Court with competent jurisdiction to determine the suit in the first place. Counsel relied on the cases of *West Kenya Sugar Co Limited vs Matayo Ingoshe & Others (2021) eKLR*; *Charles Omwata Omwoyo vs African Highlands & Produce Co Ltd (2002) eKLR* and others.
8. After perusing the pleadings in this case and the written submission filed by the 1st and 3rd Defendants/Respondents herein, I find that the bone of contention and issue for determination between the parties in this instant application is whether or not this Court should order the transfer of this suit to itself for hearing and determination, or better still, whether the Plaintiffs/Applicants have made out a case by providing this Court with sufficient grounds to transfer the instant suit to itself.
9. Section 18 of the *Civil Procedure Act* which empowers this Court to order transfer of suits stipulates as follows:
 - (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) .
 - (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) .
 - (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.
10. Under Section 18 of the [Civil Procedure Act](#), the High Court in its supervisory jurisdiction is empowered to withdraw or transfer to itself or to other Courts subordinate to it for trial and final disposal suits instituted in the subordinate courts and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. When the transfer is at the instance of a party then the burden lies on the applicant to make out a strong case for the transfer.
11. In the case of *David Kabungu vs Zikarenga & 4 Others, Kampala HCCS No 36 of 1995*, the Court had the following to say on the circumstances under which the order to transfer suits may be granted.
- ' A mere balance of convenience in favour of the proceedings in another court is not sufficient ground thought it is a relevant consideration. As 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 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'.
12. In the instant case, the Plaintiffs/Applicants have stated the amount claimed in the amended plaint is for Kshs 61, 950,000/= which sum is way beyond the pecuniary jurisdiction of the Principal Magistrate's Court hence the need to transfer the suit as vested under Section 7(1) of the [Magistrates Court Act](#) and capped not to exceed KShs 10 Million. That puts it beyond doubt that the suit claiming Kshs 61, 950,000/= filed before the Principal Magistrate's Court is before a Court without jurisdiction. With such established position, the question that remains is if a suit filed in a Court devoid of jurisdiction to try it can be transferred from such a Court. In interrogating that question I bear in mind that when the suit was filed it was filed by a layman who lacked comprehension on the aspect of pecuniary jurisdiction and simply walked into a court of law near his area of residence seeking justice.
13. On whether the Applicant has established a case for grant of transfer of suit to the High Court, the 1st and 3rd Defendants/Respondents in their responses averred that a suit filed without jurisdiction is a nullity in law and therefore there is nothing to be transferred to this Court, the 1st and 3rd Defendants/Respondents further averred that by virtue of Section 18 of the [Civil Procedure Act](#), power to transfer suits cannot be exercised in matters filed without jurisdiction. I have considered the authorities relied on by the 1st and 3rd Defendants/Respondents and fully appreciate the reasoning therein advanced. However, I would respectfully depart from the position taken on this question on the precedents cited. The explanation given by the Plaintiffs/Applicants is that the filing of the suit before the lower Court was by inadvertence by the 1st Plaintiff/Applicant on behalf of the other Plaintiffs/Applicants who lacked proper legal representation to decipher the component of pecuniary jurisdiction for which the parties should not be penalized.
14. In the instant case, this Court is not convinced that any prejudice would be visited on the Defendants/Respondents in the event that the present matter is transferred to the High Court. Having established



that the Principal Magistrate's Court lacks jurisdiction to determine the present matter I find that justice will only be served if the matter is transferred to the High Court for efficient disposal. In doing so, this Court will be furthering its obligation to give effect to the overriding objective considering that this matter can only be expedited before the High Court. This Court is also saying that when being filed, it is imperative to remember that the same was filed by a layman who at that point lacked requisite legal representation to ensure proper jurisdiction was observed but that situation was salvaged by a new Counsel on record for the Plaintiffs/Applicants and the various amendments on the documents. Further, the prayers by the Plaintiffs/Applicants then could not have guided them to know where exactly they ought to have filed their suit as they lacked proper amounts in terms of special damages sought. In those circumstances, I choose to follow the law set by the Court of appeal in *Eastern Radio Services vs R J Patel (1962) EA 818* on the principle of law that not every time should an amended pleading be treated as if nothing ever existed before the amendment. I chose to consider the cause pleaded before the amendment and find in favour of sustaining the suit for hearing on the merits rather than leaning towards its defeat on account of lack of jurisdiction.

15. In light of the foregoing observations, I find merit in the Applicants' application. The same is allowed as prayed. Each party to bear their own costs.

It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 20TH DAY OF MARCH, 2023

D. KEMEI

JUDGE

In the presence of:

Akech for Applicants

No appearance for 2nd Respondent

Lidero for Machama for 1st and 3rd Respondents

No appearance for 4th and 5th Respondents

No appearance for 6th Respondent

No appearance for 7th Respondent

No appearance for 8th Respondent

Kizito Court Assistan

