



Ngii (Suing as the administrator ad litem in respect of the Estate of Carlos Mutemi Kalonzo) v Mosque & 2 others (Miscellaneous Civil Case E002 of 2023) [2023] KEHC 17829 (KLR) (19 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17829 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
MISCELLANEOUS CIVIL CASE E002 OF 2023**

JN ONYIEGO, J

MAY 19, 2023

BETWEEN

**MUTEMI MUTEMI MWAROKO NGII (SUING AS THE ADMINISTRATOR
AD LITEM IN RESPECT OF THE ESTATE OF CARLOS MUTEMI
KALONZO) PLAINTIFF**

AND

ROWDA MOSQUE 1ST DEFENDANT

MOHAMED SHEIKH OSMAN 2ND DEFENDANT

ODHIAMBO ANTHONY ODUOR 3RD DEFENDANT

RULING

1. By Notice of Motion dated January 22, 2023 brought pursuant to Section 1A, 1B, 3C and 18 of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*, the applicant sought orders to have Manderu Civil Suit No. E003/ 2022 transferred to Mwingi Magistrate's court for hearing and determination.
2. The application is premised upon grounds set out on the face of it and averments contained in the affidavit in support sworn by the applicant on March 14, 2023. The applicant averred that since inception of the suit herein against the respondent, he has received threats and warnings cautioning him from attending court proceedings at Manderu Law Courts. That the threats include anonymous calls with the caller identities blocked.
3. It is the applicant's averment that he is apprehensive of attending court proceedings at Manderu Law Courts hence the prayer that the matter be transferred to Mwingi for hearing and determination. That the transfer will be in the interest of justice and that the respondent will not suffer any prejudice nor harm.



4. Despite service of the application and hearing notice, the applicant did not file any response nor appear in court. The application was therefore argued as unopposed.
5. During the hearing, Mr. Magotsi appearing for the applicant, basically adopted grounds on the face of the application and averments contained in the affidavit in support.
6. I have considered the application herein and the affidavit in support. This court is being asked to exercise its authority under Section 18 of the [Civil Procedure Act](#) to transfer civil case number E003/2022 Mandera CM's Court to Mwingi Law Courts for hearing and determination on grounds that the applicant is under threats from the defendant hence fears for his security and life.
7. This court's authority to exercise the powers sought is conferred by Section 18 (1) of the [Civil Procedure Act](#) which provides that:

“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 sub-ordinate to it and competent to try or dispose the same:

or
 - b) withdraw any suit or other proceeding pending in any court sub-ordinate to it, and thereafter:
 - (i) try or dispose of the same; or
 - (ii) transfer the same for trial or disposal to any court sub-ordinate 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. In the Case of; *David Kabungu v Zikarenga & 4 others* Kampala HCCS number 36/1995, the court had this to say;

“Section 18 (1) 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 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 or the suit has been filed in particular for the purposes of working injustice...”
9. It is trite law that the overriding objective of the [Civil Procedure Act](#) and the rules made thereof is to facilitate the just, expeditious, proportionate and affordable resolution of Civil disputes by the governed by the Act.
10. It is not in dispute that, the suit in question was instituted by the applicant himself. He is however alleging that he has been threatened. There was no proof of any threats directed towards him. He did not even attempt to report such threats to the police for investigation. This claim is quite general and unsubstantiated.



11. Whereas the applicant may have a genuine claim which is not proved, Technology has a solution to his fear. With technology now in place, the applicant can testify on line without necessarily going to Mandera.
12. For the court to transfer the matter from Mandera to Mwingi, it will also be costly for the defendant and his witnesses. We cannot endeavor to solve one problem and at the same time open an avenue for another problem. In a nutshell, I do not find the ground given for transfer of the suit to be sufficient to warrant the transfer of the suit from Mandera to Mwingi.
13. Although the application is not opposed, it is not automatic that it must succeed. The onus lies with the applicant to prove that the application is meritorious. See [*Gideon Sitelu Konchellab -vs- Julius Lekakeny Ole Sunkuli & 2 others*](#) (2018) eKLR where the court held that;

“... It is not automatic that for any unopposed application, the court will as a matter of cause grant the sought orders. It behooves the court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted”.
14. In view of the above holding, I do not find any justification to transfer the subject suit from Mandera to Mombasa. There is a remedy to his concerns and that is technology. Accordingly, the application is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MAY, 2023

J. N. ONYIEGO

JUDGE

