



AN ((Minor Suing Through Next Friend and Father ABK)) v Wanjala (Miscellaneous Civil Application 48 of 2022) [2023] KEHC 18024 (KLR) (2 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18024 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION 48 OF 2022**

WM MUSYOKA, J

JUNE 2, 2023

BETWEEN

AN APPLICANT

(MINOR SUING THROUGH NEXT FRIEND AND FATHER ABK)

AND

CALISTUS MASIKA WANJALA RESPONDENT

RULING

1. This a straightforward case of a transfer of a case from one subordinate court to another. The dispute is on whether there is jurisdiction to transfer a suit from a court without jurisdiction to another with jurisdiction.
2. The transfer application, dated 22nd March 2022, is at the instance of the applicant. The suit in contention, Butali SPMCCC No. 15 of 2022, was initiated, by her as plaintiff, at Butali, which is within Kakamega County, whereas the accident, the subject of the suit, happened at Pan Paper, Webuye, within Bungoma County. The plaintiff says that before she filed suit, investigations had established that the respondent, the defendant in the subject suit, ordinarily resided and carried on business at Butali, and it was on that basis that the suit was initiated at that court. It is averred that now that the respondent has asserted that he is not a resident of Butali, she would like to have the suit moved to the Webuye law courts, which is the court nearest to where the accident happened.
3. The respondent asserts that he does not reside at Butali, but, at the time the accident happened, he resided at Kisumu. He asserts that as the accident happened within the local limits of the jurisdiction of the Webuye court, that is where the suit ought to have been filed, and that the Butali court lacked jurisdiction over the matter. He argues that the suit was incompetent ab initio as it was filed before a court without jurisdiction.



4. Directions were given on 23rd May 2022, for disposal of the application, by way of written submissions. Both sides have complied. The applicant argues that there is discretion, under section 18 of the *Civil Procedure Act*, cap 21, Laws of Kenya, for the High Court to make transfer orders, and cites *Ruth Gathigia Kamunya & another vs. George Kimani* [2015] eKLR (Aburili, J), *Elizabeth Kapoli vs. Hekima Place Trust* [2018] eKLR (Nyakundi, J) and *Bud and Blooms Ltd vs. Jonathan Balongo Okumu* [2021] eKLR (Ng'etich, J). In his written submissions, the respondent cites sections 14 and 15 of the *Civil Procedure Act*, on place of suing, to submit that both provisions conferred jurisdiction on the Webuye court, and did not favour filing at Butali. He cites *Boniface Waweru Mbiyu vs. Mary Njeri & Another* [2005] eKLR (Ojwang, J), *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (Makhandia, Ouko & M'Inoti, JJA), *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (Karanja, Gatembu & Sichale, JJA), and *Gaikia Kimani Kiarie vs. Peter Kimani Kiramba* [2020] eKLR (Gacheru, J), where the courts have taken the position, that where a suit is filed in a court, which has no jurisdiction over the matter, the same, that is the matter, would be a nullity, and such nullity would be incapable of being transferred by the High Court, in exercise of the discretion in section 18 of the *Civil Procedure Act*.
5. The power of the High Court to transfer suits is provided for in section 18 of the *Civil Procedure Act*. The High Court may transfer suits from itself to subordinate courts competent to try or dispose of such suits, transfer suits from subordinate courts to itself for trial and disposal, and from one subordinate court to another. What is sought, in this case, is transfer from one subordinate court to another. The jurisdiction to transfer suits in that manner is not what is in dispute, but rather whether that power is absolute, or whether it is subject to certain limitations.
6. Section 18 of the *Civil Procedure Act* provides that:
 - “18. Power of High Court to withdraw and transfer case instituted in subordinate court
 - (1) 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 respondent takes the view that there are limitations. He submits that one limitation is that the suit sought to be transferred ought to be competent, in terms of having been filed in the court with jurisdiction. He submits that where a suit is filed in a court which lacks jurisdiction to entertain it, such suit would be incompetent from the beginning, and would not be available for transfer, since the High Court ought not transfer a suit which is incompetent or a nullity. The decisions in *Boniface Waweru Mbiyu vs. Mary Njeri & Another* [2005] eKLR (Ojwang, J), *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (Makhandia, Ouko & M’Inoti, JJA), *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (Karanja, Gatembu & Sichale, JJA), and *Gaikia Kimani Kiarie vs. Peter Kimani Kiramba* [2020] eKLR (Gacheru, J) make that point.
8. I have perused all the decisions cited by the respondent, and they all turned on substantive jurisdiction. Indeed, they were about transferring a matter filed at the subordinate court to the High Court or other superior court for hearing and disposal, upon the premise that the subordinate court did not have jurisdiction. Pecuniary jurisdiction is substantive, somewhat close to jurisdiction with respect to disputes in a certain sector, say cooperatives or land or employment or judicial review, where vested in a particular of specific class of courts. Only the courts vested with substantive jurisdiction by *the Constitution* or statute can exercise substantive jurisdiction, and a matter filed before a court which has no such substantive jurisdiction would be incompetent and a nullity, and it is in respect of such that the High Court would not exercise jurisdiction to transfer a null suit. A suit filed before a court which has no jurisdiction to handle a dispute, where the subject matter is beyond the pecuniary limits of that court, would be incompetent and a nullity, and such would not be for transfer by the High Court. As indicated above, all the authorities cited by the respondent turn on these issues.
9. I have noted, however, that the authorities cited by the respondent have not dwelt on territorial or geographical jurisdiction. He has cited section 14 and 15 of the *Civil Procedure Act*, which deal with this area. These provisions generally state that a claim for compensation for a wrongful act, and other cases, can be filed where the cause of action arose, or where the defendant resides. The suit at the trial court relates to compensation for a wrong to the person, section 14 of the *Civil Procedure Act* is the more relevant of the 2.
10. The 2 provisions state as follows:
 14. Suit for compensation for wrong to the person or movables Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts...”
 15. Other suits to be instituted where defendant resides or cause of action arises 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...”

11. The suit, sought to be transferred herein, is pending at the magistrate’s court, a court established under the Magistrate’s Courts Act, No. 26 of 2015. The parties have not adverted to the Magistrates Courts Act, on the jurisdiction of the courts that it establishes. Before the Magistrate’s Courts Act, 2015, came into force, in 2016, the magistrate’s court had countrywide jurisdiction, by dint of section 3(2) the Magistrates Courts Act, Cap 10, Laws of Kenya, which meant that, despite the provisions on territorial or geographical jurisdiction, the magistrate could handle a matter from whatever corner of the country. It was in that light, that the High Court made the decisions, in Ruth Gathigia Kamunyu & another vs. George Kimani [2015] eKLR (Aburili, J) and Jedidah Katwa Kweyu vs. John Njoroge Ngige & another [2015] eKLR (Nyamweya, J), to effect that the magistrate’s court has countrywide jurisdiction, and sections 14 and 15 of the Civil Procedure Act do not apply to that court. These 2 decisions, which follow others made before 2016, when the Magistrate’s Courts Act, 2015, became operational, are founded on section 3(2) the Magistrates Courts Act, which was repealed by the coming into force of the Magistrates Courts Act, 2015. There is no equivalent of section 3(2) in the new Act, and the position, held in Ruth Gathigia Kamunyu & another vs. George Kimani [2015] eKLR (Aburili, J) and Jedidah Katwa Kweyu vs. John Njoroge Ngige & another [2015] eKLR (Nyamweya, J), is, therefore, no longer tenable.
12. The position which I find more persuasive is that stated in such cases as Sustainable Management Services vs. New Mitaboni FCS [2017] eKLR (D. Kemei, J), Paulo Anyanzwa Kutekha vs. Steel Structures Limited [2018] eKLR (Waweru, J) and Peter Ouma Nyapara vs. Willis Ouma Okoth [2021] eKLR (Wendoh, J), that sections 14 and 15 of the Civil Procedure Act do not quite deal with jurisdiction of courts handling certain classes of civil cases, but rather they are more of guidelines to parties on where to file suits, and that these provisions deal with administrative issues, with respect to having suits filed in a manner which is sensitive to the convenience of the parties, and that filing a suit contrary to these administrative guidelines ought not render the suit incompetent, and such suits would be amenable to transfer under section 18 of the Civil Procedure Act. That argument is further buttressed by sections 1A, 1B and 3A of the Civil Procedure Act, on substantive justice and overriding objectives, and Article 159 of the Constitution, with respect to not giving too much attention to technicalities of procedure.
13. The jurisdiction issue raised, with respect to the suit in Butali SPMCCC No. 15 of 2022, is about where the suit should have been filed. I am guided by Sustainable Management Services vs. New Mitaboni FCS [2017] eKLR (D. Kemei, J), Paulo Anyanzwa Kutekha vs. Steel Structures Limited [2018] eKLR (Waweru, J) and Peter Ouma Nyapara vs. Willis Ouma Okoth [2021] eKLR (Wendoh, J), to find and hold that the filing of the said suit at Butali, rather than at Webuye, did not render that suit incompetent or a nullity, and the same is amenable to transfer, under section 18, and I do hereby direct that the said suit be transferred, accordingly, from the Butali court to the Webuye court. Each party shall bear their own costs. Orders accordingly.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2ND DAY OF JUNE 2023

W MUSYOKA

JUDGE



Mr. Erick Zalo, Court Assistant.

Appearances

Mr. Omollo, instructed by Ndinya Omollo & Company, Advocates for the applicant.

Mr. Oundo, instructed by Oundo Muriuki & Company, Advocates for the respondent.

