



**Kirui (Suing as the Chairman of Kessir Youth Bunge Self-Help Group) v
Kecha Sammy Matonyi t/a Kibochi Ventures (Miscellaneous Civil Application
E007 of 2023) [2023] KEHC 20720 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20720 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
MISCELLANEOUS CIVIL APPLICATION E007 OF 2023**

DK KEMEL, J

JULY 21, 2023

BETWEEN

**PROTUS NGEYWO KIRUI (SUING AS THE CHAIRMAN OF KESSIR YOUTH
BUNGE SELF-HELP GROUP) APPLICANT**

AND

KECHA SAMMY MATONYI T/A KIBOCHI VENTURES RESPONDENT

RULING

1. Vide a notice of motion application dated February 27, 2023 pursuant to section 1A, 1B, 3A, 5, 15 & 17 of the *Civil Procedure Act* and order 47 (6) & 51 (1) and all other enabling provisions of the law, the Applicant seeks orders that: this Court finds that Bungoma Chief Magistrate's Court had both geographical and pecuniary jurisdiction to hear and determine Webuye Civil Suit No. E003 of 2023 and that the suit herein, Webuye Civil Suit No. E003 of 2023, be transferred to Bungoma Chief Magistrate's Court for hearing and final determination.
2. The application is premised upon grounds stated on the face of it and averments contained in the supporting affidavit sworn on 27th February 2023, by the Applicant who deposed inter alia; that he had approached the Webuye court on the basis of the balance of the money due in the sum of Kshs 11, 500, 000/ yet he was to have considered the whole sum of Kshs 18, 600, 000/; that the contract was entered in Mt Elgon within Bungoma County and hence the best place to file suit is Bungoma Chief Magistrate's court; that the pecuniary jurisdiction is always based on the total contract sums as in this case; that since both parties reside within Bungoma County and the contract being fully executed in Bungoma, then the suit ought to be heard by the Chief Magistrate Bungoma.
3. In response, the Respondent herein filed a replying affidavit sworn on March 6, 2023 claiming that the subject matter of the suit is in Mt. Elgon Sub Count and thus the Court with the territorial jurisdiction



to hear and determine the dispute is either Kimilili or Sirisia law courts which have the pecuniary jurisdiction of Kshs. 15,000,000/=

4. Vide Court directions dated March 8, 2023, the application was canvassed by way of written submissions. Both parties filed and exchanged their submissions.
5. In a nutshell, it was the Applicant's submissions that this Honourable Court is empowered to transfer suits from one subordinate Court the other. Reliance was placed on the case of *John Mwangi Karanja vs Alfred Ndirangu* (2011) eKLR amongst others
6. The Respondent submitted that this Court lacks the power to transfer a case filed in a Court without jurisdiction and that the only option is for the Applicant to withdraw it or let the trial court strike it out.
7. I have considered the application herein, affidavit in support, response thereto and written submissions by Counsel for the Applicant and the Respondent. The crux of the application herein is that Webuye Magistrate's Court lacks territorial/geographical and pecuniary jurisdiction to entertain the suit in question. It is trite that jurisdiction is the cornerstone of any litigation and without it, a Court has no legs to stand on nor legal authority to entertain a suit that is not properly before it. See *Owners of the Motor vessel "Lillian S" V Caltex Oil Kenya Ltd* (1989) Eklr where Nyarangi, J held that jurisdiction is everything and without it a court cannot move a step further hence should down its tools.
8. 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 had this to say;

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law and by principles laid out in judicial precedent”

9. In compliance with 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 trial Court with the requisite monetary jurisdiction as prescribed under the Magistrate's Court Act will entertain the matter.
10. 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 case to the right Court with jurisdiction. However, 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 the other. See *Kitbita Ngeana v Mwaniki Kisume* (2018) eKLR. Indeed, pursuant to Section 11 of *Civil Procedure Act*, a suit ought to be entertained in a Court of the lowest grade that is competent to try it. It is incumbent upon the Applicant to convince the Court that he has good grounds to support transfer of the case from Webuye Principal Magistrate's Court to Bungoma Chief Magistrate's Court.
12. In the case of *David Kabungu Vs Zikarenga and 4 others* Kampala HCCS No. 36 of the 1995 Okello J, held that;

“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 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 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”.

13. Besides the above guidelines which have equally been highlighted in various judicial precedents, Courts are further required to consider the real motive or character for transfer of a case from one Court to another. In the instant case, the Applicant is relying on the ground inter alia; lack of territorial and pecuniary jurisdiction.
14. Apparently, on October 3, 2022, the Applicant entered into a written agreement with the Respondent for sale of 6000 Kipyeto Cypress trees and that the same agreement was executed in Mount Elgon within Bungoma County where both parties to the suit resided.
15. According to the Applicant, the relevant Court to handle the arising dispute would have been Kimilili Law Courts which has the territorial jurisdiction but lacks the appropriate pecuniary jurisdiction. On the other hand, the Respondent argues that since the subject matter of the suit arises in Mt. Elgon Sub-County within Bungoma County and the parties herein reside in Mt. Elgon Sub-County, the appropriate Court to hear the suit would be either Kimilili or Sirisia Courts.
16. Under section 17 and 18 of the *Civil Procedure Act* upon an application by a party, or on its own motion, the High Court may transfer the suit to another subordinate Court with territorial jurisdiction, when justice of the case demands such action. It is also instructive that if no objection as to place of suing is raised in the subordinate Court in the first instance, it cannot be raised on appeal unless there has been a consequent failure of justice – Section 16.
17. In the case of *Hangzhou Agrochemicals Industries Ltd. Vs 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”



18. In the case of *David Kabungu vs Zikarengu & 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”.

19. In the instant case, the Applicant has stated the amount claimed is for Kshs. 11, 500,000/= which sum is within the pecuniary jurisdiction of the Senior Principal Magistrate’s Court hence the need to transfer the suit as vested under Section 7(1)(b) of the Magistrates Court Act and capped not to exceed KShs.15 Million. That puts it beyond doubt that the suit claiming Kshs. 11,500,000/= filed before the Webuye Senior Principal Magistrate’s Court is before a Court with pecuniary jurisdiction but lacks the geographical/territorial jurisdiction. With such established position, the question that remains is if a suit filed in a Court devoid of geographical 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, the Court was not properly vested with territorial jurisdiction to entertain it as the appropriate forum would be Kimilili Senior Principal Magistrate’s Court. I find the justice of the case demands that the suit ought to be taken to Kimilili Law courts for determination and not Bungoma Chief Magistrate’s court.

20. In the end, therefore, the Applicant’s Notice of Motion dated 27th February 2023 is hereby allowed with the result that Webuye Senior Principal Magistrate’s Suit No. 3 of 2023 be and is hereby withdrawn and transferred to Kimilili Senior Principal Magistrate’s Court, Bungoma for hearing and final disposal. There will be no orders as to costs.

It is hereby so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF JULY 2023

D. KEMEI

JUDGE

In the presence of:

Miss Wekesa for Plaintiff/Applicant

Sabwani for Komolo for Defendant/Respondent

