



REPUBLIC OF KENYA



KENYA LAW
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**Muito v Mwangi & 2 others (Miscellaneous Case E108 of 2023)
[2024] KEHC 14517 (KLR) (15 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14517 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MISCELLANEOUS CASE E108 OF 2023
DO CHEPKWONY, J
NOVEMBER 15, 2024**

BETWEEN

CATHERINE REBECCA WACUKA MUITO APPLICANT

AND

GACHUHI CYRUS MWANGI 1ST RESPONDENT

MOSES GITHINNJI NDIRANGU 2ND RESPONDENT

CAR & GENERAL (TRADING) LIMITED 3RD RESPONDENT

RULING

1. For determination before this Court is the Notice of Motion application dated 20th July, 2023 which seeks the following orders
 - a. Spent.
 - b. Spent.
 - c. That the Honourable Court be pleased to transfer Kikuyu Chief Magistrates Court, Civil Suit No. E017 of 2021 to the Chief Magistrates Court at Milimani, Nairobi for hearing and determination.
 - d. That costs be in the cause.
2. The Application is based on the grounds set out on its face and the Supporting Affidavit of Catherine Rebecca Wacuka Muito sworn on 20th July, 2023. According to the Applicant, Civil suit No.E107 of 2021 at Kikuyu Chief Magistrate’s Court, being subject of an accident involving herself and the Respondents’ vehicles which occurred along Naivasha road near Kenol at Dagoretti Corner which she believed was the border of Nairobi and Kiambu County. However, it has become clear to her that the cause of action arose at Nairobi and not Kiambu County and therefore there is need to have the matter



filed in Kikuyu Law Courts transferred to Milimani Law Court which is the court seized with proper territorial jurisdiction to hear and determine the matter so that the same can be determined on its merit. It is the Applicant's position that the transfer will not cause any prejudice on the Respondents.

3. The Application is opposed vide a Replying Affidavit of Joseph Karanja as the Legal Officer of the 3rd Respondent, wherein it is averred that they had filed Notice of Preliminary Objection in Kikuyu CMCC No. E017 of 2021 challenging the territorial jurisdiction of the said court to hear and determine the suit since the cause of action arose along Naivasha road near Kenol at Dagorreti Corner and was reported to Karen Police Station within the jurisdiction of the Chief Magistrate's Court at Nairobi. The 3rd Respondent holds that the trial court gave directions on the disposal of the Preliminary Objection but instead of filing the submissions, the Applicant filed the present application in an attempt to defeat the determination of the Notice of Preliminary Objection which is still pending before the lower court.
4. It is the 3rd Respondent's case that the present application is incompetent and abuse of court process since a matter filed in a court without jurisdiction is a nullity in law and the Plaintiff having knowingly filed the matter in the wrong court was awakened by the Notice of Preliminary Objection. The 3rd Respondent has thus urged the court to dismiss the application with costs.
5. The court directed the parties to file their submissions in the matter. The Applicant filed her submissions dated 11th December, 2023 while the 3rd Respondent filed its submissions dated 18th January, 2024. The matter was then reserved for Ruling. It is important to indicate that the court reserved the matter for Ruling but later established that the Respondents had not regularised payment of their pleadings.

Analysis and Determination

6. In determining the prayer sought by the Applicant, this Court has read through and considered the 3rd Respondent's Notice of Preliminary Objection and submissions by both parties on whether or not to allow the application for transfer of the Civil Suit No.E017 of 2021 from Kikuyu Law Courts to another court with territorial jurisdiction to hear and determine the same.
7. According to the Applicant, and while relying on the provisions of Section 18 of the *Civil Procedure Act*, the High Court has power to withdraw and transfer a suit from one subordinate court to another at any stage if satisfied that it is expedient for the end of justice to be met by such transfer. Also, the Applicant has submitted that if the case is dismissed for having been filed in a court without territorial jurisdiction, then it will have been denied the right to fair hearing which is a valued right and the cornerstone of the Rule of Law. Her argument is that the transfer of the suit will not prejudice the Respondents in any way.
8. The 3rd Respondent on the other hand have submitted that even though the High Court has power to transfer suits of civil nature from one court to another, a suit filed in a court without jurisdiction is not capable of being transferred because the same is a nullity in law and cannot be cured by the overriding objective under Sections 1A and 1B of the *Civil Procedure Act* or Article 159(2)(d) of the *Constitution*. Section 18 of the *Civil Procedure Act* provides:-

“ [18]. Power of High Court to withdraw and transfer case instituted in subordinate court

- (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.”

9. However, Section 15 of the same *Act* provides that:-

“[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.”

10. It is not in dispute that the cause of action in the Kikuyu CMCC No.E107 of 2021 occurred along Naivasha Road near Kenol at Dagoretti Corner and was reported to Karen Police Station which was then within the jurisdiction of the Chief Magistrate’s Court at Nairobi. In accordance with the provisions of Section 15 of the *Civil Procedure Act*, this suit should not have been filed in Kikuyu Court.



11. From the pleadings, the 1st and 2nd Defendants reside and carry on business in Karatina while the 3rd Defendant carries on business in Nairobi. None of the Defendants reside in Kikuyu where the suit was filed. It is for this reason that the 1st and 3rd Respondents filed a Notice of Preliminary Objection dated 1st March, 2023 challenging the territorial jurisdiction of the court. It is then directions on its disposal were issued by the court. That while the 1st and 2nd Defendants/Respondents complied with the court's directions on filing submissions on the Notice of Preliminary Objection, the Applicant filed the instant application seeking to have the Kikuyu CMCC No.E017 of 2021 transferred to Nairobi Chief Magistrate's Court For Hearing And Determination.
12. By filing the instant application, it is clear that the Applicant has admitted that Kikuyu Law Courts was not the proper court where she ought to have filed the suit as it lacks territorial jurisdiction to hear and determine a suit where the cause of action arose within the jurisdiction of Nairobi. What the Applicant has attempted to do by her instant application is to legitimize or regularize a nullity, which is Kikuyu CMCC No.E017 of 2021.
13. A suit can only be transferred from one court to another if the court from which it is being transferred had jurisdiction over the subject matter. In the case of *Wamathu Gichoya v Mary Wainoi Magu* [2015]eKLR, the Court held that:-

“Furthermore, according to *Kagenyi v Musiramo and Another*, supra, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer”.
14. And in the case of *Nickson M. Chanda v Angela Kamwaria* [2009] eKLR, it was stated that failure to institute a suit in a competent court renders it incurably defective and as good as a non-existent and that where a suit is as good as non-existent, there would be nothing to be transferred. Therefore, Kikuyu CMCC No.E017 of 2021 is a nullity ab initio and cannot be cured by invoking the overriding objective under Sections 1A and 1B of the *civil Procedure Act* or Article 159(2)(d) of the *Constitution*.
15. Also, the Applicant urged that the Respondents will not be prejudiced if the court were to allow the application and have the Kikuyu CMCC No.E017 of 2021, to which I say No! It is worth noting that in the said application there is a pending Notice of Preliminary Objection which has not been heard and determined. The question then becomes, if the said suit is transferred, what happens to the said Preliminary Objection in a court where certainly the point(s) it has raised do not apply?
16. Further, the Applicant has submitted that it is her counsel/advocate who made the mistake and filed the suit in a court without jurisdiction and prays that this should not be visited upon her. On this, the court relies on the case of *Gaika kimani Kiarie v Peter Kimani Kiramba* [2020]eKLR, where Justice L. Gacheru while making reference to the case of J. B. Ojwang, S.C (as he then was) had this to say:-

“Since the Applicant is seeking to transfer the suit based on the fact that the subordinate court has no jurisdiction, then the court finds that the application is not merited as already held above by the court. The suit is to be transferred from a court with no jurisdiction, then it means it is not only an incompetent suit, but also a nullity in law and thus there is nothing to transfer.”
17. In the upshot, the Notice of Motion application dated 20th July, 2023 is based on a nullity and the same is hereby dismissed with costs to the Defendants/Respondents.

It is so ordered.



**RULING DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF ...NOVEMBER, 2024.
(UPLOADED VIA ELECTRONIC MAIL)**

D. O. CHEPKWONY

JUDGE

