



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MIGORI

MISC APPLICATION NO. 26 OF 2020

PETER OUMA NYAPARA.....APPLICANT

-VERSUS-

WILLIS OURU OKOTH.....RESPONDENT

RULING

Before this court, is a Notice of Motion application dated 11/08/2020 and filed on 15/09/2020 under Section 1A, 3A, 18 and 95 of the Civil Procedure Act. The firm of S.M Sagwe & Co. Advocates appears for the applicant. It seeks the following orders:-

a. Spent.

b. That this High Court be pleased to transfer Rongo Resident Magistrate Court ELC No. 9 of 2020 to Ndhiwa Principal Magistrates Court for hearing and determination.

c. That costs of this application be provided for.

The application is premised on **four (4) grounds** which are restated in the Supporting Affidavit of the applicant, **Petro Ouma Nyapara** as follows: -

i. That the Rongo ELC No. 9 of 2020 was filed by a person who did not know the court's jurisdiction.

ii. That the applicant was running away from the respondent who has a lot of influence in Ndhiwa;

iii. That the applicant has instructed S.M. Sagwe Advocate who has explained to him the need to transfer the suit as Rongo court does not have jurisdiction to transfer the same.

iv. That the defendant/respondent's advocate raised the issue of jurisdiction.

v. That it is fair and proper that the Honourable Court do transfer the suit to its original jurisdiction (Territorial Jurisdiction).

The application was opposed. The respondent through the firm of **P.R. Ojala & Co. Advocates** filed a replying affidavit dated 22/01/2021 on 03/03/2021 sworn by the respondent **Willis Ouru Okoth**. The respondent's **eleven (11) grounds** can be summarised as follows: -

i. That the applicant filed a suit against him on 09/03/2020 in the Senior Resident's Magistrate Court Rongo being ELC No. 9 of 2020.

ii. That the suit property is located in Ndhiwa.

iii. That Ndhiwa has a Resident Magistrate Court which has jurisdiction to handle land matters, but the applicant opted to file the said matter in Rongo.

iv. That the respondent is advised by his Advocate that the Magistrate Court has jurisdiction to hear and determine all civil cases as provided under Section 3 (2) of the Magistrate's Court Act which gives resident court power to hear and determine matters all over Kenya thus Rongo Law Court has the territorial jurisdiction to hear and determine the matter.

v. That the application is premised upon irrelevant provision of the law.

On 03/03/2021, the court directed that the matter be canvassed by way of written submissions and parties were directed to file their submissions within ten (10) days starting with the applicant. By 12/11/2021, the applicants had not filed these submissions but the respondent had.

In his written submissions dated 22/01/2021 filed on 03/03/2021, the respondent raised two (2) issues for determination: -

a) Whether this court has jurisdiction to transfer the matter to a subordinate court and whether there is need to transfer the same.

b) Whether the matter was filed with malicious intent.

On the first issue, the respondent submitted that Section 18 of the Civil Procedure Act gives the High Court or a Court of similar jurisdiction to transfer a suit. The respondent relied on **Aberdare Investments vs Bernard Wachira & 5 Others (2014) eKLR and Joseph Mururi vs Godfrey Gikundi Anjuri (2012) eKLR** in which the courts held that the High Court has jurisdiction to transfer a suit from or to a subordinate court.

Further, the respondent submitted that **Section 3 (2) of the Magistrates Court Act** provides that the Resident Magistrates Court shall have jurisdiction throughout Kenya; that the Senior Resident Magistrate in Rongo has the territorial jurisdiction to hear and determine this matter thus there is no need to transfer the same as was similarly held by Ringera J (as he was then) in **Mohamed Sitaban vs George Mwangi Karoki CA No. 13/2002**.

On the second issue, the respondent submitted that **Section 7(3) of the Magistrate's Court Act 2015** gives Magistrates the power to hear and determine land matters. The applicant and the respondent both reside in Homabay County in Ndihiwa Sub – County; that filing of the suit in Rongo which is within Migori County was an act taken by the applicant to frustrate the respondent to incur travelling expenses coming to court yet there is a court within the territorial jurisdiction to handle the said matter.

The respondent finally submitted that the Resident Magistrate's Court has territorial jurisdiction all over Kenya as was held in **Pricilla Jemaiyo Omwenga v Agakhan Hospital (2010) eKLR**. The respondent urged the court to dismiss the application with costs.

Analysis and Determinations

This court has carefully read and considered the applicant's application, the respondent's replying affidavit and submissions. The issues that emerge for determination are as follows;

i. Whether this court has powers to transfer a suit.

ii. Whether the Senior Resident Magistrate's Court in Rongo has jurisdiction to handle SRM ELC No. 9 of 2020.

i. Whether this court has powers to transfer a suit.

Section 18 (1) (b) of the Civil Procedure Act gives the High Court powers to withdraw and transfer suit instituted in the subordinate court.

“On the application of any parties and after notice of 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

(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 which it was withdrawn.”

Hon J.N. Mulwa J observed as much in **Julius Lekuruito & another v Nottingham Mwangi & another (2018) eKLR** in which the court held:-

“Under **Section 17 and 18** of the 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.”

There is no dispute that this court has powers and jurisdiction to make orders for transfer of suit where it so finds.

ii. Whether the Senior Resident Magistrate's Court in Rongo has jurisdiction to handle SRM ELC No. 9 of 2020.

Sections 11, 12, 13, 14 and 15 of the Civil Procedure Act makes provision on the place of suing. In relation to this matter, Section 12 provides as follows: -

“Subject to the pecuniary or other limitations prescribed by any law, suits—

(a) ...

(b) ...

(c) ...

(d) for the determination of any other right to or interest in immovable

property;

(e) ...

(f) ...

where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:”

Both parties do agree that the subject dispute is a suit parcel of land located in Ndhiwa Sub - County.

The applicant deponed in his supporting affidavit that the reason why he filed the suit in Rongo is that he was running away from the respondent who has a lot of influence in Ndhiwa. The applicant further deponed that indeed Counsel for the respondent raised the issue of jurisdiction although he did not attach the copy of the pleadings as stated in his affidavit.

The respondent submitted as much as follows: -

“That both the applicant and the respondent herein reside in Homabay County Ndhiwa sub county, the suit property is located in Ndhiwa sub county Homabay County.”

Learned Counsel for the respondent submitted that **Section 3 (2) of the Magistrates Court Act** provides that the Resident Magistrates shall have jurisdiction all over Kenya.

However, this court respectfully differs with the argument of Learned Counsel. That was the position then as the said Act was repealed and replaced by the Magistrates’ Courts Act No. 26 of 2015 and whose date of commencement was 02/01/2016.

Although no pleadings of the lower court have been annexed by either party in the current application, it is in no doubt from the case number itself that the suit was filed in the year 2020. Therefore, the governing statute guiding the Magistrates Courts would be the Magistrates’ Court Act No. 26 of 2015 and not the repealed Act as submitted by the respondent.

A thorough reading of the Act indicates that the new Act abolished the said provision of country-wide jurisdiction of the Magistrates’ Courts.

I associate myself with the findings of the court in **Paulo Anyanzwa Kutekha v Steel Structures Limited [2018] eKLR the court held:**

“This new Act appears to have removed the country-wide jurisdiction of magistrates’ courts. At any rate, there is not a similar provision in the statute. The territorial jurisdictions set out in the Civil Procedure Act, therefore now appear to be substantive provisions regarding jurisdiction of the magistrate’s courts.”

There is admission by both parties that the suit property is in Ndhiwa and there is a Magistrates Court of competent jurisdiction to handle the matter.

Sections 1A and 1B of the Civil Procedure Act implores the courts to ensure and facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. In furtherance of the overriding objectives, the courts are mandated to among others, ensure the just determination of proceedings, efficient disposal of business of the court, the efficient use of available judicial and administrative resources and the timely disposal of proceedings at a cost affordable by the litigants.

Both parties reside in Ndhiwa and so does the suit subject matter. I therefore see no reason why parties should spend money, time and resources traveling to Rongo while they can be heard before the Magistrates Court in Ndhiwa.

In the end, I make the following orders: -

1. The applicant’s application is merited.

2. The suit filed in Rongo being Rongo ELC No. 9 of 2020 be and is hereby withdrawn and transferred to Ndhiwa Magistrates Court for hearing and determination.

3. Mention at Ndhiwa Court on 24/6/2021.

4. Applicant to bear costs of the application.

DATED, SIGNED AND DELIVERED AT MIGORI THIS 10TH DAY OF JUNE, 2021

R. WENDOH

JUDGE

Judgment delivered in the presence of

Applicant in person

No appearance for the respondent

Nyauke Court Assistant