



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIVASHA
(CORAM: R. MWONGO, J.)

MISCELLANEOUS CIVIL CASE NO. 205 OF 2019

JOYCE MUTHONI NJOROGE.....1ST APPLICANT
SIMON N. KAGAI.....2ND APPLICANT
PHILIP KIGURU.....3RD APPLICANT
[Suing as members and/or shareholders OF MERIRONI NYAKINYUA HARAMBEE GROUP]

VERSUS

JOSHUA GACHIE.....1ST RESPONDENT
ANN GITHAIGA.....2ND RESPONDENT
[Directors of MERIRONI NYAKINYUA MULTI PURPOSE CO-OPERATIVE SOCIETY]

RULING

Introduction

1. The applicants, members of Merironi Nyakinyua Harambee Group, have filed an application seeking that the suit they filed against the Respondent, viz: **Naivasha CMCC No. 837 of 2018**, be transferred from the Chief Magistrate’s Court Naivasha to the Co-operatives Tribunal. The motion invokes **Articles 159 (2) and 165 (5)(b)** of the **Constitution**, **Sections 1A, 1B, 3A, 17 and 18 (1) & (2)** of the **Civil Procedure Act** and **Sections 76 & 77** of the **Co-operative Societies Act**.

2. In their supporting affidavit, the applicants assert that:

“2. The issue in dispute concerns members of a Co-operative society, its operations and assets.

3. That the right forum to adjudicate over the issues is the Co- operatives Tribunal and not the Chief Magistrate’s Court.”

3. The Respondents oppose the application on the grounds that: they are in agreement that the dispute concerns members of a co-operative society and that the right forum to adjudicate it is the Co-operative Tribunal, in terms of **Section 76 & 77** of the **Co-operative Societies Act CAP 490**; that the suit in the subordinate court having been filed without jurisdiction, it is a nullity in the eyes of the law and cannot therefore be transferred.

Analysis and Determination

4. The only issue for determination is a question of law: namely, whether the High

Court has the authority to transfer the said suit to the Co-operatives Tribunal.

5. In their written submissions, the parties have filed authorities, emanating from the High Court, which clearly demonstrate that at the High

Court there are two schools of jurisprudence on the issue.

6. The first school of thought contends that the Oxygen Principles under the Civil Procedure Act and **Article 159 (2)** and **165 (6)** of the **Constitution** giving supervisory jurisdiction to the High Court over subordinate courts and tribunals entitles the court to invoke a broad authority to transfer. That school holds that transfer of a matter from one court to another is essentially a procedural matter which can be cured by application of the overriding principles in the Civil Procedure Act.

7. The authorities cited in support of the first school of thought have their support in the case of **John Mwangi Karanja v Alfred Ndiangui [2011] eKLR** where Waweru J departed from the **Kanyegi** case (supra) stating:

“With the enactment of sections 1A and 1B of the Civil Procedure Act, the time has perhaps now come for this matter of transfer of suits to be looked at afresh. These sections provide as follows:-

“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court at a cost affordable by the respective parties; and

(e) the use of suitable technology.”

It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction.

If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1)).

The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions.” (Emphasis added)

8. Further authorities in support of this view include **Grace Thogori Komo v Dan Njagi Ndwiga [2013] eKLR** where the court again stated:

“It is conceded that Nairobi CMCC No 6966 of 2012 was filed in the wrong court as that court did not have jurisdiction to hear and determine it by virtue of the provisions of section 2 of the Magistrate’s Courts Act, Cap 10. That being the case, what is the sensible and expeditious thing to do? Is it not to take the case to the right court?”

9. Kasango J agreed with this approach in **Wycliffe Mwangaza Kihugwa v Grainbulk Handlers Limited [2014] eKLR** where she stated:

“21. I agree with the approach adopted by Waweru, J. in the cited cases. It is my considered view that the holding in the Kanyegi Case has perhaps been overtaken by the development in law. The overriding objectives of the Civil Procedure Act contained in Sections 1A and 1B of the Act as well as the principles of exercising judicial authority enshrined in Article 159 (2) of the Constitution of Kenya now enjoin this court to perform its duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities.”

In **Wycliffe’s case**, however, Kasango J declined to transfer the suit on the ground that whilst the High Court could transfer a suit *“even in instances where the suit was filed in the subordinate court without jurisdiction to try the case”* it would not do so in that case because the transfer sought was to the Industrial court which was a court of similar status to the High Court, and that court had such powers itself.

10. The opposing jurisprudential school holds that, in essence, where a suit has been instituted in a forum having no jurisdiction, such suit cannot be transferred to a tribunal where it ought to have been properly instituted, for the reason that the suit was filed without jurisdiction. That there having been no jurisdiction, the suit would be a nullity in the eyes of the law and there is therefore nothing to be transferred.

11. This jurisprudential concept was pointed out in the well-known Ugandan case of **Kagenyi v Musiramo & Another [1968] EA 43** which interpreted Section 18 of the **Ugandan Civil Procedure Act** (which is in *pari materia* with the Civil Procedure Act **Section 18** Kenya). The High Court there declined to transfer s suit to the High Court from the Magistrates Court because the Magistrate had no jurisdiction to try it. the Court held that:

“an order for the transfer of a suit from one court to another cannot be made unless the suit had been brought in the first instance to a court which has jurisdiction to try it”; and that

12. It was further held in **Kagenyi’s** case that:

“the subject matter of the application on the admission and showing of the applicant had been instituted in a court without jurisdiction and it was therefore incompetent for the case to be transferred to the High Court.....” (Emphasis added)

13. The positions held by Waweru J and Kasango J were taken being cognizant of the **Kagenyi case** but in an attempt to infuse the progressive and overriding provisions of **Sections 1A and 1B** of the **Civil Procedure Act**. The **Kagenyi case** has, however, been widely adopted in the High Court.

14. More recently in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR**, the Court of Appeal set aside the High Court’s decision that had held that the suit though filed in a court lacking jurisdiction, was capable of being transferred in the circumstances of the case. In that case the suit had been filed in the Principal Magistrate’s Court which did not have the pecuniary jurisdiction to entertain the suit.

15. The Court of Appeal, in the **Equity Bank case**, considered authorities on the question of jurisdiction and stated:

“In numerous decided cases, courts, including this Court, have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.” (Emphasis added)

16. As earlier indicated, the application herein invokes the “Oxygen” Principles in the provisions of the **Section 1A and 1B** of the **Civil Procedure Act** and **Article 159** of the **Constitution**.

17. In the present case, both of the parties to the suit filed in the lower court are in agreement that the dispute concerns parties who are members of co-operative societies in respect of which the only:

“forum to adjudicate over the issues is the Co-operatives Tribunal and not the Chief Magistrate’s Court.”

18. The applicant indeed invoked **Sections 76 and 77** of the **Co-operative Societies Act**. **Section 76** on settlement of disputes, which provides:

“(1) If any dispute concerning the business of a co-operative society arises-

a. among members, past members and persons claiming through members, past members and deceased members; or

b. between members, past members or deceased members, and the society, its Committee or any officer of the society; or

c. between the society and any other co-operative society, it shall be referred to the Tribunal.” (Emphasis added)

19. The provision is a mandatory provision that obligates members of co-operative societies to resolve their disputes through that forum and no other. By **Section 75 (5)** of that Act, that Tribunal has unlimited geographical and pecuniary jurisdiction in matters of co-operatives disputes. Further, recourse during proceedings or in respect of orders and awards of the Tribunal can only be appealed to the High Court.

Disposition

20. From all the foregoing, it is clear that the matter herein filed in the Chief Magistrate’s Court was so filed in circumstances where there is

no jurisdiction. As such, the absence of jurisdiction is a clear indicator that there is nothing vested in that court to be transferred from it. What is filed in the lower court is an incompetent suit. As stated by the Court of Appeal in the Equity Bank Case, this court cannot, through judicial craftsmanship, sanctify an otherwise incompetent suit through a transfer.

21. Additionally, all parties are agreed that the dispute can only be adjudicated by the Co-operative Tribunal both in respect of parties as members of co-operatives and subject matter and there is no jurisdiction thereon. Neither is capable of transfer since at no time has the lower court been invested with jurisdiction as to either subject matter or parties.

22. Accordingly, the application is declined and is hereby dismissed with costs.

Administrative directions

23. Due to the current inhibitions on movement nationally, and in keeping with social distancing requirements decreed by the state due to the Corona-virus pandemic, this Judgment has been rendered through Teams tele-conference with the consent of the parties noted hereunder, who were also able to participate in the conference. Accordingly, a signed copy of this judgment shall be scanned and availed to the parties and relevant authorities as evidence of the delivery thereof, with the High Court seal duly affixed thereon by the Executive Officer, Naivasha.

24. A printout of the parties' written consent to the delivery of this judgment shall be retained as part of the record of the Court.

25. Orders accordingly.

DATED AND DELIVERED IN NAIVASHA BY TELECONFERENCE THIS 21ST DAY OF SEPTEMBER, 2021

R. MWONGO

JUDGE

Attendance list at video/teleconference:

1. Ms Mwangi for the Applicants
2. No representation for Nyagaka Advocates for the Respondents
3. Court Assistant - Quinter Ogutu