REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 383 OF 2019

ALLAN MUPE BAKARI.....APPLICANT

VERSUS

DIANI SEA LODGE.....RESPONDENT

R U L I N G

1. It is now a dictate of the law discernible from the constitution and *stare decisis* that justice must be administered bereft of undue technicalities and in a prompt, fair and cost effective manner.

2. Those values are part of what one would call the right to access justice unimpeded with the court retaining its character as the arbiter of legal disputes. It is also an emergent jurisprudence in this country that courts should be hesitant at terminating litigant's disputes prior to affording to them the right to be heard on the merits of the dispute.

3. Before me is an application evidently brought pursuant to the provisions of Section 18, Civil Procedure Act and seeking that Mombasa CMCC No. 2307 of 2007 be withdrawn from that court and transferred to the Magistrate Court sitting at Msambweni for being and final disposal.

4. The reasons advanced for the transfer are that the cause of action arose in Diani, Proximate and within the local jurisdiction of the magistrate's court at Msambweni and that both parties reside and carry out business in Kwale. Even this early in the decision, it is important to note that the county was for a long time served by one court house, Kwale law courts, till 2019 when Msambweni was opened.

5. The defendant/Respondent objected very strenuously to the request by grounds of opposition dated 18/10/2019 on the basis that a matter filed before a court without jurisdiction is incapable of transfer to any court least of all another court without jurisdiction and that the same was bad for having been brought after prolonged and undue delay spanning over 12 years and was therefore frivolous and deserve being dismissed with costs.

6. At the hearing, both counsel had filed lists of authorities on their rival positions and then relied on the same in the oral submissions offered.

7. For the applicant, position was taken, citing decisions of the High Court, that a magistrate's court's jurisdiction is not confirmed to the district of situation. He cited to court the decisions in ***Shaiwaz Sadrudin Jmon vs Abdillahi Hassan Abdurahaman [2019] eKLR***, ***Killuira Ngeana vs Muruiki Kisome [2018] eKLR***, ***Ruth Kamunya vs George Kimeu [2015] eKLR*** and ***Grace Thogori Komo vs Dan Njagi Ndwiga [2013] eKLR*** in support of his request for transfer.

8. For the Respondent the decision in ***Mcfoy vs United Co. Ltd [1961] ALL ER 1169*** was cited for the now notorious position of law that anything founded upon a nullity cannot stand but must crumble. The same position was quoted with approval in ***Equity Bank Ltd vs Bruce Mutie t/a Diani Tours and Travels [2016] eKLR*** where the Court of Appeal held that a suit filed before a court without jurisdiction is incapable of being transferred. Same reasoning flowed in the decision in **Phoenix of *EA Assurance Ltd vs SM Thiga t/a Newspaper Service [2019] eKLR*** while ***RE: LILIAN "S" [1989] eKLR*** was cited for the established position that jurisdiction is everything and that without it a court of law downs its tools.

9. I consider this to be an unsettled area of law and jurisprudence without ignoring the two decisions of the Court of Appeal on transfer of suits filed in a court without jurisdiction. My respectful view, as informed by decisions of the superior court of this country, remain that to safe guard the right to access justice courts exist for the purposes of determining disputes brought before to them by litigants on the merits, and that there should be all attempts made at sustaining a suit rather than terminating the same in a summary manner. No litigant needs to leave the court with the feeling that the strictures of the law have been employed to deny him a right to be heard.

10. I also take the view that most of the decisions on the subject have largely been persuaded by the Ugandan decision in ***Kagenyi vs Musiramu [1968] EA 43*** which I consider to have been over-taken by the very huge strides we have made in Kenya as we ushered in a new constitution with a robust bill or rights just as we incorporated the oxygen principles as guiding factors in the administration of justice in Kenya.

11. This court proceeds from the standpoint that before a court delivers itself on the merits of the parties' dispute, it is awaited to execute its mandate to such litigants. In fact, it is now settled that a mistake or blunder should not be the only reason to shut the doors of justice to citizen of this country[1].

12. In saying so much, I lay a basis for posing the question; what would become of the Applicant's suit filed some 12 years ago when there was no court in Msambweni and the only court then in the entire Kwale district was Kwale Law Courts? I also pose the question of how well did the Chief Magistrate, sitting in Mombasa, serve the interest of justice and the law if regard is taken of the jurisdiction given to it under the first proviso to Section 11 of the Civil Procedure Act? The only answer I get is that if I decline the application, the plaintiff shall forever be unable to pursue the claim. He shall have been kept in court for over a decade without a chance to be heard. Such a litigant will surely and justifiably view the court system as a failure on duty to Kenyans on all parameters of its mandate. I also take the view that the chief Magistrate, Mombasa, should have taken an early step to return the file to a court within the then Kwale district. I am a firm believer that substantial justice should always triumph over technical approach to determination of disputes.

13. But more importantly, the superior courts in this country have interpreted Article 165(2) of the constitution to erect a stonewall on jurisdictional boundaries between the High Court and Courts of equal status. It has been said on uncountable decisions that what belongs to a court of equal status cannot be entertained by another and vice versa. This is what the authority in **Republic v Karisa Chengo & 2 others [2017] eKLR** dictates to me**.**

14. However study of what actually happens when a court finds that it has no jurisdiction in a matter, has not been a dismissal or striking out. The courts have taken the purposive approach to let the matter be heard where it belongs. That is achieved by regular transfer of suits between the courts of equal status almost on a daily basis. Suits have not been routinely defeated merely on the basis that it was filed in a court which lack jurisdiction. I am persuaded and fully convinced that this is the proportionate and robustly just approach to the administration of justice so that, ultimately, parties have their day in court.

15. It might serve a useful purpose to give just but a few examples that I can remember beforehand having been involved in such cases. In TSS INVESTMENTS LTD & ANOTHER VS NIC BANK LTD [2019] eKLR, the suit was filed at the Environment and Land Court on 20/4/2017. On the 4/5/2017 the judge of that court on own motion transferred the suit to the High Court which heard the matter and delivered a determination. On appeal one of the attacks on the decision was that the High Court was wrong in accepting the transfer. In resolving that ground the Court of Appeal said:-

> **"We have considered the record of appeal, submissions by counsel and the cited authorities. We shall start with the issue of jurisdiction. As earlier stated, the appellants filed their suit before the Environment and Land Court. The court, on its own motion, having considered the nature of the claim, transferred it to the Commercial Division of the High Court. When counsel appeared before the learned judge of the High Court, none of them raised any issue about the court's jurisdiction to hear and determine the matter. We are not saying that the appellants are estopped from raising the issue before this Court; far from it. We are in agreement with the appellants' argument that the normal rule that a party cannot raise for the first time on appeal a point he failed to raise in the High Court does not apply when the issue sought to be raised for the first time goes to jurisdiction. See FLORICULTURE INTERNATIONAL LIMITED v CENTRAL KENYA LIMITED & 3 OTHERS, [1995] eKLR,** and **KENYA PORTS AUTHORITY v MODERN HOLDINGS [E.A.] LIMITED [2017] eKLR.**
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> **Our view on the issue of jurisdiction is that the matter was rightly transferred to the High Court since the substantive dispute was about creation of security over land, which does not constitute land use, as provided in** Article 162(2) **of the** Constitution **and does not therefore fall under the jurisdiction of the Environment and Land Court. This Court pronounced itself on a similar issue is CO-OPERATIVE BANK OF KENYA LIMITED v PATRICK KANGETHE NJUGUNA & 5 OTHERS** (emphasis provided)

16. Earlier in **County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others [2015] eKLR,** the suit was filed in the High Court but the trial court on being urged to dismiss the petition on account of want of jurisdiction had it transferred to the Employment and labour Relations court. Once again the matter was determined at the ELRC, the decision was challenged on appeal and the transfer was never faulted but upheld. In its judgment the court of appeal said:-

> **The next issue for our determination is whether or not the ELRC had jurisdiction to determine the petition. Before we consider it, we would like to state that we deprecate the conduct of counsel for the appellants in this matter. When it suited them, on 5th November 2014 they urged Maina, J. to dismiss the petition as the issues raised therein fell within the jurisdiction of the ELRC and not that of the High Court. Maina, J. obliged but instead of dismissing the petition, she transferred it to the ELRC. Before the ELRC, the appellants' counsel did not question that court's jurisdiction to determine the petition. However, when they lost and the petition was granted, they came to this Court up in arms contending that the ELRC lacked jurisdiction to entertain the petition. Counsel, as officers of the court, should be candid and state the correct position of the law even when it affects their clients' cases. They should not approbate and reprobate. Having said that, we now wish to consider the issue of jurisdiction…**
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> **According to** Article 162 **of the Constitution, the ELRC has the status of the High Court. This being the case, it follows that in matters falling within its jurisdiction, the ELRC has supervisory powers over "*any person, body or authority exercising judicial or quasi judicial functions.*" We have already found that the removal of a Speaker of a County Assembly is a quasi-judicial function. As we shall shortly demonstrate, the issues raised in the petition fell within the jurisdiction of the ELRC. We therefore find that the challenge of the impeachment of the 2nd respondent was a matter that fell squarely within the**

ELRC's supervisory mandate.

17. I read the court of appeal to uphold the decision by **Maina J** by which she opted not to dismiss the petition on account of lack of jurisdiction, but transfer the same to the court with jurisdiction.

18. Many other examples may be given and the number of cases transferred between courts of equal status may actually be innumerable. That practice tells me that those superior courts have continued to transfer suits between themselves on the basis of lack of jurisdiction, the receiving courts have accepted the transfers and proceeded with matter to logical conclusions but the transfers have never been declared null. In fact the court of appeal has repeatedly upheld such transfers, if the two examples given above and the next example are to be appreciated.

19. In **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR** the court of appeal underscored the need for proportionate and expeditious disposal of disputes while saving costs of litigation when the court said:-

> **"Believing as we do that the approach taken by *Majanja J* is the correct one, and in endevouring to meet the ends of justice untrammeled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to *Article 165(5)(b)*. And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file "*mixed grill*" causes in any court they fancy. This will only delay dispensation of justice.**
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> **In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.**"

20. The question that bothers my mind is whether it is acceptable that a court of equal status or the High Court can decline jurisdiction, transfer a matter at the horizontal level of equal status, but the same courts cannot transfer a suit from one subordinate court to another or vertically from the subordinate courts, the courts which the superior court are obligated to supervise, to selves? Does the principle that jurisdiction is everything go on vacation when the issue is transfer of suit between court of equal status?

21. I hold the view that time has come, and look up to that time, for what I consider to be conflicting positions on the subject of transfer to be settled.

22. I am prepared to hold that it is untidy and may amount to unequal application of the law to have suits transferred between the High Court and courts of equal status yet it is not open to transfer a suit from a one subordinate court to another or even from the subordinate court to the High Court or Courts of equal status. While fully bound by the decisions of the Court of Appeal, I find myself with apparently two conflicting positions by that court. In those circumstances I chose to be guided by the position that I believe to meet the ends of justice, untrammelled by procedural technicalities, and this court being mandated to supervise the subordinate courts, section 18, Civil Procedure Act should be interpreted to introduce nothing new beyond the inherent powers of the court to do justice and do so robustly and substantially. I reiterate that to refuse a transfer and leave a litigant with no prospects of being heard, save for his claim being dismissed on account of lack of jurisdiction, would not be in the interests of justice but meting out an injustice.

23. From the foregoing, I have come to the conclusion that in the interests of justice and the need to give every Kenya their day in court, I find that the request for withdrawal of **Mombasa Cmcc 2307 of 2007** from that court and transfer to Msambweni law courts is merited. I order and direct that the suit be so transferred for hearing and final determination.

24. Even though the applicant has succeeded, I order that each party shall bear own costs because the application would not have been necessary had the matter been filed in the proper court in the first instance.

Dated, signed and **delivered** this **15th** day of **January 2020**

P J O OTIENO

JUDGE

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[1] *per**Apaloo JA, in Phillip Chemulolo vs Augustine Kubebe [1982] KAR at page 1040***.