



REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT MACHAKOS

CIVIL SUIT NO. 15 OF 2019

MUEMA NDUNGL.....1ST PLAINTIFF/RESPONDENT

REV PETER MWANGANGI.....2ND PLAINTIFF/RESPONDENT

VERSUS

BISHOP RAPHAEL KITUVA.....1ST DEFENDANT/APPLICANT

REV. BONIFACE MBWANG'A.....2ND DEFENDANT /APPLICANT

WILSON MAILU.....3RD DEFENDANT/APPLICANT

WILLIAM MUSYOKA.....4TH DEFENDANT/APPLICANT

HENRY TANUL.....5TH DEFENDANT/APPLICANT

BENSON MUINDI.....6TH DEFENDANT/APPLICANT

PHILIP IVULI.....7TH DEFENDANT/APPLICANT

DANIEL MWANIA.....8TH DEFENDANT/APPLICANT

RULING

1. The ruling pertains to the Notice of Motion dated 16.9.2019 and more specifically the request by the defendants to transfer the instant suit from this court to the High Court of Kenya at Nairobi for further hearing and determination.

2. The Application is supported by an annexed affidavit of Bishop Raphael Kituva, indicated as a defendant in this matter sworn on even date on the following grounds:-

(a) the suit is based on allegations of breach of trust by the elected trustees of the church and members of the church's central council who are residents and work for gain in Nairobi and that the church head office is in Nairobi.

(b) The particulars of breach of trust are alleged to have taken place in Nairobi.

(c) it is imperative that the application be allowed for efficient and convenient proceeding by the court.

3. The application was opposed by the plaintiffs vide their joint affidavit deponed on 27.9.2019. It was averred that all the parties agreed to set aside all applications and took steps to have the main suit heard expeditiously. It was averred that one of the properties in question is situate in Mlolongo, Mavoko. It was averred that only one defendant is based in Nairobi and the others are based in Nandi, Makeni, Kitui and Nandi counties. It was averred that the suit was properly filed before this court in line with Section 15 of the Civil Procedure Act.

4. Learned counsel for the defendants vide their submissions filed on 24.10.2019 prayed that the application be allowed and placed reliance on Section 15 and 16 of the Civil Procedure Act as well as the case of **Rosemary Karimi & 59 others v Cabinet Secretary, Ministry of Agriculture, Livestock and Fisheries & 8 others [2018] eKLR**.

5. In reply, learned counsel for the plaintiff in placing reliance on Section 15 of the Civil Procedure Act submitted that the cause of action

relates to one that arose in the whole country including in Machakos and that the defendants are being accused of wrong doing in relation to property that is in Mlolongo within Machakos County.

6. I have considered the application and the two issues for determination is whether this court has jurisdiction to hear and determine **the instant suit** and whether this court can order for the transfer of the said suit from this Court to Nairobi for hearing and final determination.

7. The application is brought under Section 1A, 1B, 3A, 12 and 15 of the Civil Procedure Act as well as Order 51 of the Civil Procedure Rules. Section 15 of the civil Procedure Act provides that every suit shall be instituted in a court within the local limits of whose jurisdiction the Defendant or each of the Defendants actually or voluntarily resides or carries on business or personally works for gain or have acquiesced in such institution of suit of the cause of action wholly or in part arises. Again Section 12 of the said Act provides that subject pecuniary jurisdiction or other limitation prescribed by law suits shall be instituted where subject matter is situate.

8. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **OWNERS OF MOTOR VESSEL "LILIAN S" VS CALTEX OIL (K) LTD [1989] KLR 1** that:-

"Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction."

9. Article 165(3)(a) of the Constitution provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters (a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or (b) falling within the jurisdiction of the courts contemplated in Article 162 (2). Article 162(2) on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land. It is therefore clear that the High Court no longer has original and unlimited jurisdiction in all matters as it used to have in the old Constitution. However, the jurisdiction of the High Court can only be limited as provided by the Constitution itself. I find that the suit in this court was filed before a court that had jurisdiction to hear and determine the subject suit. The suit was properly filed before this court.

10. Having satisfied myself on the issue of jurisdiction I shall embark on the issue of transfer. In the case of **Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd (2012) eKLR** Justice Odunga addressed conditions to be considered in determining whether or not to grant an order transferring a suit, thus:

"..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"

11. What the court has to consider is whether the applicant has made out a case to justify the grant of the orders sought. 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. The matter was dealt with by by Emukule J in **Rapid Kate Services Limited v Freight Forwarders Kenya Limited & 2 Others [2005] 1 KLR 292** where he expressed himself thus:

Whereas under rule 5(2) of Order 46 the Court has a wide and flexible discretion to order that a case be tried in a particular place, that discretion may however be exercised upon cause being shown, and that cause shall have regard to the convenience of the parties, and of the witnesses, the date of when the trial shall take place, and the circumstances of the case. The Court's power to transfer proceedings from one Court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings.

12. Order 47 rule 6 of the Civil Procedure Rules provides as follows:

(1) Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such place as the court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.

(2) The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:

Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.

13. There are also sections 1A and 1B of the Civil Procedure Act which are expressed in the following terms:

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.

14. The Overriding Objective provided for under sections 1A and 1B is meant for the attainment of justice. It is therefore clear that it is a matter of balancing the interests of the parties with the ultimate aim of doing justice. In my view therefore, the High Court has discretion, where it so deems appropriate, to direct that a matter filed in one place be heard by the same court sitting at a different place.

15. In the present case, it is argued by the respondent that the matter had reached the stage where directions had been taken and in an act of approbation and reprobation, the instant application popped up. It is a well-known principle of equity that one cannot approbate and reprobate all at the same time. This principle is based on the doctrine of election which postulates that no party can accept and reject the same transaction and that “a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage.” (**Verschures Creameries Ltd. v Hull & Netherlands Steamship Co. Ltd., (1921) 2 KB 608**, at p. 612, per Scrutton, L.J.)

16. It is for this reason that it is understandable that the plaintiffs are not amenable to the transfer. Based on the material placed before me I cannot decide one way or the other whether transfer would be appropriate in the circumstances. However the overriding objective aforesaid enjoins the court to aim towards the efficient disposal of proceedings. The record confirms that parties had earlier filed some interlocutory applications but which were later compromised and that parties agreed to abandon the same and proceed with the main trial. Indeed parties entered into a consent to that effect on the 16.7.2019 and that they were to come back on the 25.9.2019 for pre-trial directions only for the present application to be lodged. It has also transpired that both parties herein are members of Good News Church of Africa that has several branches within the country. It is reported that there is a branch not far from this court while the headquarters is based in Nairobi. It is also reported that the church has embarked on a purchase of several parcels of land within Mlolongo area. As the parties had agreed to proceed with the matter I do not see any reason why it should be moved to Nairobi. If it is about the inconvenience of the church officials travelling from Nairobi the same is not such an issue since Machakos is a few kilometers from Nairobi city. In any event the defendants vide their statement of defence dated 20.5.2019 indicated that the jurisdiction of this court is not denied. I find it is appropriate to have the matter heard at Machakos as earlier on agreed by the parties. Hearing the matter at Machakos in my view will achieve the efficient and speedy disposal of the matter as envisaged under the provisions of section 1A and 1B of the Civil Procedure Act. There will be no prejudice occasioned to the Defendants if they proceed with the matter here.

17. In the result I find the application dated 16.9.2019 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at **Machakos** this **6th** day of **February 2020**.

D. K. Kemei

Judge