



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**MISC CIVIL APPLICATION NO. 60 OF 2018**

**PATRICK NJUGUNA KIARIE.....APPLICANT**

**VERSUS**

**PETER MAINA KARIUKI.....RESPONDENT**

**RULING**

1. The Subject of this Ruling is a Notice of Motion Application dated 5<sup>th</sup> February, 2018 brought under **Section 3A and 60(c) of the Civil Procedure Act, 2010, Order 48 and 51 of the Civil Procedure Rules, 2010** and other enabling provisions of the Law.

2. The said Application sought Orders that:

i. *That this Hon. Court be pleased order that Kithimani CMCC No. 11 of 2017 be transferred from Kithimani Law Courts to Thika Law Courts for hearing and final determination.*

ii. *The costs be provided for*

3. The grounds in support of the Application as adduced were briefly that the plaintiffs filed a civil case before the magistrate's court in Kithimani and the subject matter of the suit is a road accident that occurred at a place called Gatitu. It emerged that the cause of action of this suit arose within the jurisdiction of Thika Law Courts and the trial court so indicated on the hearing date, therefore the applicant prays that the application be allowed as no prejudice will be suffered by the Defendant if the suit is transferred.

4. The grounds were reiterated in the Applicant's Affidavit in Support of the Application. The application was served on the Respondent who did not file a response.

**Analysis and Determination**

5. This matter is about transfer of suits. Transfer of suits from one lower Court to another is primarily governed by the **Civil Procedure Act, 2010** as read together with the relevant provisions of the **Civil Procedure Rules, 2010. Section 17** of the Act provides,

*“Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.”*

6. **Section 18** of the Act give the High the power to transfer a case instituted in the lower courts on application by the parties or on its own motion. It provides;

*“...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) ...*

(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) ...

7. These provisions give the High court powers to transfer a case from one sub-ordinate court to another if the circumstances of the case so warrant the transfer. **In addition to the afore-said provisions, the overriding objectives of the Act stipulates that the objective of the legislation is to facilitate just and efficient resolution of disputes.**

8. This power has been discussed in *Aberdare Investments v Bernard Wachira & 5 others* where it was held:

**“It is clear from these provisions (section 17 and 18) of the Civil Procedure Act, 2010 that the Court with the jurisdiction to transfer a suit from or to a sub-ordinate court is the High Court or courts with similar status.”**

9. It is not in contention from the pleading that the jurisdiction to transfer is vested in the High Court. The Applicant’s plea is that the **Kithimani CMCC No. 11 of 2017** be transferred to the Thika Law Court in Milimani primarily because it ought to have been filed where the cause of action arose as required by **Section 15 of the Civil Procedure Act, 2010**. I will need to determine whether Kithimani Court had jurisdiction to hear the matter in the first place. Since the issue of jurisdiction is central to these proceedings and any legal proceedings, as was stated by Nyarangi JA in **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1**:

**“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court 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 before it the moment it holds the opinion that it is without jurisdiction”**

10. THE MAGISTRATES' COURTS ACT, 2015, provides under Section 7. that (1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed— (a) twenty million shillings, where the court is presided over by a chief magistrate; (b) fifteen million shillings, where the court is presided over by a senior principal magistrate; From the foregoing, it can safely be concluded that claim that falls below Kshs 20 million, the Kithimani Law Courts have pecuniary jurisdiction over it.

11. The Respondent has filed no affidavit in reply to oppose the application and this therefore calls for the Court to take into account the applicant’s application on merit in the absence of the respondent as provided for under *Order 51, rule 14 of the Civil Procedure Rules viz*;

(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) The said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.

(4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex parte.

12. It has been pleaded that the **Kithimani CMCC No. 11 of 2017** was filed on 26<sup>th</sup> January, 2017 and the Applicant alleges the cause of action arose in Gatitu within the Jurisdiction of Thika Law Courts. This position has not been denied or controverted by the Respondent and the applicant has furnished his Affidavit of Service in Court to support his position.

13. This being the case, this Court will consider the interests of the justice as espoused in **Section 3A of the Civil Procedure Act** in determining which forum is more convenient for the determination of the matter. In the instant case this shall include; considering the timeliness of the instant application and the need to have the matter heard and determined expeditiously.

14. Having regard to the sentiments expressed by the applicant in his pleadings, this Court is of the view that the application be allowed and the suit namely **Kithimani CMCC No. 11 of 2017** be transferred to Thika for further hearing and determination. This is because the cause of action falls within the jurisdiction of Thika Law Courts and it will serve the interests of justice.

15. In conclusion, I find that the application is merited, and is hereby allowed with the following orders;

i. **The Kithimani CMCC No.11of 2017 be transferred to The Chief Magistrates Court Thika for hearing and final determination.**

ii. *There be no orders as to costs.*

It is so ordered.

Dated and delivered at **Machakos** this **4<sup>th</sup>** day of **December, 2018**

**D.K. KEMEI**

**JUDGE**