



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MURANG'A**  
**MISCELLANEOUS APPLICATION NO. 22 OF 2013**

SAMUEL KURIA KIMANI.....PLAINTIFF/APPLICANT

VERSUS

THE B.O.G TRUSTEES

PCEA MAKONGENI CHURCH....DEFENDANT/RESPONDENT

**RULING**

The applicant moved this court under **Order 51, rule 1** of the **Civil Procedure Rules** and **sections 15 and 18 (i)** of the **Civil Procedure Act, Cap 21**, and sought for an order to have **Civil Suit No. 84 of 2010** filed in the Senior Resident Magistrates Court at Kandara transferred to the Chief Magistrates Court at Thika.

The grounds upon which the application was made were that the cause of action arose in Thika within the jurisdiction of the Chief Magistrate's Court at Thika; the respondent has its registered office in Thika town; and, that it would be expedient and economical for the suit to be heard in Thika. The application was supported by an affidavit sworn by the counsel for the applicant.

In response to this application, counsel for the respondent filed grounds of objection in which he stated that the application is incompetent and an abuse of the due court process; he urged that this court has neither jurisdiction nor power to transfer an incompetent suit. In the counsel's view the applicant ought to withdraw the suit and file it in a proper court.

Counsel chose to file written submissions in support of their respective positions on the application; I have had occasion to read these submissions together with the court decisions they cited and relied upon.

The major issue in this application, as far as I understand it, is whether **section 15** of the **Civil Procedure Act, Cap 21** is the basis of territorial jurisdiction of the magistrates' courts and whether, therefore, any suit filed in breach of this section is a nullity and incapable of transfer from one court to another. Counsel for the respondent thinks that such a suit is a nullity while his counterpart for the applicant opines that the suit is competent and can properly be moved in different territories.

**Section 15** of the Civil Procedure Act provides as follows:-

***15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-***

- a. The defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally***

*works for gain; or*

- b. *Any of the defendants (where they are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or*
- c. *The cause of action, wholly or in part, arises.*

This provision has been interpreted by the applicant's counsel to mean that a suit must and can only be filed where the defendant or any of the defendants, where they are more than one, resides or works for gain or where the cause of action or part thereof arose. A suit filed outside the boundaries set forth in this provision is, in the counsel's view, a nullity and incapable of transfer to, as it were, a court of competent jurisdiction.

The decisions cited in support of this position is **High Court Miscellaneous Application No. 184 of 2004 Onesmus Mwanza Mutua versus Daima Bank Ltd** in which the court (Lady Justice R.V. Wendoh) held that a suit can only be instituted within the local limits prescribed in **section 15** of the **Civil Procedure Act**; the learned judge dismissed an application to transfer a suit which she found to have been filed outside the local limits contemplated under **section 15** of the Act.

Counsel also relied on the decision in **Miscellaneous Application No. 249 of 2005, Charles Wainaina Njehia versus Barclays Bank of Kenya**. Here, a suit was filed in a court without pecuniary jurisdiction; when the applicant sought to transfer the suit to the High Court which only had the jurisdiction to determine the matter, the court (Ibrahim J., as he then was) dismissed the application on the ground that the suit was a nullity and therefore incapable of transfer.

The decisions cited by the respondent may be distinguished from the application herein in several respects; in the **Onesmus Mwanza Mutua versus Daima Bank Ltd (supra)** case, no reference was made to the **Magistrates Court Act Cap 10** which is the substantive Act that confers jurisdiction upon the magistrates' courts. Section 3 (2), specifically refers to the resident magistrates' court and states as follows:-

**3. (2) *The Resident Magistrate's Court shall have jurisdiction throughout Kenya.***

Under **subsection (1)** a resident magistrate's court is duly constituted when held by a chief magistrate, a senior principal magistrate, a senior resident magistrate or a resident magistrate. The Kandara senior resident magistrate's court in which the applicant lodged his suit would therefore fall within the category of the resident magistrate's court contemplated under **section 3(2)** of the **Magistrates Court Act**. If that is the case, it would follow that the court's territorial jurisdiction is not subject to limits or restrictions within Kenya; it is, instead, as expansive as the boundaries of this country.

This question was considered in **Mohamed Sitaban versus George Mwangi Karoki, Civil Application No. 13 of 2002** which was cited with approval by Odunga J in **Justus Kyalo Mutunga versus Labh Singh Harnan (2012) eKLR** where Ringera J as he then was said of **section 3(2)** of the **Magistrates Court Act** as follows:-

***“Section 3(2) of the Magistrates Court Act provides that a Court of Resident Magistrate (which is defined to include a Senior Principal Magistrate's Court) has jurisdiction throughout Kenya. Such a court is not the subject of the local territorial jurisdiction contemplated by section 15 of the Civil procedure Act, in my opinion, section 15 of the Civil Procedure Act applied only to courts lower than the Resident Magistrate Court. I am fortified in that view by the fact that the Magistrates Court Act, Cap 10 of the Laws of Kenya was enacted in 1967 long after the Civil Procedure Act. The Legislature was therefore aware of the provisions of section 15 of the Civil Procedure Act and the hallowed rule of statutory construction that where two provisions in different statutes conflict, the provision in the latter statute is deemed to amend the earlier***

*provision must be applied. Accordingly, I find that the Bungoma Court had jurisdiction to entertain the suit and the rule that a suit filed in a court without jurisdiction is a nullity and cannot therefore be transferred is inapplicable in the circumstances of this case. There may be sound administrative reasons for filing suits in administrative districts in which the defendant resides as the cause of action but those reasons cannot oust a statutory jurisdiction.”*

The second decision, **Charles Wainaina Njehia versus Barclays Bank of Kenya (supra)** which the respondent relied upon is of little assistance to its case to the extent that it deals with the question of magistrate’s pecuniary jurisdiction. If anything, it confirms the position that the jurisdiction of the resident magistrate’s court is conferred by a statute other than the Civil Procedure Act which was essentially enacted to make provision for procedure in civil matters. The rationale of that decision appears to me to be that a suit whose subject matter exceeds a court’s jurisdiction as expressly provided for in a statute is a nullity.

In the final analysis, I am of the opinion that, in view of **section 3(1) and (2)** of the Magistrates Court Act, the applicant’s suit is not a nullity and it is the kind of suit that this court, in exercise of its powers under **section 18. (1) (b) (ii)** of the **Civil Procedure Act**, can withdraw and transfer for trial or disposal to any other subordinate court competent to try or dispose of it.

I would, in the circumstances, allow the applicant’s application; however, since the applicant was fully seized of the facts pertaining to where the suit should have been filed from the beginning, he will bear the costs of this application.

**Dated, signed and delivered in open court this 6<sup>TH</sup> day of October 2014**

Ngaah Jairus

**JUDGE**