



**ABRAHAM MWANGI WAMIGWI .....APPLICANT**

**VERSUS**

**SIMON MBIRIRI WANJIKU.....1<sup>ST</sup> RESPONDENT/RESPONDENT**

**TEKLA WANJIKU MBIRIRI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

### **RULING**

The applicant herein instituted a suit by way of a plaint in the Chief Magistrate's Court, Nairobi being CMCC No. 229 of 2012 on 23<sup>rd</sup> January 2012 against the respondent herein and one **Tekla Wanjiku Mbiriri** seeking orders for specific performance of a contract for sale in respect of land parcel No. Ngong/Ngong/43138, damages for breach of contract, costs and interests. According the said plaint the consideration for the said contract was Kshs. 1,100,000.00.

The applicant has now moved this Court by way of Notice of Motion dated 27<sup>th</sup> February 2012 seeking the following orders:

- 1. That CMCC (Milimani) No. 229 of 2012 Abraham Mwangi Wamigwi Vs Tekla W. Mbiriri & Another be transferred to the High Court for hearing and determination of the Application dated 23<sup>rd</sup> January 2012.**
- 2. That CMCC (Milimani) No. 229 of 2012 Abraham Mwangi Wamigwi Vs Tekla W. Mbiriri & Another be transferred to the High Court for final determination of the suit.**
- 3. That this Honourable Court do maintain the interim orders given on the 23<sup>rd</sup> January 2012 by the Hon. Mr. S. A. Okato (Senior Principal Magistrate) based on the plaintiff's Application dated 23<sup>rd</sup> January 2012.**
- 4. Costs in the cause.**

The grounds upon which the said application is based are contained in the grounds appearing on the face of the application, the supporting affidavit sworn by **Shamsa Gathoni Ibrahim**, and the submissions by **Mr Patel**, learned counsel for the applicant. According to the foregoing, the matter was erroneously filed in the said Magistrate's Court due to the interpretation of section 159 of the now repealed Registered Lands Act, Cap 300 Laws of Kenya which limited the jurisdiction of the Chief Magistrate's Court in land matters to land valued at 25,000 pounds and below. In filing the said suit the advocates erroneously assessed the value by applying the current value of the pound at Kshs. 130.00 thus placing the threshold at Kshs. 3,250,000.00 before discovering that the calculation of the pounds pursuant to section 19(1) of the Central Bank of Kenya Act cap 491 of the Laws of Kenya is at the rate of Kshs. 20.00 a pound. According to the applicant the said mistake was genuine and was occasioned by the applicant's law firm's mistake and not the applicant. Since the suit is still at an interlocutory stage no prejudice will be occasioned to the respondent who may be compensated in costs. According to the applicant this Court has jurisdiction under sections 1A, 1B and 18 of the Civil Procedure Act as well as Article 159(2)(d) of the

Constitution to grant the orders sought. In support of this limb of the application learned counsel relied on **Kagenyi vs. Musiramo and Another [1968] EA 43** and contended that the matters to be taken into consideration are balance of convenience, questions of expense, interests of justice and possibilities of undue hardship. On the second limb of the application it is contended that the applicant had paid substantial sums towards the purchase of the property but implementation of the contract was frustrated by the respondents' refusal to accept the balance of the purchase price who instead opted to resale the said property.

In opposing the application, the respondents swore a replying affidavit through **Tekla Wanjiku Mbiririri** on 5<sup>th</sup> March 2012 in which it is stated that the applicant filed the said suit in respect of a property valued at Kshs. 1,100,000.00 prompting the respondents to raise a preliminary objection on both territorial and pecuniary jurisdiction of the Court. It is this that prompted the applicant to institute these proceedings with a view to defeat the said objection an action which in the respondents' view amounts to an abuse of the process of the Court. It is further contended that it is unprocedural for the court to transfer to itself a suit or other proceedings pending in any Court Subordinate to it and thereafter try and dispose of it. It is further contended that the suit sought to be transferred is a nullity for want of jurisdiction and hence there is nothing to be transferred. Since the suit property is in Ngong within Kajiado *ab initio* North District only the High Court at Machakos has territorial and supervisory jurisdiction in the matter. It is further contended that in so far as the supporting affidavit deposes on contentious issues without disclosing sources of knowledge and further as some paragraphs are not drawn in the first person as required under Order 19 of the Civil Procedure Rules, the same is defective. Since the said Central Bank of Kenya Act came into effect in 1963, the applicant's advocates cannot feign ignorance of its provisions. On the issue of interim orders, it is the respondents' position that the same lapsed as a result of non-extension thereof. It is further contended that the issue of jurisdiction is cardinal and cannot be equated to procedural technicalities hence the application ought to be struck out. The proper procedure according to **Mr Githuka**, learned counsel for the respondents, is for the applicant to withdraw the suit and file a proper suit in a court with jurisdiction to hear the matter. The respondents relied on **Ali Abdi Sheikh vs. Edward Nderitu Wainaina & 3 Others HCCC No. 556 of 2009** and **Rainbow Manufacturers Limited vs. National Bank of Kenya [2010] eKLR**.

The law relating to transfer of suits from subordinate Courts to the High Court or any transfer for that matter is very clear. In **Kagenyi vs. Musiramo** (supra), **Sir Udo Udoma, CJ** made it clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. In **Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others** (supra), **Koome, J** (as she then was) found that since the plaintiff had filed a suit in respect of a claim to land whose value exceeded Kshs. 500,000.00 in the subordinate court the suit could not be transferred since the general powers of the court to transfer suits under section 18 of the Civil Procedure Act cannot be exercised in a matter where the suit was filed in a court without jurisdiction. A similar view was taken by the same Judge in **Rainbow Manufacturers Limited vs. National Bank of Kenya** (supra).

Dealing with the same issue of jurisdiction, **J B Ojwang, J** (as he then was) in the **Boniface Waweru Mbiyu vs. Mary Njeri & Another** expressed himself as follows:

**“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court”.**

It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity

in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further. That position was made clear by **Nyarangi JA** in **The Owners of Motor Vessel “Lillian S” vs. Caltex Oil Kenya Limited (1989) KLR 1**, where the learned Judge stated:

**“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”.**

The reason advanced by the applicant in seeking the transfer of Nairobi Chief Magistrate’s Court Civil Suit No. 229 of 2012 to the High Court is that the value of the disputed parcel of land exceeds the jurisdiction of that Court. This was the same position in **Ali Abdi Sheikh vs. Edward Nderitu Wainaina & Others** (supra). I have no reason to depart from the reasoning of the learned Judge in the said decision. Matters of jurisdiction, in my view, cannot be described as technicalities of procedure. They are matters of substance since without jurisdiction the Court cannot be said to be seized of the dispute. Accordingly, lack of jurisdiction cannot be cured either by overriding objective under sections 1A and 1B of the Civil Procedure Act or Article 159(2)(d) of the Constitution. It follows that this application has no merit.

Before I pen off there are other issues which were raised which in fairness to counsel I wish to deal with. It was contended that under section 18 of the Civil Procedure Act the Court cannot transfer a suit from the subordinate court to itself. The said section provides:

***(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, 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) try or dispose of the same; or***

***(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) retransfer the same for trial or disposal to the court from which it was withdrawn.***

***(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.***

Whereas it is correct that section 18(1)(b)(i) talks about the court withdrawing the suit or proceedings and thereafter disposing of or trying the same, to say that the High Court cannot under the said provision transfer a suit from the subordinate court to itself is in my view a misconception. It is noteworthy that under section 18(1)(b)(iii) the High Court is empowered to “retransfer” such a suit back to the court in which it was originally filed. This may occur where a magistrate with pecuniary jurisdiction is posted to the said court. I am therefore clear in my mind that under section 18 aforesaid the High Court has jurisdiction to transfer a suit from the subordinate court to itself for hearing and disposal.

With respect to the provisions of Order 19 rule 5 of the Civil Procedure Rules, what the law requires is that an affidavit be in “the first person”. It does not say that it be in the “first person singular”. Accordingly the use of “we” in the affidavit is in my view acceptable.

In the result the application dated 27<sup>th</sup> February 2012 is incompetent and the same is dismissed with costs to the respondents.

Dated at Nairobi this 5<sup>th</sup> day of October 2012

**G V ODUNGA**

**JUDGE**

Delivered in the presence of

Mr Patel for the Applicant

Mr Kahubu for Mr Githuka for the Respondent