



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Miscellaneous Civil Application 396 of 2011**

**CHARLES NDUNGU KIROBI ..... APPLICANT**

**VERSUS**

**ESTHER MUTHONI MUNGAI ..... RESPONDENT**

**RULING**

The application dated 13<sup>th</sup> December 2011 seeks for orders to transfer Nyahururu Principal Magistrate court **Civil Case No.229 of 2011 CHARLES NDUNGU KIROBI V ESTHER MUTHONI MUNGAI** to Naivasha Chief Magistrate’s court for hearing and determination.

It is premised on grounds that the cause of action arose on the Naivasha-Mai Mahiu Road, within the jurisdiction of the Naivasha Chief Magistrate’s court, but the suit was erroneously filed in the Nyahururu Principal Magistrate’s court due to an oversight on the part of the applicant’s advocate.

From the supporting affidavit, this realisation dawned on the Applicant’s counsel when the Respondent raised the issue of territorial jurisdiction in her statement of defence.

The application is opposed as being an abuse of the court process on grounds that since the court in which the matter was filed had no territorial jurisdiction, then this court cannot transfer what was a nullity *ab initio*.

The application was disposed of by way of written submissions – where the applicant’s counsel invoked the provisions of Article 30 (1) of the Constitution that:

**“Every person has the right to have any dispute that can be resolved by the application and law decided in fair and public hearing before a court, if appropriate authentic independent and impartial tribunal or body.”**

Counsel further urges this court to be guided by **Section 1A and 1B** of the **Civil Procedure Act**, so as to do substantive justice to the parties, saying the transfer of this suit will not cause inconvenience to any of the parties. Reference is made to the decision in **JOHN MARARA WEKESA V PATRICK WAFULA OTUNGA** 2005 eKLR, which addresses the issue regarding territorial jurisdiction. The applicant’s counsel has realised his mistake and wishes the matter to go before the court with jurisdiction.

On the other hand, the Respondents’ counsel has cited several decisions to demonstrate that a suit filed without jurisdiction cannot be transferred.

It is not disputed that the cause of action arose in Naivasha and the suit ought to have been filed in

Naivasha Magistrate's court. Under **section 15** of the **Civil Procedure Act**, every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant resides.

I recognise that **section 18** of the **Civil Procedure Act** gives this court wide powers to withdraw and transfer suits from one court to another for good reason and expediency. In this instance there is really no good reason why the suit was filed in Nyahururu because the cause of action obviously arose in a very determinable place and the only reasonable inference to draw is that the plaintiff's counsel was simply not diligent. This kind of situation was addressed by Ringera J (as he then was) in the case of **Omwoyo v African Highlands & Produce Co. Ltd** (2002) 1 KLR pg 698 at pg 699 as follows:

**“That being the case, the sole issue for determination her is whether this court has jurisdiction to transfer a suit from a court which is seized of it has no jurisdiction to determine it to a court vested with jurisdiction.”**

The judge while drawing from the Uganda decision of **Kagenyi V Musiramo** noted that an order of transfer of a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try. The court observed that:

**“The principle of law to be gleaned. . . is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first place, in a court which does not have pecuniary and/or territorial jurisdiction to try it.”**

This clearly states the position, and with the greatest respect to applicant's counsel **Article 50(1)** which he cites is with regard to referring suits to other tribunals or bodies for determination and not for transfer. I do not think section 1A and 1B of the Civil Procedure Act were enacted to defeat exercise of due diligence, especially by counsel and the cure for such mistake does not lie with the High Court sanitizing what was a nullity *ab initio*.

This case can easily be distinguished from the decision in Ibrahim **Sheikh Abdula V David Mucheru**, because in that instance the plaintiff was torn between filing suit where the cause of action arose, or filing it where the defendant resided. This is why that case the court observed that in the resolution of disputes by courts, a financial burden should not be placed on a party with regard to a place of filing suit. That is not the situation prevailing here.

Consequently I am not satisfied that the orders sought are merited as this suit *ab initio* was filed in a court which lacked jurisdiction to handle the same, there being a competent court in the place where the cause of action arose, and no justified explanation has been given.

Indeed I can do no better than to borrow from the decision in **Omwoyo V African Highlands** that:

**“It may be that to dismiss the application for transfer would be to punish the plaintiff for the mistake of his advocate but if the court has no jurisdiction to do something it cannot do so in what is said to be in the interests of justice.**

**The interests of justice are forever best served by upholding the law and not bending it to suit the individual circumstances of cases before the court. But even if the court had discretion in the matter, it may be asked whether to file a suit in a court without jurisdiction may be treated as the kind of mistake by an advocate which the court may over look. . . . The time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour.”**

Consequently the application herein is dismissed with costs to Respondent.

**Delivered and dated this 2nd day of November, 2012 at Nakuru.**

**H.A. OMONDI**  
**JUDGE**