Peter v Aga Khan University Hospital (Civil Case E355 of 2023)
[2024] KEMC 37 (KLR) (23 September 2024) (Ruling)

Neutral citation: [2024] KEMC 37 (KLR)

REPUBLIC OF KENYA

IN THE MACHAKOS LAW COURTS

CIVIL CASE E355 OF 2023

CN ONDIEKI, PM

SEPTEMBER 23, 2024

BETWEEN

SAMUEL MUSEMBI PETER ..... PLAINTIFF

AND

AGA KHAN UNIVERSITY HOSPITAL ..... DEFENDANT

RULING

1. Vide a Plaint dated 26th October 2023 and filed on 27th October 2023, the Plaintiff brought an action against the Defendant, based on the tort of defamation.

2. In its Statement of Defence dated 24th November 2023 and filed on 28th November 2023, the Defendant denied the claim, seriatim verbatim.

part ii: the defendant/applicant's case

3. On 14th February 2024, the Defendant/Applicant (hereinafter "the Applciant") filed a Notice of Motion dated 8th February 2024 primarily seeking an order of this Court dismissing the suit in its entirety.

4. The Application is predicated on the grounds set out on the face of the Motion and facts deposed in the Supporting Affidavit sworn on 8th February 2024 by one Valentine Situma Achungo, who describes herself as the Legal Counsel of the Applicant.

5. Basing its case on section 15(a) of the *Civil Procedure Act*, the Applicant claims that first, the cause of action arose in Nairobi and not Machakos. Secondly, the Applicant claims that it carries on its business in Nairobi, particularly, at 3rd Parklands Avenue, in Parklands area. In this connection, it is claimed that the Court in Machakos lacks jurisdiction to hear and determine this suit.

6. In her written Submissions dated 24th July 2024 and filed on even date, learned cousnel Ms. Omulele instructed by Omulele Tollo Advocates, representing the Applicant, submits that the Applicant has established that this suit is filed contrary to section 15(a) of the *Civil Procedure Act* and the Court in Machakos Law Courts therefore lacks juridicrion to determine it, placing reliance upon Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd [1989] (sic); Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service [2019] eKLR; Joseph Muthee Kamau & another vs. David Mwangi Gichure & another [2013] eKLR.

7. This Court is thus urged to dismiss the suit in entirety, with costs to the Applicant.

Part iii: the plaintiff/respondent's case

8. In his Replying Affidavit dated 28th February 2024 and filed on 29th February 2024, the Plaintiff/ Respondent (hereinafter "the Respondent") does not deny the fact that the cause of action arose in Nairobi and that the Applicant carries on its business in Nairobi.

9. It is deposed that the basis of filing of this suit in Machakos Law Courts was not section 15(a) of the *Civil Procedure Act* relied upon by the Applicant but sections 12, 13 and 14 of the *Civil Procedure Act*. It is deposed that the Respondent resides and works in Machakos.

10. It is further deposed that a magistrates Court has countrywide jurisdiction under section 3(2) of the Magistrates' Act.

11. In his written submissions dated 22nd July 2024 and filed on even date, learned counsel Mr. Muumbi instructed by the firm of Messieurs D.M. Muumbi & Company Advocates, representing the Respondent, submits that the Applicant has failed to persuade the Court that this suit should be dismissed, relying on sections 11 and 14 of the *Civil Procedure Act*.

12. It is submitted that the *Magistrates' Courts Act* confers countrywide jurisdiction on a magistrates' Court should be construed to override the *Civil Procedure Act*, placing reliance upon Justus Kyalo Mutunga vs. Labh Singh Harnam [2012] eKLR; Doshi Enterprises Limited vs. Oriental Steel Fabricators & Builders, Nairobi (Milimani) HCMA No. 627 of 2001; Ruth Gathinga Kamunya & another vs. George Kimani [2015] eKLR; and In Re ANM (Minor) [2021] eKLR.

Part iv: questions for determination

13. Commending itself for determination - gleaning from the Notice of Motion, the Replying Affidavit, and the rival written submissions – is only one question namely whether this Court has original jurisdiction to determine the suit.

Part v: analysis of the law; examination of facts; evaluation of evidence and determination

14. The gravamen of the Applicant's Motion is that this Court lacks territorial jurisdiction to entertain, leave alone hearing and determining this suit. In opposing the thesis advanced by the Applicant, the Respondent asserts that this Court has the requisite jurisdiction to hear and determine the suit ion and the suit since the law does not limit its jurisdiction to any specific geographical area.

15. It's now an entrenched edict, well-settled I must add, that first, jurisdiction is everything and second, a Court of law can only hear and determine that which is within its domain, as circumscribed by *the Constitution* or Statute or both. The designers of this edict were justified by well-founded fears, chief among them being that authority -except when circumscribed- is inherently corruptive and a Court may fall into the temptation of becoming what Lord Mersey once described in his riveting analogy as

"an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be." See G & C Kreglinger vs. New Patagonia Meat & Cold Storage Co. Ltd (1913).

16. Since jurisdiction is everything and bears a preliminary determinative effect on both this Application and the main suit, it follows that a Court of law must inquire into its jurisdiction before a decision is rendered on merit. Without it, a Court has no power to make one more step and should instead down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. See the cause celebre and now locus classicus case in jurisdiction disputes Court of Appeal decision in Owners of Motor Vessel "Lillian S" vs. Caltex Oil (K) Ltd [1989] KLR 1, where Nyarangi, JA pronounced himself as follows: "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a Court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or tribunal has been given power to determine conclusively whether the facts exist. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given."

17. There is no universally accepted definition of jurisdiction. Broadly speaking, jurisdiction is the authority or power granted to a formally constituted legal body to deal with and make pronouncements on legal matters and by implication to administer justice within a defined area of responsibility. In the context of Kenya, jurisdiction of a Court is the authority or power granted to a Court to admit, consider and determine a legal matter on an area of responsibility defined by *the Constitution* and/or Act of Parliament and more particularly, the power reposed in a Court to interpret and apply the laws contemplated by Article 2 of *the Constitution* of Kenya and those set out under section 3 of the *Judicature Act*. See the locus classicus on this subject namely the Court of Appeal decision in Owners of Motor Vessel "Lillian S" vs. Caltex Oil (K) Ltd [1989] KLR 1, per Nyarangi, JA. Article 2(2) of *the Constitution* provides that no person may claim or exercise State authority except as authorized under *the Constitution*.

18. Jurisdiction of a Court of law ought to flow either from *the Constitution* or legislation or both. In the case of Samuel Kamau Macharia vs. Kenya Commercial Bank Ltd & 2 Others [2012] eKLR, the Supreme Court of Kenya held that "[68] A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred (to it) by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by the law. We agree with Counsel for the first and second Respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of

jurisdiction extensively in, "In the Matter of Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the Constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal the legislature would be within its authority to prescribe the jurisdiction of such Court or tribunal by statute law." See also the Supreme Court of Kenya decision In the Matter of Interim Independent Electoral Commission [2011] eKLR. In the foregoing context, Courts and other public bodies should work within the powers expressly conferred either by statute or legislation of both, but not by implication. Power should not be expanded through judicial craft. See Geoffrey K. Sang vs. Director of Public Prosecutions & 4 others [2020] eKLR, per Odunga, J.; Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461; Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530; and Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

19. A Court cannot, consequently, make up for the lack of jurisdiction. The impact of proceeding without jurisdiction is so deleterious that no Court should ever imagine to so do. In Sir Ali Salim vs. Shariff Mohammed Sharray 1938 KLR, it was held that: "If a Court has no jurisdiction over the subject matter of the litigation, its judgements and orders, however certain and technically correct, are mere nullities and not only voidable, they are void and have no effect either as estoppel or otherwise, and may not only be set aside at any time by the Court in which they are rendered, but be declared void by every Court in which they may be presented. It is well established law that jurisdiction cannot be conferred on a Court by consent of parties and any waiver on their part cannot make up for the lack of jurisdiction."

20. Article 2(2) of *the Constitution* provides that "No person may claim or exercise State authority except as authorised under this Constitution." Article 162 of *the Constitution* enshrines the system of Courts in Kenya. Article 162(4) of *the Constitution* provides that subordinate Courts are the Courts established under article 169 of *the Constitution* or alternatively, those Courts established by Parliament in accordance with Article 169. The text of Article 162 aforesaid reads thus: "162. (1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2). (2) 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. (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2). (4) The subordinate Courts are the Courts established under Article 169, or by Parliament in accordance with that Article."

21. Article 169 sets out the subordinate Courts referred to in Article 162(4) thereof. In particular, Article 169(1)(a) establishes Magistrates Courts. Unlike superior Courts whose jurisdiction is primarily set out in *the Constitution* and other ancillary jurisdiction found in legislation like the *Judicature Act*, in the case of Magistrates' Courts, *the Constitution* has donated the power to define the jurisdiction thereof to Parliament Courtesy of Article 169(2) thereof. The text of Article 169 reads as follows: "169. (1) The subordinate Courts are— (a) the Magistrates Courts; (b) the Kadhis' Courts; (c) the Courts Martial; and (d) any other Court or local tribunal as may be established by an Act of Parliament, other than the Courts established as required by Article 162 (2). (2) Parliament shall enact legislation conferring jurisdiction, functions and powers on the Courts established under clause (1)."

22. In line with the command of Article 169(2) of *the Constitution*, Parliament repealed the *Magistrates' Courts Act*, Cap 10 of the Laws of Kenya in 2015 and re-enacted it as the *Magistrates' Courts Act*, 2015. In the said re-enacted Act, the Preamble reads thus "AN ACT of Parliament to give effect to Articles 23(2) and 169(1)(a) and (2) of *the Constitution*; to confer jurisdiction, functions and powers on the Magistrates' Courts; to provide for the procedure of the Magistrates' Courts, and for connected purposes". The pre-amble clearly indicates that the enactment is to actualize among other intentions, the command of *the Constitution* contained in Article 169 (2) of *the Constitution*. It is in line with that command that Parliament housed the jurisdiction of Magistrates' Courts. Categorically, sections 6, 7, 8, 9 and 10 of the *Magistrates' Courts Act*, 2015 is dedicated to the jurisdiction of Magistrates. Section 6 provides for the criminal jurisdiction of Magistrates' Courts; section 7 provides for civil jurisdiction of the said Courts; section 8 provides for claims relating to violation of human rights jurisdiction of the said Courts; section 9 provides jurisdiction on labour, employment, environment and land; and finally, section 10 provides for jurisdiction to punish for contempt of Court.

23. The *Civil Procedure Act* provides for the procedure to be adopted in civil Courts. Generally, a party can file a civil suit in any Court unless the Court is barred by law. Section 5 of the *Civil Procedure Act* provides thus: "Any Court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred." Notwithstanding the generality of section 5 of the *Civil Procedure Act*, a suit should be instituted in the lowest Court competent to try it. Section 11 of the *Civil Procedure Act* provides thus: "Every suit shall be instituted in the Court of the lowest grade competent to try it, except that where there are more subordinate Courts than one with jurisdiction in the same County competent to try it, a suit may, if the party instituting the suit or his Advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate Courts: Provided that— (i) if a suit is instituted in a Court other than a Court of the lowest grade competent to try it, the Magistrate holding such Court shall return the Plaint for presentation in the Court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his Court; and (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate Court in the same County." Regarding to suits relating to land, the procedure requires that such a suit shall be instituted either in the Court within the local limits of whose jurisdiction the property is situate or in the Court within the local limits of whose jurisdiction the Defendant actually and voluntarily resides or carries on business, or personally works for gain. Section 12 of the *Civil Procedure Act* provides thus: "Subject to the pecuniary or other limitations prescribed by any law, suits— (a) for the recovery of immovable property, with or without rent or profits; (b) for the partition of immovable property; (c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property; (d) for the determination of any other right to or interest in immovable property; (e) for compensation for wrong to immovable property; (f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the Court within the local limits of whose jurisdiction the property is situate: Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the Defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the Defendant actually and voluntarily resides or carries on business, or personally works for gain."

24. In situations where the suit land straddles over the jurisdiction of two Courts, the suit may be instituted in any of the two Courts. Section 13 of the *Civil Procedure Act* provides thus: "Where a suit is to obtain relief respecting, or compensation for wrong to, immovable property situate within the jurisdiction of

different Courts, the suit may be instituted in any Court within the local limits of whose jurisdiction any portion of the property is situate, provided that, in respect of the value of the subject-matter of the suit, the entire claim is cognizable by such Court."

25. In the event where a suit is for recovery of movable property or for compensation for torts, then the suit shall be instituted in the Court within whose jurisdiction the wrong tort occurred or where the Defendants ordinarily reside or carry on business. Section 14 of the *Civil Procedure Act* provides that "Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the Defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the Plaintiff in either of those Courts."

26. In any other nature of suits, any suit should be instituted within the local limits of a Court where the Defendant resides15. Other suits to be instituted where Defendant resides or carries on business at the material time or where the cause of action arose. Section 15 of the *Civil Procedure Act* provides thus: "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 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, 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."

27. Section 16 of the *Civil Procedure Act* provides that "No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the Court of first instance and there has been a consequent failure of justice."

28. A Defendant may approach the High Court with an Application to withdraw and transfer a suit where any of favourable circumstances contemplated under sections 12-16 allow but have not been considered by the Plaintiff. Section 17 of the *Civil Procedure Act* provides that "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."

29. The High Court is clothed with power to withdraw and transfer a suit instituted in subordinate Court to either another subordinate Court or to the High Court itself. Section 18 of the *Civil Procedure Act* provides that "(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."

30. This Application is indirectly inviting this Court to apply the doctrine of kompetenz kompetenz. There are two levels of jurisdiction. The first level is procedural jurisdiction and the second level is substantive jurisdiction. The former allows the Court to interrogate the matter before it under the doctrine of kompetenz kompetenz with a view of establishing whether or not it has the latter jurisdiction to hear and determine the matter. See Uganda General Trading Co. Ltd vs. N T Patel Kampala [1965] EA 149, where Sir Udo Udoma, CJ, expressed himself as follows: "The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand the Court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law... The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the Court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the Court where there is one as in the instant case. It may be considered incompetent for a Court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the Court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity." Similarly, in Associated Battery Manufacturers Ltd vs. Samuel Mutie Ndambuki [2020] eKLR, Odunga, J., while echoing the reasoning of Ochieng, J. in *Sammy Likuyi Adiema vs. Charles Shamwati Shisikani, Kakamega HCCA No. 144 of 2003*, took the following view on levels of jurisdiction: "6. Several decisions have been handed down by the Courts regarding the issue of jurisdiction particularly what amounts to want of jurisdiction. As was held by Ochieng, J in *Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 Of 2003*, a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute ab initio, in which case it ought to down its tools before taking one more step as was held in Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1. It may also be that though the Court has jurisdiction to enter into the inquiry concerned it lacks the jurisdiction to grant the relief sought."

31. Courtesy of the doctrine of kompetenze kompetenz, this Court is exercising the first level of jurisdiction in this instance.

32. Want of jurisdiction ought to be raised at the earliest because jurisdiction ought to be the first test in the legal authority of a Court since its absence disqualifies a Court from determining the question. Ojwang J. (as he then was) in *Boniface Waweru vs. Mary Njeri and Another, Nairobi Misc. Application No. 639 of 2005* (UR) held that "Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question." See also Owners of Motor Vessel "Lillian S" vs. Caltex Oil (K) Ltd [1989] KLR 1, where Nyarangi, JA stated as follows: "I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything..."

33. A Court should not readily drop the ball when faced with a question of jurisdiction. A Court should jealously guard its jurisdiction while at the same time minding that it may be precluded or restricted by either legislative mandate or certain special contexts but if the legislative provisions which suggest a curtailment of the Courts' power of review give rise to a tension between the principle of legislative mandate and the judicial fundamental of access to Courts, and if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the Court. See Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati [2008] KLR 728, per Nyamu, J. (as he then was).

34. A Magistrate's Court has jurisdiction throughout Kenya. The basis of downing tools should be a finding that a Court lacks jurisdiction and not merely on grounds of inconvenience or costs to be incurred by the Applicant and parties should score the difference between jurisdiction which is conferred by the *Magistrates' Courts Act* which confers a magistrate with countrywide jurisdiction and which affords the aggrieved party to move the Court to strike the suit out on one hand, and territorial inconvenience which is catered by the *Civil Procedure Act* and which then affords the aggrieved party the right to seek transfer of the suit to a Court which is convenient to the Applicant, on the other hand. See Sustainable Management Services vs. New Mitaboni F.C. S. [2017] eKLR, per D.K. Kemei, J.

35. And so, filing a suit in a Court other than the Court where the suit property is situated does not erect a jurisdictional bar to the suit since multiple Courts can have concurrent jurisdiction. When a party is aggrieved with territorial inconvenience and attendant costs, the aggrieved party should seek transfer and dismissal of the suit. See David Karobia Kiiru vs. Charles Nderitu Gitoi & another [2018] eKLR, where faced with a similar question, Ohundo, J. rendered himself as follows and I will quote His Lordship in extenso: "The question that then emerges is: should a matter which is filed in a Court other than the Court within the local limits of whose jurisdiction the property is situate be struck out? ... 21. There was no suggestion that there was any jurisdictional bar to the suit aside from the issue of the case being filed in a Court other than the Court within the local limits of whose jurisdiction the property is situate. Assuming that the suit property was situated in Nakuru, the Magistrate would have comfortably handled the matter to conclusion. Strictly speaking, the Magistrate had jurisdiction and the requirement of filing the case elsewhere was more of an issue of distribution of work among the various Magistrates' Court stations. It's important to reiterate that a valid preliminary objection should, if successful, dispose of the suit. The preliminary objection before the Magistrate could not and ought not to have resulted in a striking out of the suit... 23. Had the Magistrate considered that the Court's overall mission is to hear parties and do justice, it would have become apparent that the transgression of filing the case in a Court other than the Court within the local limits of whose jurisdiction the property is situate could be cured in a manner that allows the parties to have the real dispute between them determined in a just, expeditious and affordable manner. The learned Magistrate had a discretion to handle the matter in such a way as to give the parties a chance to have the suit heard in a Court within the local limits of whose jurisdiction the property is situate. A pragmatic approach in the circumstances would have been to order the parties to file an appropriate Application to this Court seeking transfer of the suit to the appropriate Court station. 24. In view of the foregoing discourse, I find that the appeal has merit. I therefore make the following orders: a) This appeal is allowed. b) The ruling and order of the learned Magistrate dated 22nd February 2016 is set aside and substituted with an order dismissing the preliminary objection dated 11th January 2016. c) Costs of this appeal as well as costs of the preliminary objection before the subordinate Court are awarded to the Appellant and shall be paid by the 1st Respondent. d) Parties are at liberty to make an appropriate Application for transfer of the subordinate Court case to the appropriate Court station."

36. The provisions of the *Civil Procedure Act* should be interpreted in the direction of affording convenience to a Defendant and saving the Defendant some costs. It is not intended to curtail the jurisdiction of a Magistrate's Court. See John Wekesa Maraka vs. Patrick Wafula Otunga [2005] eKLR, where J.K. Sergon, J. took the following judicial view: "I do not think Section 15 of the *Civil Procedure Act* was meant to apply to Resident Magistrates Court. Most probably it was intended to apply to District Magistrates' Courts defined under Section 6 of the Magistrate's Courts Act. Even if it were to be said that the provision of Section 15 were to apply to the Resident Magistrate's Court, the position in my view will not change because the law is well settled that where there is a conflict of between two statutes, the provision in the latter statute would be deemed to have amended the earlier provision. The Magistrates Courts Act was enacted later than the *Civil Procedure Act*. It is therefore evidently clear that the Webuye Court had jurisdiction to entertain the suit. The learned Senior Resident Magistrate therefore misapprehended the point when she held that she had no jurisdiction to hear the matter. For the above reasons, the appeal must succeed."

37. In any event, filing of a case outside the jurisdiction of both parties contrary to the mandatory provisions of section 15 of the *Civil Procedure Act* does not make it a nullity because section 15(b) thereof adds that a Court may give leave for the filing away from the local limits or the Defendant may acquiesce in such institution. Per Mwera, J. (as he then was) Doshi Enterprises Limited vs. Oriental Steel Fabricators & Builders Nairobi (Milimani) HCMA No. 627 of 2001 (UR). This reasoning has been followed in subsequent cases including the decision by Odunga, J. in Justus Kyalo Mutunga v Labh Singh Harnam (2012) eKLR.

38. The provisions of the *Civil Procedure Act* and Rules thereunder are administrative in nature with the intention that the place of suing be governed by certain rules for purposes of convenience and minimizing costs. These provisions were not intended to oust, cannot oust and should not be interpreted as ousting the country-wide jurisdiction of Magistrates. H.P.G. Hatari, J. opines (in passing) that this position may have changed with the coming into force of the *Magistrates' Courts Act*, 2015. In Paulo Anyanzwa Kutekha vs. Steel Structures Limited [2018] eKLR, the Appellant (Paulo Anyanzwa Kutekha) was the Plaintiff in the lower Court while the Respondent was the Defendant. The Appellant's suit (a claim for damages on account of industrial accident) was struck out by the trial Court upon a preliminary objection raised by the Respondent on the issue of the Court's territorial jurisdiction. H.P.G. Waweru, J. held that "3. For purposes of this appeal, there were two statutes that governed the civil jurisdiction of Magistrates' Courts at the time the suit was filed. The substantive statute that established Magistrates' Courts and declared their various jurisdictions was the *Magistrates' Courts Act*, Cap 10. That statute provided at section 3 thereof as follows –"3. (1) There is hereby established the Resident Magistrate's Court, which shall be a Court subordinate to the High Court and shall be duly constituted when held by a chief Magistrate, a senior principal Magistrate, a senior resident Magistrate or a resident Magistrate. (2) The Resident Magistrate's Court shall have jurisdiction throughout Kenya." At section 5 the Act provided for various pecuniary limits of the civil jurisdiction of Magistrate's Courts. This Act commenced operation on 1st August 1967. 4. The procedural statute on the other hand was (and still is) the *Civil Procedure Act*, Cap 21 which commenced operation on 31st January 1924. This Act, in various provisions (sections 11, 12, 13, 14 and 15), provides for places of suing. These provisions are obviously administrative in nature with the intention that the place of suing be governed by certain rules for purposes of convenience, to minimize costs, etc. These provisions under the *Civil Procedure Act* cannot have been intended to oust, and should not be interpreted as ousting, the country-wide jurisdiction of Resident Magistrates' Courts conferred by the substantive statute, the Magistrate's Courts Act, Cap10. In any event, this Act came in time much later than the *Civil Procedure Act*, Cap 21. Under rules of interpretation and construction, the latter statute is deemed to amend the earlier statute where there is an apparent conflict. 5. The

remedy for not following guidelines provided in sections 11, 12, 13, 14, and 15 of the *Civil Procedure Act* regarding the place of suing would not be, in all justice, the striking out of the suit, because of the country-wide jurisdiction conferred by the substantive Act, Cap 10; it would lie in an appropriate order for costs, or the exercise of the High Court's power to withdraw and transfer cases instituted in subordinate Courts under section 18 of the *Civil Procedure Act*. 6. That was the legal position when the Appellant's suit was struck out by the lower Court. It should not have been struck out. It should have been allowed to proceed; alternatively the lower Court could have directed that an appropriate Application be made to the High Court under section 18 of the *Civil Procedure Act*. 7. It will be noted that now the position is different. The Magistrates' Court's Act, Cap 10 was repealed and replaced by the *Magistrates' Courts Act*, No 26 of 2015 that commenced operation on 2nd January 2016. This followed the promulgation of the new *Constitution of Kenya, 2010* which at Article 169(1) established subordinate Courts (including Magistrates' Courts). Under Article 169(2) Parliament was to enact legislation to confer jurisdiction, functions and powers upon the subordinate Courts. It did so in the *Magistrates' Courts Act*, No 26 of 2015 as far as those Courts are concerned. 8. This new Act appears to have removed the country-wide jurisdiction of Magistrates' Courts. At any rate, there is not a similar provision in the statute. The territorial jurisdictions set out in the *Civil Procedure Act*, therefore now appear to be substantive provisions regarding jurisdiction of the Magistrate's Courts. 9. For purposes of this appeal, as already found, the lower Court had jurisdiction to hear and determine the suit. The suit was wrongly struck out. 10. In the event I will allow the appeal and set aside the order of the lower Court that struck out the Appellant's suit. The suit is hereby reinstated for disposal in the usual way..."

39. The Principal legislation which confers jurisdiction on Magistrates' Courts is the *Magistrates' Courts Act*, 2015 and not the *Civil Procedure Act*. The principal place of the *Civil Procedure Act* and Rules thereunder is to provide for the procedure to be followed in civil suits. See Ruth Gathigia Kamunya & another vs. George Kimani [2015] eKLR, per Aburili, J.

40. Even with the enactment of the *Magistrates' Courts Act*, 2015, sections 14 and 15 of the *Civil Procedure Act* are procedural sections aimed at guiding parties on the appropriate place for suing. Suing in the wrong Court as far as geographical location is concerned does not amount to lack of jurisdiction by the Court and does not necessarily make the suit a nullity. See Esther Mugure Karegi vs. Penta Tancom Limited [2016] eKLR, per J. Ngugi, J.

41. See also Kwamboka vs. Philemon Matoke Mosioma & 2 others [2019] eKLR, where Majanja, J. reiterated the judicial view he held earlier in Betty Nyamusi Machora vs. Betty Nyanduko Makori [2018] eKLR) that: "7. Since the issue of jurisdiction is fundamental to any determination, I propose to deal with it notwithstanding it was not appealed against. The Respondents submitted that the subordinate Court lacked territorial jurisdiction as the subject matter took place at Kijauri market within Nyamira County and not within Kisii County where the Court is situate. On this issue, I agree with the trial Magistrate that on the basis of section 3(2) of the Magistrates Court Act (Repealed) which was applicable at the time provided that the Magistrates Court shall have jurisdiction throughout Kenya. Further, the section 15 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which provides for territorial jurisdiction, was not intended to limit the territorial jurisdiction of the Court but only provide for guidance to the convenient forum for lodging claims. Finally, the Magistrates Court Act, 2015 does not impose any territorial limits on the jurisdiction of the Magistrates Court."

42. While concurring with the reasoning of Majanja, J. in Betty Nyamusi Machora vs. Betty Nyanduko Makori [2018] eKLR, M. Thande, J., in V N M vs. S M M & another [2018] eKLR, had this to say: "11. I agree with Majanja, J. that the place of filing suit set out in Section 15 of the *Civil Procedure Act* is for convenience of the parties. The provision seeks to ensure that undue hardship is not visited upon a party in defending a suit. The place of filing suit does not go to the jurisdiction of the Court. The

filing of the suit in Tononoka, Mombasa as opposed to Kilifi or Wundanyi may have inconvenienced the Respondents but it did not divest that Court of jurisdiction to entertain the matter. In any event the Respondents were at liberty to move to the High Court to seek transfer of the suit under Section 18 of the Act to a more convenient Court. In the circumstances, my finding is that the argument by the Respondents lacks merit."

43. On the front of jurisdiction, whenever there is a conflict between the *Magistrates' Courts Act*, 2015 and the *Civil Procedure Act*, the former prevails on two grounds. First, the former is the residence of substantive jurisdiction of a Magistrate's Court. Second, the former is deemed to have amended the latter in the rules of interpretation of statues. Per Ringera, J. (as he then was) in Mohamed Sitabani vs. George Mwangi Karoki HCCA No. 13 of 2002 (UR); and George Omollo Anyango vs. Jacob Ochola and another [2015] eKLR, where C.B. Nagillah, J. adopted the judicial view of Ringera, J. in the said Mohamed decision.

44. The provisions on substantive jurisdiction of a Magistrate's Court are housed not in an Act housing procedure to be adopted by a Court, but rather in an Act hosing the functions and substantive jurisdiction of a Magistrate's Court namely the *Magistrates' Courts Act* as opposed to the *Civil Procedure Act*. The *Civil Procedure Act* is not the instrument that confers jurisdiction on Magistrates' Courts. See Justus Kyalo Mutunga vs. Labh Singh Harman [2012] eKLR, per Odunga, J. See also Threeways Shipping Services (K) Limited vs. Yussuf Hussein Haile [2015] eKLR, per J.K. Sergon, J.

45. Regarding suits based on section 14 of the *Civil Procedure Act*, where this defmation suit squarely falls, at the option of the Plaintiff, the suit can be filed either where the casue of action arose or where the Defendant resides or carries on business or personally works for gain. See Kennneth Kaburi Kababi vs. Attorney General & 3 others [2018] eKLR, where F. Muchemi held that "10. This is a suit for compensation of wrong done to a person and that Section 14 is applicable. 11. Section 14 of the *Civil Procedure Act* is the applicable law herein and it provides: - "Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one Court and the Defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the Plaintiff in either of those Courts." 12. Depending on the circumstances of the case, the Applicant/Plaintiff had an option to sue either in Kerugoya where the wrong against him was allegedly done or where one or more of the Defendants resides. 13. The explanation given by the Applicant explains that at the time of filing the suit, there was no Magistrate in Kerugoya possessed of the pecuniary jurisdiction to hear and determine the matter. This was disputed by the Counsel for the 3rd Respondent. 14. However, the 1st, 2nd and 4th Respondents prefer the case being heard in Embu since it is still in compliance with Section 14 of the Act. The 3rd Defendant is of the same opinion. The issue whether there was a Magistrate with pecuniary jurisdiction to hear the case in Kerugoya at the time of filing is not material to this Application. 15. The concern of the Court is whether the law as stipulated under Section 14 and 15 was complied with. The Court also requires to consider whether any of the parties will be inconvenienced if the suit is heard in Embu or Kerugoya. This is in terms of cost of traveling and other expenses. 16. In my considered opinion that this suit, by being filed in Embu complied with the law because one or more of the Defendants is located or stationed in Embu. Generally, all the Defendants have no problem in the case remaining in Embu Chief Magistrate's Court. This may be interpreted to mean that none of them will be inconvenienced in any way should the case remain where it is. 17. I take judicial notice that the distance between Kerugoya and Embu is slightly over thirty (30) kilometres. The Applicant would not be inconvenienced in case he has to travel to Embu for hearing of the case. 18. I have perused the supporting Affidavit. It does not say that the Applicant will be inconvenienced in any way should the case be heard in Embu. The only reason given for transfer is that the Court now has a Magistrate possessed of the pecuniary jurisdiction

required. 19. The 3rd Defendant said he has a preliminary objection to raise on the competence of the suit as per paragraph 5 of the Defence. The said objection is yet to be raised. In my considered view, this is not a sound reason for keeping the suit in Embu if the Court was of the opinion that the Application for transfer is merited. 20. I am convinced that the suit complies with Section 14 of the Act and no satisfactory reasons for transfer have been given. 21. It is my finding that the Applicant has not established a case for transfer of the suit from Embu to Kerugoya. 22. I find that the Application lacks merit and I dismiss it accordingly."

46. On force of the ratio in Sustainable Management Services vs. New Mitaboni F.C. S. [2017] eKLR; David Karobia Kiiru vs. Charles Nderitu Gitoi & another [2018] eKLR; Ruth Gathigia Kamunya & another vs. George Kimani [2015] eKLR; Esther Mugure Karegi vs. Penta Tancom Limited [2016] eKLR; Agnes Kwamboka vs. Philemon Matoke Mosioma & 2 others [2019] eKLR; Betty Nyamusi Machora vs. Betty Nyanduko Makori [2018] eKLR; V N M vs. S M M & another [2018] eKLR; Kenneth Kaburi Kababi vs. Attorney General & 3 others [2018] eKLR Mohamed Sitabani vs. George Mwangi Karoki HCCA No. 13 of 2002 (UR); George Omollo Anyango vs. Jacob Ochola and another [2015] eKLR; Justus Kyalo Mutunga vs. Labh Singh Hamman [2012] eKLR; Esther Mugure Karegi vs. Benta Tancom Limited [2016] eKLR; and Threeways Shipping Services (K) Limited vs. Yussuf Hussein Haile [2015] eKLR, I have said enough to demonstrate that the *Magistrates' Courts Act* does not limit the jurisdiction of this Court to a specific geographical area.

47. Section 15 of the *Civil Procedure Act* speaks to convenience and economy of costs of the Defendant. An objection under the *Civil Procedure Act* therefore ought to be viewed through the prism section 16 of the *Civil Procedure Act* and in particular, the prejudice to be occasioned in terms of inconvenience and enlarged costs occasioned to the Defendant both of which must not only be pleaded but also proved. I hasten to add that this can only serve the Defendant best, if the Defendant lodges an Application before the High Court for transfer of the suit to the desired Court of convenience in accord with section 15 of the *Civil Procedure Act*.

48. I have amply discussed the legal exposition assigned to the provisions of the *Magistrates' Courts Act* viz aviz the *Civil Procedure Act* enough to demonstrate that the provisions of the *Civil Procedure Act* are not meant to oust the country-wide jurisdiction of Magistrates as enacted in the *Magistrates' Courts Act*, 2015. Even more telling is the fact in the Preamble of the *Magistrates' Courts Act*, 2015, it is textualized in black and white that the Act was enacted by Parliament under the express command of Article 169(2) of *the Constitution* which enjoins parliament to enact a legislation which shall confer jurisdiction and functions of Magistrates' Courts. In this light, it can therefore be safely concluded that the substantive jurisdiction of a Magistrate's Court stems from the *Magistrates' Courts Act*. When a party raises a Preliminary Objection that a Court lacks jurisdiction to hear and determine a suit, the target of the objection in this context is not the procedural jurisdiction but rather the subtractive jurisdiction of the Court (as discussed in at length supra). In response to the command of Article 169(2) of *the Constitution* and as more clearly captured in the said Preamble thereto, the substantive jurisdiction of Magistrates' Courts is housed in the *Magistrates' Courts Act*, 2015. The said Act has in black and white enacted that a Magistrate's Court has two jurisdictional beacons to wit pecuniary and subject matter jurisdictional beacons. Conspicuously absent from the *Magistrates' Courts Act*, 2015 is the territorial jurisdictional beacon. Put differently, the *Magistrates' Courts Act* does not impose jurisdictional limits along geographical or territorial lines. On the other hand, the *Civil Procedure Act* and Rules thereunder provide for the procedure in civil suits which procedure includes inter alia the place of filing a suit dictated by circumstances provided therein (as more particularly set out supra). The provisions of the *Civil Procedure Act* and Rules thereunder are administrative in nature with the intention that the place of suing should be governed by certain rules in the direction of managing convenience and costs in accord with the overriding objective of the *Civil Procedure Act* and

Rules thereunder. The provisions in the *Civil Procedure Act* and Rules thereunder were therefore not intended to oust, cannot oust and should not be interpreted as ousting the country-wide jurisdiction of Magistrates.

49. Suffocated by and unable to sustain the weight of the foregoing reasons, I conclude that this Application is unstainable and must thus be dismissed for want of merit.

50. I would have wished to stop here but I need to expand the reach of this decision. What is the appropriate approach contemplated by law on an issue of this nature arising from sections 11-16 of the *Civil Procedure Act*? If a suit is filed in a Court with jurisdiction to hear and determine the suit (like is in this case), it means the suit is not a nullity and where a suit is not a nullity, then if convenience and management of costs contemplated by sections 11-16 of the *Civil Procedure Act* so demands, the Defendant may lodge an Application at the High Court having supervisory jurisdiction over the Magistrate's Court where the suit is filed for appropriate transfer to the Court of convenient to the Defendant. In Omwoyo vs. African Highlands and Produce Ltd (2002) KLR 698, Ringera, J. (as he then was) while echoing the ratio decidendi of Sir Udo Udoma, CJ (as he then was) in Kagenyi vs. Musiram & Another (1968) EA 48, expressed the following view in regard to section 18 of the Uganda *Civil Procedure Act* (which is to date similar to section 18 of the Civil Procedure Code of the Laws of Kenya):- "An order for transfer of a suit from one Court to another Court cannot be made unless the suit has been in the first place brought to a Court which has jurisdiction to try it. In that case, the Appellant had sought to transfer a suit from the Magistrate's Court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the lower Court...." See also Owners of Motor Vessel "Lilian S" vs. Caltex Oil (K) Ltd [1989] KLR 1; Sustainable Management Services vs. New Mitaboni F.C. S. [2017] eKLR; Ruth Gathigia Kamunya & another vs. George Kimani [2015] eKLR; David Karobia Kiiru vs. Charles Nderitu Gitoi & another [2018] eKLR; Doshi Enterprises Limited vs. Oriental Steel Fabricators & Builders Nairobi (Milimani) HCMA No. 627 of 2001 (UR); John Wekesa Maraka vs. Patrick Wafula Otunga [2005] eKLR; and Justus Kyalo Mutunga vs. Labh Singh Harnam (2012) eKLR.

51. In this light, it can be concluded that failure by the Plaintiff to adhere to sections 12-16 of the *Civil Procedure Act* may entitle the Defendant to approach the High Court with an Application to withdraw and transfer a suit where any of favourable circumstances contemplated under sections 11-16 allow but have not been considered by the Plaintiff. In this case, the Plaintiff may suffer costs to the Defendant. In this regard, since the *Magistrates' Courts Act*, 2015 does not limit the territorial jurisdiction of Magistrates and since section 12 of the *Civil Procedure Act* does not in effect divest Magistrates' Courts of jurisdiction, a Defendant who is dissatisfied with the place where the suit has been filed is entitled to invoke sections 17 and 18 of the CPA and apply to the High Court to transfer the suit to a Court of convenience and lesser costs to the Defendant. In Betty Nyamusi Machora vs. Betty Nyanduko Makori [2018] eKLR, Majanja, J. had this to say: "In my view, section 15 of the CPA provides for the convenient forum of instituting a suit. It does not divest the Magistrates Court of jurisdiction, hence a Defendant who is dissatisfied with the place where the suit has been filed is entitled to invoke section 18 of the CPA and apply to the High Court to transfer the suit to the appropriate forum. This position still obtains following repeal of the MCA. The Magistrates Court Act, 2015 provides for the jurisdiction of the Magistrates Court on the basis of subject matter and/or its value; it does not limit the territorial jurisdiction of the Magistrates Court."

52. And if lodged in the same trial Court, before considering to strike out a pleading on grounds that it has been filed in a wrong Court, the Court should be at liberty to consider either upon the Application of any party or on its own motion order separate trials or make such order as may be expedient. In William Kiprono Towett & 1597 Others vs. Farmland Aviation Ltd & 2 Others [2016] eKLR the

Court of Appeal stated as follows while dealing with a situation where a preliminary objection on the alleged misjoinder of 1,598 parties to a suit was upheld and the suit struck out: "Whereas the trial Court was of the considered opinion that the suit filed before it could not be conveniently tried and determined as filed, the Court was at liberty to and should have, in our considered and respectful opinion, either upon the Application of any party, or on its own motion ordered separate trials, or made such order as may be expedient. See Order 3 Rule 8 of the Civil Procedure Rules (2010). Given that avenue that was available to it, the trial Court's order to strike out the Appellant's suit comes into sharp focus. The same was discretionary in the face of the grounds adduced by the Respondents and Submissions both in favour and against the issuance of the said order. Thus, strictly speaking the Respondent's preliminary objection did not meet the requisite threshold and should not have been allowed. We think that Newbold, J.A. was right to opine that matters discretionary are outside the purview of preliminary objections and while we note Mr. Musangi's contrary view, we respectfully think Counsel has it wrong." For instance, if a suit relating to land has been filed in a Court not within the local limits of whose jurisdiction the property is situate, should not be struck out since such a filing does not amount to lack of jurisdiction. Rather, Court ought to consider that striking out is a drastic step and in that regard give a Plaintiff time to make an Application at the ELC for transfer of the matter to the appropriate Court as this is an undue technicality within the meaning of Article 159(2)(d). In David Karobia Kiiru vs. Charles Nderitu Gitoi & another [2018] eKLR (supra), Ohundo, J. expressed the following view: "19. Having been invited to strike out the suit, the learned Magistrate ought to have considered the drastic nature of an order of striking out...23. Had the Magistrate considered that the Court's overall mission is to hear parties and do justice, it would have become apparent that the transgression of filing the case in a Court other than the Court within the local limits of whose jurisdiction the property is situate could be cured in a manner that allows the parties to have the real dispute between them determined in a just, expeditious and affordable manner. The learned Magistrate had a discretion to handle the matter in such a way as to give the parties a chance to have the suit heard in a Court within the local limits of whose jurisdiction the property is situate. A pragmatic approach in the circumstances would have been to order the parties to file an appropriate Application to this Court seeking transfer of the suit to the appropriate Court station. 24. In view of the foregoing discourse, I find that the appeal has merit. I therefore make the following orders: a) This appeal is allowed. b) The ruling and order of the learned Magistrate dated 22nd February 2016 is set aside and substituted with an order dismissing the preliminary objection dated 11th January 2016. c) Costs of this appeal as well as costs of the preliminary objection before the subordinate Court are awarded to the Appellant and shall be paid by the 1st Respondent. d) Parties are at liberty to make an appropriate Application for transfer of the subordinate Court case to the appropriate Court station." (Emphasis supplied). In Paulo Anyanzwa Kutekha vs. Steel Structures Limited [2018] eKLR, the Appellant (Paulo Anyanzwa Kutekha) was the Plaintiff in the lower Court while the Respondent was the Defendant. The Appellant's suit (a claim for damages on account of industrial accident) was struck out by the trial Court upon a preliminary objection raised by the Respondent on the issue of the Court's territorial jurisdiction. H.P.G. Waweru, J. held that "5. The remedy for not following guidelines provided in sections 11, 12, 13, 14, and 15 of the *Civil Procedure Act* regarding the place of suing would not be, in all justice, the striking out of the suit, because of the country-wide jurisdiction conferred by the substantive Act, Cap 10; it would lie in an appropriate order for costs, or the exercise of the High Court's power to withdraw and transfer cases instituted in subordinate Courts under section 18 of the *Civil Procedure Act*."

53. I will fail parties if I close this analysis without drawing from the wisdom of the Court of Appeal in a discourse of this nature contained in Martha Wangari Karua vs. Independent Electoral & Boundaries Commission & 3 others [2018] eKLR. While appreciating that the Court, lawyers and parties should to the highest level follow the procedural rules because they streamline actions and obtain orderly

conduct of affairs of the Court, the Court of Appeal reasons that deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. The Court of Appeal directs that the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings reasoning that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. The Court of Appeal resorts to the time-tested edict that justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness. The Court of Appeal directs that it is such instances that Article 159 (2)(d) of *the Constitution* should be invoked to avoid glorification of undue technicalities at the expense of substantive justice. I desire to set out verbatim what the Court of Appeal said in that case: "We draw from the judgment of this Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR (Civil Appeal No. (Application) 228 of 2013*) where Ouko, JA. in the majority stated that: "Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or which do not occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed at the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness...it ought to be clearly understood that the Courts have not belittled the role of procedural rules. It is emphasized that procedural rules are tools designed to facilitate adjudication of disputes; they ensure orderly management of cases. Courts and litigants (and their lawyers) alike are, thus, enjoined to abide strictly by the rules. Parties and lawyers ought to be reminded that the bare invocation of the oxygen principle is not a magic wand that will automatically compel the Court to suspend procedural rules. And while the Court, in some instances, may allow the liberal Application or interpretation of the rules that can only be done in proper cases and under justifiable causes and circumstances. That is why *the Constitution* and other statues that promote substantive justice deliberately use the phrase that justice be done without "undue regard" to procedural technicalities." We agree with those sentiments. In this appeal as well, justice should not have been sacrificed at the altar of the procedural requirements ...., particularly because those lapses did not go to the fundamental dispute that was before the Court. This does not mean that procedural rules should be cast aside; it only means that procedural rules should not be elevated to a point where they undermine the cause of justice. ...The elevation and prominence placed on substantive justice is so critical and pivotal to the extent that Article 159 of *the Constitution* implies an approach leaning towards substantive determination of disputes upon hearing both sides on evidence..."

54. Having mischaracterized issue of inconvenience and costs as an issue of jurisdiction, this Court consequently reaches a conclusion that the assertion that this Court lacks jurisdiction lacks a legal basis and it must fail. The issues raised in the Application are apposite grounds for an Application for transfer of the suit to a Court of the convenience of the Defendant.

55. It follows that unless and until a transfer order is issued by the High Court, this Court is clothed with jurisdiction to hear and determine this suit.

Part vi: Disposition

56. Wherefore this Court:

i. Dismisses this Application for lack of merit. However, the Applicant is at liberty to approach the High Court – if it so elects - for transfer of the suit on basis of convenience and costs.

ii. Directs that costs of this Application shall be in the cause.

VIRTUALLY DELIVERED, SIGNED AND DATED THIS 23RD DAY OF SEPTEMBER 2024

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Advocate for the Plaintiff/Respondent:

Advocate for the Defendant/Applicant:

Court Assistant: Mr. Ndonye