



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & G.B.M. KARIUKI, JJ.A)

CIVIL APPEAL NO. 354 OF 2014

BETWEEN

LIVINGSTONE MAINA OMBETE.....APPELLANT

VERSUS

KENYA POWER & LIGHTING COMPANY LIMITED.....RESPONDENT

(Appeal from a Ruling and Order of the High Court of Kenya at Nairobi (Ochieng J.) dated 1st October 2014

in

Misc. Application No. 377 of 2014)

JUDGMENT OF THE COURT

[1] The appellant, **Livingstone Maina Ombete**, filed suit before the Chief Magistrate's Court in Nairobi being Civil Suit No.1055 of 2014 claiming special and general damages against the respondent, **Kenya Power & Lighting Company Limited**. In the suit, the appellant alleged that the respondent trespassed upon his parcel of land known as **KISA/WAMBULISHE/499** situated in Kakamega County (hereinafter referred to as "the suit property") and felled 30 eucalyptus trees to enable the respondent erect power poles to supply electricity. The respondent denied the claim vide its statement of defence filed in court on 6th May, 2014.

[2] Before the suit could be set down for hearing, the respondent applied to the High Court by Notice of Motion dated 21st August, 2014 for the suit to be transferred from the Magistrate's Court in Nairobi to the Magistrate's Court in Kakamega *inter alia* on the grounds that the suit property is based in Kakamega County; the respondents witnesses are based in west Kenya region and that the defendant shall request the honourable court to visit the *locus in quo*. The appellant filed its reply opposing the application on the grounds *inter alia* that there is no justification to have the suit transferred; the respondent has its headquarters in Nairobi; the Resident Magistrate's jurisdiction is not territorial and that whether or not the court ought to visit the *locus in quo* is not enough ground for making the application.

[3] When the application came up for hearing before Ochieng J., the learned judge without hearing the parties made an order *suo moto* transferring the suit to the Chief Magistrates Court in Kakamega for

hearing and determination on the ground that the subject matter of the case is based in Kakamega. Aggrieved by the said Ruling, the appellant filed this appeal which he predicates on the following three grounds:-

“(a) The High court lacks jurisdiction to transfer the suit from the Resident Magistrate’s court at Nairobi to the Magistrate’s Court at Kakamega;

(b) The learned Judge erred in law and fact in acting suo moto while there was an application for transfer of suit pending on record;

(c) The learned Judge erred in failing to hear the parties before making his decision to transfer the suit.”

Both parties entirely rely on their written submissions filed on behalf of the appellant on 13th October, 2016, and for the respondent on 14th November, 2016. The appellant’s submissions were urged under two broad heads. First, that the appellant was denied his right to be heard before the Judge made the orders to transfer the suit from Nairobi to Kakamega; and second, that the Judge failed to appreciate that the jurisdiction of a Resident Magistrate’s Court is not territorial in nature.

[4] In support of the first ground of appeal, the appellant took issue with the *suo moto* decision by the learned Judge and faulted his lack of consideration of the matter on merits upon argument as per the filed application. The appellant called in aid the High Court decision of **Political Parties Dispute Tribunal & Another v Musalia Mudavadi & 6 Others Ex Parte Petronila Were [2014] eKLR** where the court took the approach that favoured involving the parties in decision making process in accordance with the principle of fair hearing especially where a party may suffer loss if the decision is made *suo moto*.

As for the second issue, it was learned counsel’s submission that the High court lacks the requisite jurisdiction to transfer a case from one Resident Magistrate’s Court to another. Learned counsel further submitted that although **Sections 11 and 12 of the Civil Procedure Act** would seem to provide that the suit ought to have been heard in Kakamega where the suit property is situated, that would not be so as the respondent’s registered offices are in Nairobi, and that is where the suit ought to have been heard. The appellant does not therefore envisage any legal basis for the learned judge’s decision to transfer the suit properly filed in a court of competent jurisdiction to another court of concurrent jurisdiction. The appellant therefore asks this Court to set aside the whole of the *suo moto* order of the Hon. Ochieng J. and the suit proceeds to full hearing and determination at the Resident Magistrate’s Court at Nairobi. The appellant also asks for costs of the appeal.

[5] In opposing the appeal, learned counsel for the respondent submitted that he had raised an objection on the issue of jurisdiction before the magistrate who was seized of the matter, and it was the magistrate who directed the respondent to make an appropriate application before the High Court. It is on this basis that the application subject to this appeal was filed. According to learned counsel, the appellant had not even filed a response to that application.

The respondent also raises two issues upon which the appeal hinges. First is whether the learned Judge erred in proceeding *suo moto* to make and deliver a ruling on a jurisdictional issue and secondly, whether the Chief Magistrates court in Nairobi has territorial jurisdiction to hear the matter. The respondent argues that **Section 12 of the Civil Procedure Act** deals with territorial jurisdiction particularly where a suit should be instituted. The respondent emphasises that a suit should be instituted in the court within the local limits of whose jurisdiction the property is situated, 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.

As the operations of the respondent are geographically split in 10 regions in order to attain a higher penetration and decentralization, the respondent has a regional office in Kakamega to address the concerns raised in the suit. The respondent submits that whereas the Magistrate’s Court Act confers countrywide jurisdiction, the same is limited by **Section 15 of the Civil Procedure Act** which limits

jurisdiction to where the cause of action wholly or in part arises. This provision also acknowledges a subordinate office in respect of any cause of action arising at any place where a corporation has such a subordinate office. The suit property being in Kakamega County presents itself under the jurisdiction of the Magistrate's court at Kakamega. In addition, the respondent highlighted the fact that it would require the court to visit the *locus in quo* in order to make a decision on the facts as averred and to establish the trespass as alleged by the plaintiff, which issues cannot be determined in theory.

[6] The respondent supports the learned Judge's decision arguing that **Section 18(1)(b) (ii) and (2) of the Civil Procedure Act** gives the High Court powers to transfer a matter filed in a court subordinate to the High Court to a subordinate court competent to try the issues in question. In its view, the Judge rightly took judicial notice of the facts at hand in making an administrative yet judicial decision to have the suit transferred. The respondent contends that the issue of jurisdiction can be taken up by the court *suo moto* and the learned Judge acted in accordance with **Section 3A of the Civil Procedure Act** which provides for the inherent powers of the court.

[7] We have considered the issues raised in the rival submissions filed in this appeal. Without seeming to belittle the importance of the issues raised, we feel constrained to state that this is a very straightforward matter and the law in this area is succinctly set out. There are only two issues for determination in this appeal namely;

a) Whether the learned judge of the High Court erred in proceeding suo moto in the circumstances ; and

b) Whether jurisdiction to hear and determine the matter reposed in the resident magistrate's court in Nairobi, or the resident magistrate court in Kakamega.

We do not intend to spend too much time discussing these issues as the answers thereto are in black and white in the Civil Procedure Act.

[8] On the first issue, two contentions arise for consideration. First is whether the High Court has power to transfer a suit from one magistrate's court to the other and secondly, whether the power can be exercised *suo moto*. The jurisdiction of the High Court is derived from **Article 165(3) and (6) of the Constitution**. Accordingly, the High Court has unlimited original jurisdiction in criminal and civil matters, supervisory jurisdiction over the subordinate courts, which includes the Magistrate's courts and any other jurisdiction, original or appellate, conferred on it by legislation.

The powers of the High Court to transfer a suit are set out in **Sections 17 and 18 of the Civil Procedure Act**. **Section 17** provides:

“Where a suit may be instituted in any 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.”.

A reading of this provision reveals that the High Court has power to transfer a suit from one subordinate court to the other. This jurisdiction is triggered either by any defendant, after notice to the other parties or by the subordinate court on its own motion at the earliest possible opportunity applying to the High Court seeking such transfer of suit. Where the jurisdiction is triggered by any defendant, the High Court is obliged to hear any objections. However, we do not think that where the court acts on its own motion, there is room for objections by the parties.

Section 18 on the other hand deals with the power of the High Court to withdraw and transfer case instituted in a subordinate court. Relevant to the present case is **Section 18(1) (b) (ii)** which 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); or

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter –

(i) ...; 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 (emphasis ours)

From the provisions of **sections 17 and 18 of the Civil Procedure Act**, there is no doubt that the High Court has power to not only transfer a suit from one subordinate court to the other but also to act on its own motion. We cite with approval the holding of Emukule, J in **Rapid Kate Services Limited vs. Freight Forwarders Kenya Limited & 2 Others** [2005] 1 KLR 292 where he expressed himself thus:

“The Court’s power to transfer proceedings from one Court to another is a useful corrective measure to ensure that proceedings wherever began or whatever forum the plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings. When making or refusing an order for transfer the Court will have regard to the nature and character of the proceedings the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power of the Court under section 3A of the Civil Procedure Act...”

[9] In addressing the second issue, we need to be very clear by stating that the issue as to whether the High Court has power to transfer a suit from one subordinate court to another can only be contemplated if the court in which the suit was filed in the first instance has jurisdiction. This is so because a suit filed before a court without jurisdiction is a nullity, and it would remain a nullity even if transferred to another court. Transferring such a case would not clothe it with jurisdiction. In this regard, it is not disputed that both Magistrates’ courts in Nairobi and Kakamega have requisite jurisdiction to handle the claim. The Court in Nairobi basically because the respondent’s head office is situated in Nairobi, and the Kakamega court because the suit property is situated in Kakamega and that is where the cause of action arose.

Having found that the High Court had powers to transfer the suit *suo moto* and that both the Magistrates’ courts at Nairobi and Kakamega have jurisdiction to hear and determine the appellant’s case, we do not see any reason whatsoever as to why the matter cannot be heard at Kakamega. The appellant did not demonstrate that he will suffer any prejudice if the matter is transferred to Kakamega for hearing. We think we have said enough to demonstrate that this appeal is totally devoid of merit. We dismiss the same with costs to the respondent.

Dated and delivered at Nairobi this 31st day of March, 2017.

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

*I certify that this is a
true copy of the original.*

DEPUTY REGISTRAR