



Gichuki v New Nyamakima Limited (Environment and Land Miscellaneous Application E006 of 2024) [2024] KEELC 6648 (KLR) (27 June 2024) (Ruling)

Neutral citation: [2024] KEELC 6648 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E006 OF 2024**

MD MWANGI, J

JUNE 27, 2024

BETWEEN

JOHN MUGO GICHUKI PLAINTIFF

AND

NEW NYAMAKIMA LIMITED DEFENDANT

RULING

(In respect of the Notice of motion dated 17th January 2024 seeking the transfer of Civil Suit No 4053 of 2015 before the Milimani Chief Magistrate’s Court to this Court for hearing and determination.)

Background

1. The Applicant in this miscellaneous application is the Defendant in the Civil Suit No 4053 of 2015 (New Nyamakima Ltd v John Mugo Gichuki) pending before the Chief Magistrate’s court at the Milimani Commercial Courts. He seeks for an order of this court to transfer the said suit from the Chief Magistrate’s Court to this court for the reason that his claim by way of a counter-claim against the Respondent has risen above the sum of Kshs 20,000,000/- which is way beyond the pecuniary jurisdiction of the Chief Magistrate’s court.
2. In the supporting affidavit, the Applicant’s Advocate, Alphonse Omondi Owoucha depones that the Applicant’s claim against the Respondent has risen above the sum of Kshs 20,000,000/.
3. The application was opposed by the Respondent by way of grounds of opposition dated 22nd February, 2024. The Respondent stated that the absence of pecuniary jurisdiction is not a ground for transferring a case to a higher court. Secondly that the judgement dated 17th July, 2023 which the Applicant is relying on as the reason for seeking to transfer the case to this court was set aside and is therefore non-existent. Finally, the Respondent asserted that no good ground had been advanced for the transfer of the case from the Chief Magistrate’s court to this court.



Court's Directions.

4. The court's directions were that the application be canvassed by way of written submissions. Both sides complied. I have had the opportunity to read and consider the submissions filed which now form part of the record of this court.

Submissions by the Parties.

5. In his submissions, the Applicant begins with a contextual background to his application at paragraphs 2-7 of the submissions. This contextual background however, is essentially a statement of facts which were not in the affidavit in support of the application.

6. I need to state that submissions are not pleadings. A party cannot purport to rely on submissions to do what should have been done by pleadings and evidence. As was stated by Mwera J (as he then was) in the case of *Erastus & another (Kisumu) HCCA No 46 of 2007* as cited in the case of *Ogando v Watu Credit Ltd & another* (Civil Suit No E098 of 2022) (2024) KEHC 3074 (KLR) (14TH March, 2024) (Judgment),

“Submissions simply concretize and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided.”

7. I will therefore disregard the said facts stated in the submissions. I will consider the Applicant's submissions from paragraph 8 onwards. The applicant submits that the trial Magistrate in a judgment that was nevertheless set aside thereafter had entered judgment in his favor for the sum of Kshs 10,000,000/- but indicated that he would have awarded the Applicant the entire sum of money claimed at the time being Kshs 19,000,000/- save for the fact at the time, his pecuniary jurisdiction was only Kshs 10,000,000/-. The Applicant submits that the figure of Kshs 19,000,000/- was neither hypothetical, fictional nor speculative; it was premised on calculations carried out by a duly qualified professional and a report duly filed before the court. Based on that professional report, the claim has since exceeded Kshs 20,000,000/- and therefore beyond the jurisdiction of the Magistrate's court.

8. The Applicant further submits that though the judgment was set aside, he maintains his claim for special damages at the rate of Kshs 85,000/- from August, 2011. He too has additional claims including special damages for loss of machinery, and general and aggravated damages for unlawful eviction.

9. The Applicant argues that his application is in line with the overriding objective of this court which aims at the just determination of proceedings and the efficient disposal of the court business.

10. The Respondent in its submissions maintained its position that the absence of pecuniary jurisdiction is not a ground for transferring a case to a higher court and that the application by the Applicant is therefore untenable. The Respondent cited a number of decisions in support of its position.

11. In *Gaika Kimani Kiarie v Peter Kimani Kiramba* (2020) eKLR, Gicheru J, (as he then was) stated that a matter can only be transferred if the court from which the Applicant is seeking to have it transferred had jurisdiction over the said matter and the Applicant has satisfied the court that the transfer is necessary. Gicheru J was explicit that,

“Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused.”



Issues for Determination

12. The sole issue for determination in this matter is whether the application by the Applicant is merited. In essence, the issue is whether the suit filed before the Magistrate's court can be lawfully transferred to this court on the grounds advanced by the Applicant or at all.

Analysis and Determination.

13. The Applicant's application put in its proper context seeks the transfer of the suit before the Chief Magistrate's court to this court, on the basis that the Chief Magistrate's court lacks the pecuniary jurisdiction to entertain and determine the said suit.
14. The Court of Appeal in the case of *Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, emphatically pronounced itself on the issue of transfer of cases in the following words,

“In numerous decided cases, courts including this court have held that it would be illegal for the High Court in exercise of its powers under section 18 of the *Civil procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such Jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same, in the same way, a court of law should not through what can be termed as Judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”

15. Earlier on, J.B. Ojwang J, (as he then was) had expressed a similar strong opinion in the case of *Boniface Waweru Mbiyu v Mary Njeri & another* (2005) eKLR, when he stated that,

“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.”

16. The decision by the Court of Appeal in *Equity Bank Ltd v Bruce Mutie Mutuku t/a Diani Tour Travel* (*supra*) is binding on this court. The Applicant as stated earlier is seeking refuge under the oxygen principle. He further invoked the provisions of Article 159 of the *Constitution* as the basis of his application. However, as clearly stated in the said decision, a party cannot get relief under either the oxygen principle or even Article 159 of the *Constitution*.
17. The long and short of the matter is that the application before me lacks merit and is hereby dismissed with costs to the Respondent.

It is so ordered.



JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 27TH DAY OF JUNE 2024.

M.D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Owoucha for the Applicant.

Mr. Amuga for the Respondent

Court Assistant: Yvette

