



Nyasimi v China Henan International Co-operation Group Co. Ltd (Miscellaneous Suit E007 of 2022) [2023] KEELC 15736 (KLR) (22 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15736 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
MISCELLANEOUS SUIT E007 OF 2022
M SILA, J
FEBRUARY 22, 2023**

BETWEEN

GEORGE MORARA NYASIMI APPLICANT

AND

**CHINA HENAN INTERNATIONAL CO-OPERATION GROUP CO.
LTD RESPONDENT**

RULING

(Application to transfer suit from the Magistrates' Court to the Environment and Land Court; applicant stating that the value of the subject matter exceeds the pecuniary jurisdiction of the Magistrates' Courts thus need to transfer the suit to the superior court; respondent urging that a suit filed in a court without jurisdiction is incapable of being transferred; two schools of thought demonstrated; one being that a suit filed in a court without jurisdiction cannot be transferred as it is a nullity and the other being that courts should be liberal in permitting transfer of suit to the court with jurisdiction to hear the matter; court of opinion that so long as the suit was filed in good faith, and no prejudice is caused to the defendant, then the liberal approach should be preferred; facts demonstrating that when suit was filed in the Magistrates' Court, the applicant was relying on a valuation report that gave a value that was within the pecuniary jurisdiction of the Magistrates' Court; the value being subsequently revised; suit was thus filed in good faith upon relying on an expert's opinion; no prejudice caused to the respondent if suit is transferred save for some adjournment costs paid; court allowing order of transfer subject to payment of these costs)

1. The subject Application is dated 27 June 2022 and basically seeks an order to have the suit Kisii CMCCC No. 824 of 2019 transferred from the Magistrates' Court to this court. The application is based on the ground that the value of the subject matter exceeds the sum of Kshs. 20,000,000/= and therefore the Magistrates' Court lacks pecuniary jurisdiction to hear the case. The application is supported by the affidavit of the applicant. He has deposed that he filed the suit Kisii CMCC No. 824 of 2019 against the respondent regarding a dispute over the land parcel Wanjare/Bokeire/2181



and 2182. He has deposed that he instructed a valuation to be done ,which he has annexed, and he has averred that the same shows that the value of the subject matter is beyond Kshs. 20,000,000/=.

2. The respondent has opposed the application. He has deposed that when the suit was filed, a valuation report was annexed in the list of documents. The report was prepared by the same valuer who has now given a different value of the subject matter. He has added that parties underwent pretrial and listed the matter for hearing on 17 March 2021 when the respondent sought an adjournment, which was strenuously opposed, but granted, subject to payment of costs of Kshs. 47,000/= which was paid. He deposes that the matter would have been concluded on 17 March 2021. He believes that the values have now been grossly exaggerated in the new report.
3. Counsel for both applicant and respondent filed written submissions which I have taken into account before arriving at my decision.
4. At the outset, it should be remembered that this court has unlimited original jurisdiction, meaning that it does not suffer any strictures on the value of the subject matter. However, Magistrate's Courts do not have unlimited pecuniary jurisdiction. Section 7 of the Magistrates' Court Act, provides that the highest ranking Magistrate, that is the Chief Magistrate, can only hear a suit where the value of the subject matter does not exceed the sum of Kshs. 20,000,000/=. It is expected that parties are alive to these provisions of the law when making a decision as to which court to file their matter.
5. There is power to transfer suit either from the superior court to the subordinate court and vice versa. This is contained in Section 18 of the [Civil Procedure Act](#), which provides as follows: -
 18. Power of High Court to withdraw and transfer case instituted in subordinate court
 - (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.
6. From the above, it will be seen that the High Court (which would include courts of equal status) has power to transfer a suit from the said court to a court subordinate to it, or transfer a matter to the superior court which is pending in the subordinate court. There is no doubt about the existence of



this power. The only issue regards its exercise and what principles a court should apply before making such an order.

7. There are two schools of thought. One, is that if the suit was filed in a court that lacked jurisdiction, then such suit is incapable of being transferred. This position is exemplified in the Ugandan case of *Kagenyi vs Musiramo & Another* (1968) EA 43 which was adopted in several judicial decisions in Kenya, including the Court of Appeal decision in the case of *Phoenix of EA Assurance Company Limited vs S.M Thiga T/A Newspaper Service*, Civil Appeal No. 244 of 2010 (2019) eKLR. In this case, the respondent, a newspaper distributor, had taken out an insurance policy with the appellant, to indemnify him for loss that he may suffer arising out of traffic accidents. His motor vehicle had an accident and was referred to a garage for repairs. The appellant did not make good the claim the result of which the motoverhicle was retained for more than 3 years. The respondent filed suit in the Principal Magistrate's Court for compensation. It turned out that his claim was larger than the pecuniary jurisdiction of the Magistrate's Court and he filed an application to transfer suit to the High Court. The application was heard *ex parte* and allowed. Subsequently the appellant applied to have the suit struck out on the basis that the suit was a non-starter *ab initio* for having been commenced in a court without jurisdiction. The application was heard and dismissed by the High Court and the applicant proceeded on appeal to the Court of Appeal. The Court of Appeal was categorical that the suit was initiated before the Magistrates' Court which had no jurisdiction and was a nullity *ab initio* and incapable of being transferred to the High Court. That appeal was allowed. The court rendered itself as follows :-

“It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity *ab initio* and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void.”

8. This school of thought was equally adopted in the case *Rebeca Chumo vs Christine Cheptoo Chumo* (2021) eKLR, cited to me by Mr. Nyamurongi, learned counsel for the respondent, where the court while referring to other decided cases with similar position pronounced itself as follows :

“15. The power to transfer a suit is discretionary and therefore a party seeking to transfer a matter from one court to another has the burden of providing sufficient reasons as to why the transfer is merited. However, a matter can only be transferred if the Court from which the Applicant is seeking to have the same transferred from, had jurisdiction over the said matter.

16. In this case the Applicant informed the Court that the pecuniary value of the suit land is Ksh. 46,000,000/= which is way above the Chief Magistrates' monetary jurisdiction thus her reason for seeking to transfer it to the Environment and Land Court.

17. There was an enactment of the *Environment and Land Court Act*, 2011, and the *Magistrates' Courts Act*, 2015 so as to among others, give effect to the provisions of Articles 23 (2) and 169 (1) (a) and (2) of *the Constitution* and to confer jurisdiction, functions and powers on the Magistrates' courts.

18. Section 7 of the Magistrate's Courts Act provides as follows;



A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed —

- (a) twenty million shillings, where the court is presided over by a chief magistrate;
- (b) fifteen million shillings, where the court is presided over by a senior principal magistrate;
- (c) ten million shillings, where the court is presided over by a principal magistrate;
- (d) seven million shillings, where the court is presided over by a senior resident magistrate; or
- (e) five million shillings, where the court is presided over by a resident magistrate.

19. Quite clearly from the above powers bestowed upon the Chief Magistrate's court, the pecuniary jurisdiction is Ksh 20,000.000/=. Could it then be said that the impugned matter was filed in a court of competent jurisdiction? It is now trite that if a matter is filed in a Court that has no jurisdiction when the claim was filed, it would mean that the said suit is incompetent and the Court does not have jurisdiction to transfer the matter.

In the case of Abraham Mwangi Wamigwi vs Simon Mbiriri Wanjiku & Another [2012] eKLR, the Court held as follows; -

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

21. Further in Boniface Waweru Mbiyu vs. Mary Njeri & Another [2005] eKLR the court had held 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”.

22. And lastly in *Wamathu Gichoya v Mary Wainoi Magu* [2015] eKLR the Court held that: -

“Furthermore, according to *Kagenyi v Musiramo and Another*, supra, the power to transfer a case to the High Court for hearing may only be exercised if the court before which it is filed is a court vested with competent jurisdiction to try and dispose of the matter. In other words, if the suit filed is incompetent, the High Court lacks jurisdiction to effect a transfer.”

9. It will be observed that the above chain of authorities emphasise that for a suit to be capable of being transferred, it first needed to have been filed in a court of competent jurisdiction. This would mean that when the suit was filed, the court had jurisdiction, but circumstances changed so that the court now has no jurisdiction. A classical case is an instance where a Magistrates’ Court station has a Chief Magistrate, who is subsequently transferred without replacement of a Magistrate of equal rank. A party would have filed suit, say for the sum of Kshs. 16,000,000/= in a court with jurisdiction, since the Chief Magistrate was available, but upon his transfer, and if there is no replacement, there would be no other Magistrate to hear the case because the next highest ranking officer, a Senior Principal Magistrate, would, pursuant to Section 7 of the Magistrates’ Court Act, only hear a case with a maximum value of Kshs. 15,000,000/=. Thus for no fault of his own, the party will find himself without a Magistrate with jurisdiction to determine the suit yet when he filed it there was a court with jurisdiction to hear it. Following this school of thought, if one filed a suit seeking, say, kshs. 25,000,000/= in the subordinate court, he would not be entitled to an order of transfer of the suit because the Magistrates’ Court had no jurisdiction in the first instance to hear such a case as it obviously exceeded the pecuniary limits of the court.
10. The second school of thought is that courts should be liberal in the transfer of suits even where the suit was filed in a court which had no jurisdiction in the first instance. This was ably captured in the decision of Waweru J, in the case of *John Mwangi Karanja vs Alfred Ndiangui* (2011) eKLR, where the learned judge stated as follows: -

“If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the *Civil Procedure Act* and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (Section 1A (1)). “

11. This approach was given traction by the Court of Appeal in the case of *Daniel N Mugendi v Kenyatta University & 3 others* [2013] eKLR. The appellant, who was an employee of Kenyatta University, sued the University and its officials, through a constitutional petition filed in the High Court, contending that he was unfairly suspended from employment and sent on compulsory leave, and claimed that this



action violated various of his constitutional rights. The High Court judge was of opinion that the gist of the suit was a labour dispute for which the High Court did not have jurisdiction and that jurisdiction lay with the Employment and Labour Relations Court. She proceeded to dismiss the petition for lack of jurisdiction. On appeal, the Court of Appeal did affirm that what was before the High Court was indeed a labour dispute which ought to have been filed in the Employment and Labour Relations Court. The Court of Appeal was however of view that where the three superior courts of equal status, that is the High Court, the Employment and Labour Relations Court, and the Environment and Land Court, face cases where they have no jurisdiction but which ought to have been filed in one of the other courts, the prudent path to take is to transfer the case to the other superior court and not to dismiss it. The Court addressed itself as follows: -

“... in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim.”

12. Both schools of thought thus have support from the Court of Appeal. In the case of *Allan Mupe Bakari v Diani Sea Lodge* [2020] eKLR, P.J Otieno J, faced the dilemma of what school of thought to follow. What was filed before the High Court was an application under Section 18 of the *Civil Procedure Act*, seeking orders to transfer a suit from the Magistrates’ Court Mombasa, to the Magistrates’ Court Msambweni, as the cause of action arose within the geographical jurisdiction of the latter court. The application was strenuously opposed mainly on the ground that a suit filed in a court that had no jurisdiction is incapable of being transferred. The learned judge correctly found that this was an unsettled area of law. He was however of opinion that courts need to do substantive justice. He found that courts of equal status routinely transfer matters between themselves as endorsed by the decision in the *Daniel N. Mugendi vs Kenyatta University* case and other decisions of the Court of Appeal which the judge cited. The judge wondered why, if transfer between courts of equal status is permissible, the same approach ought not to be taken when it comes to transfer of suits to or from Magistrates’ Courts. He stated as follows : -

The question that bothers my mind is whether it is acceptable that a court of equal status or the High Court can decline jurisdiction, transfer a matter at the horizontal level of equal status, but the same courts cannot transfer a suit from one subordinate court to another or vertically from the subordinate courts, the courts which the superior court are obligated to supervise, to selves? Does the principle that jurisdiction is everything go on vacation when the issue is transfer of suit between court of equal status?

I hold the view that time has come, and look up to that time, for what I consider to be conflicting positions on the subject of transfer to be settled.

I am prepared to hold that it is untidy and may amount to unequal application of the law to have suits transferred between the High Court and courts of equal status yet it is not open to transfer a suit from a one subordinate court to another or even from the subordinate court to the High Court or Courts of equal status. While fully bound by the decisions of the Court of Appeal, I find myself with apparently two conflicting positions by that court. In those circumstances I chose to be guided by the position that I believe to meet the ends of justice, untrammelled by procedural technicalities, and this court being mandated to supervise the subordinate courts, section 18, *Civil Procedure Act* should be



interpreted to introduce nothing new beyond the inherent powers of the court to do justice and do so robustly and substantially. I reiterate that to refuse a transfer and leave a litigant with no prospects of being heard, save for his claim being dismissed on account of lack of jurisdiction, would not be in the interests of justice but meting out an injustice”.

13. I have demonstrated the two schools of thought. I fully support the approach taken by PJ Otieno J, in the Allan Mupe Bakari case. We need to be alive to Article 159 (2) (d) of *the Constitution* which enjoins courts to do justice to parties without undue regard to procedural technicalities. Courts should go out of their way to render substantial justice to parties. On the issue that a suit has been filed in the wrong forum and thus a nullity, I really do not see the hypothesis that the suit is a nullity. A suit comprises of pleadings setting out the nature of the claim. Pleadings are merely statements of claim. It is the court’s proceedings and decisions which we can say are nullities. If a court sees pleadings which are outside the jurisdiction of the said court, I see nothing wrong in these pleadings being transferred to the court with jurisdiction, so that whatever is stated to be the claim therein is now heard by the court with jurisdiction.
14. I think that so long as a litigant shows that the suit was filed on account of a genuine mistake, and such mistake is explained, then the court with power to transfer ought to give him relief by transferring the matter to the correct court especially where there is no prejudice to the other party. But if the facts demonstrate that the suit was filed mischievously for purposes of gaining an unfair advantage, or to steal a march on the defendant, or to deliberately cause hardship to the defendant, or where it is clear that it is an abuse of the process of court, or where transfer of the suit will cause undue prejudice to the other party, then the court should not allow itself to be used to endorse the ill intention of the party by allowing a transfer of the suit. Thus, in my opinion, each case should be considered on its own merits based on the explanation given by the applicant. If the explanation reveals a genuine mistake done in good faith, and there is no prejudice to the defendant, I do not see why a transfer of suit should be denied. I see no place for the strict application of the theory that you cannot transfer that which was not filed in a court that was vested with jurisdiction in the first place.
15. What then is the explanation given in our case ?
16. The applicant has stated that it has now dawned on him that the value of the subject matter exceeds the pecuniary jurisdiction of the Magistrate’s Court. This is based on a valuation report that he has recently received. I observe that when the applicant filed suit, he had displayed a valuation report which advised him that the value of the subject matter was Kshs. 18, 163, 760/=. I believe that it is based on this report that he filed suit at the Magistrate’s Court (though I do have a few problems with the manner the plaint was drafted as this amount was not specifically pleaded as ought to have been done). I do not see how he can be faulted for filing suit before the Magistrate’s Court as he was relying on expert advice which informed him what the value of the subject matter is. He filed his suit in good faith before the court which he was confident had jurisdiction based on the opinion of the expert that he had employed. The applicant was indeed, at some point, ready to proceed and hear the suit before the Magistrates’ Court based on this initial report but the matter was adjourned. It appears that the valuer the applicant had engaged has realized that he did not take into consideration all factors when he gave the initial valuation report and he has now returned a second report with a higher value. I do not see any bad faith on the part of the plaintiff. I think he should be allowed to ventilate his suit before the court with jurisdiction now that he has been differently advised on the value. If I fail to allow the order of transfer, the only option that the applicant will be left with is to withdraw his suit before the Magistrates’ Court, which in my view will only lead to unnecessary expenses and costs. There is no prejudice that the respondent stands to suffer by the transfer of the suit to this court save for the costs that the respondent suffered when the matter was adjourned at the Magistrates’ Court. Now that it has



turned out that the applicant was laboring on the wrong value, and would not have finalized the suit before the Magistrates' Court, I think it is only fair that he reimburses the respondent the sum of Kshs. 47,000/= paid to him as adjournment costs for the hearing that did not take off on 17 March 2021.

17. I therefore order that subject to the payment of the above costs of Kshs. 47,000/= , within 14 days from the date hereof, the suit Kisii CMCC/ELC No.824 of 2019 be transferred to this court for disposal and determination.
18. There will be no orders as to the costs of this application.
19. Orders accordingly.

DATED AND DELIVERED THIS 22 DAY OF FEBRUARY 2023.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT AT KISII

