



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS APPLICATION NO.E028 OF 2022

SAMMY KIPSEREM CHEPSIROR.....APPLICANT

-VERSUS-

JOHN MACHIRA OKOMBO.....RESPONDENT

Coram:Hon. Justice R. Nyakundi

M/S Seneti & Oburu Associates for the applicant

RULING

On an application dated 23/2/2022 the applicant sought leave of the court to transfer Suit NO.E895 OF 2021 Eldoret Chief Magistrate’s Court to Nairobi Milimani Chief Magistrate’s Court for hearing and determination. In support of the application are grounds in the affidavit which averred inter alia that the Eldoret Chief Magistrate’s Court lacked territorial jurisdiction to hear and determine the cause of action. Apparently as per the deponent the cause of action is stated to have arisen in Nairobi. Further as the record denotes the movant of the application came under certificate of urgency with an order of service upon the respondent. However, during the hearing of the application on the scheduled date there was no evidence of the respondent having been duly served to participate in the proceedings. I would therefore determine this matter in absence of the input from the respondent.

DETERMINATION.

THE LAW

The power of the high court to transfer suit from one subordinate court to another at any stage if satisfied that it is expedient for the end of justice to be met by such a transfer is expressly provided for under section 18 of the Civil Procedure Act. In this respect Section 18 is to be read in conjunction with Section 11, 12 & 15 of the same Act. The basis upon which the power of transfer is excisable by the High Court is as stated in the case of **David Kabungu –v- Zikamunga & 4 others HCCC NO.36 OF 1996 (In Kampala)** that “**strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted.**

There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused... 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...”

Kenyan Courts have followed the Ugandan approach in this regard to regulate the exercise of discretion for transfer of suit from one subordinate court to another. In this view the court in **Hangzhou Agrochemicals Industries Ltd –Vs Panda Flowers Ltd (2012) eKLR** “**In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”.**

The question before the court is whether the applicant has satisfied the criteria to transfer the aforementioned suit from Eldoret Chief Magistrate’s Court to a concurrent jurisdiction at Milimani Commercial Court. He has been pointed out in the affidavit that the matter in dispute was reported at Kamukunji police station and therefore territorially it’s a Nairobi County Contract. In what circumstances should the high court transfer case docket from one subordinate court to another is crystal clear from the provisions of Section 18 of the Civil Procedure Act. This is in addition to the principles as illuminated in the above authorities. As a matter of emphasis the convenience of parties and witnesses is often figured out as some of the critical factors. In overall the court in exercising discretion has to balance the competing rights of the parties in a manner that such a transfer is essential to serve the interest of justice.

By any account from the affidavits filed in the court below the plaintiff alleges that he is a resident of Uasin Gishu County whereas the defendant a retired military officer avers that his matrimonial home is located at Webuye. Although he also acknowledges instances of a residence in Nairobi. On the question of the contract some of the vital documents filed in support of the claim are M-pesa statements as a result of which this court can ably conclude the lending agreement was based on a digital platform.

It should be by now be appreciated that the applicant hinges his application for transfer on the strength of the report filed with Kamukunji police station. This determinant is particularly not sufficient to oust the Chief Magistrate’s Court of jurisdiction to adjudicate over the claim. In this respect our legal system substantially places emphasis on pecuniary jurisdiction of a magistrate’s court and other responsive factors as stipulated Under Section 18 of the Civil Procedure Act. On the other hand typically courts have ruled in [Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & another \[2012\] eKLR](#) **the Court held that where a suit was instituted before a court having no jurisdiction, such a suit could not have been transferred to a court where it ought to have been properly instituted. The Court stated that the reason was that a suit filed in a court without jurisdiction was a nullity in law and whatever was a nullity in law was in the eyes of the law nothing and that the Court could not have purported to transfer nothing and mould it into something through a procedure known as transfer. The Court further stated that courts could only transfer a cause whose existence was recognized by law.**

This governing factor as pleaded in the notice of motion limits the court’s jurisdiction to exercise the discretion of transfer in which proceedings are stated to have been commenced without jurisdiction. It has also been suggested that the cause of action arose in Kamukunji police station which potentially brings the dispute within the ambit of criminal law. That is not the subject matter before the chief magistrate’s court at Eldoret. Therefore the totality of the circumstances are far from convincing that the cause of action of the claim would be better be heard and determined at Milimani Commercial Court. A mere convenience of the plaintiff is not enough for transfer of the case to be effected from one session magistrate to another with concurrent jurisdiction. There is no evidence that the key witnesses for both parties are residents of Nairobi. Notwithstanding that even if witnesses were found to reside in Nairobi for the last two years covid-19 pandemic has brought about phenomenal changes in adjudication of cases by adopting information technology. The use of ICT has become a game changer as enabler of justice delivery through the establishment of virtual courts. It is an effective mechanism for resolving cases speedily and efficiently. It reduces costs for witnesses who can login from any other corner of the republic or globally so long as there is internet connectivity. That being said and done it should not be difficult for the trial court at Eldoret to set up such facilities to accommodate any identified witnesses based in Nairobi or elsewhere in Kenya.

Indeed, there are serious anomalies in the approach taken by the applicant on the application to seek leave of the court to transfer the suit to a more suitable forum of conveniens. Unfortunately, that other forum is not appropriate to say the least in terms of the cause of action and it is also dogged by enormous delays due to high volume of caseloads. In the court’s view to transfer the litigation to Nairobi from the current forum at the plaintiff’s request would be yet another example of an abuse of the court process. The Chief

Magistrate's Court Eldoret has personal and subject matter jurisdiction to mete out fair and equal justice to the parties. It also rather curious that in this very case the applicant has discovered without a legitimate factor that Eldoret Court is a forum non-conveniens to adjudicate over the dispute. As pointed out by the defendant in the affidavit filed in the court below it appears, mistakenly so that National Police Service had been roped in without any sufficient good cause in a matter I consider purely commercial. Given the history of the matter having been reported to Kamukunji police station by the applicant the roots of good faith for contracting parties to the suit are at risk. It is in this context tremendous effort should be made to lay before the trial court the primary evidence in support of the claim against the defendant instead of engaging in a series of interlocutory applications. There is prima facie evidence that such applications have occasioned unnecessary delays.

For those reasons the motion is denied with costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 16th DAY OF MARCH, 2022.

.....

R. NYAKUNDI

JUDGE

In the presence of

1. Mr Ayieko for the applicant.



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