



IN THE HIGH COURT OF UGANDA SITTING AT GULU

Reportable
Miscellaneous Civil Application No. 159 of 2018

In the matter between

OKELLO JOHN FELIX **APPLICANT**

VERSUS

1. **OLOYA SAMUEL** }
2. **CHINA COMMUNICATION CONSTRUCTION CO. LTD** } **RESPONDENTS**

Heard: 24 April 2019.

Delivered: 16 May 2019.

Civil Procedure —*transfer of suits for administrative reasons and in the interest of justice —
The High Court can only exercise its powers of transfer with respect to
matters that were properly and legally filed in the correct court —
considerations of balance of convenience, questions of expense, and the
possibilities of undue hardship.*

RULING

STEPHEN MUBIRU, J.

Introduction:

[1] This is an application made under the provisions of sections 18 and 98 of *The Civil Procedure Act*, seeking the transfer of Civil Suit No. 79 of 2018 now pending before the Grade One Magistrate's Court at Gulu, to this Court. As part of the reliefs sought in that suit, is a claim for mesne profits arising out of alleged extraction of murram by the second defendant from the land in dispute. It is the applicant's contention that due to the second defendant's continued extraction of murram since the filing of that suit, that claim has since risen to a sum now estimated to be over shs. 50,000,000/= thus exceeding the pecuniary jurisdiction

of the Chief Magistrate's Court altogether. That development necessitated amendment of the plaint and now the transfer of the suit to this court.

- [2] The respondents oppose the application and in the first respondent's affidavit in reply it is contended that but for the applicant's exaggeration of disturbance allowance, the amount claimed by the applicant as mesne profits of shs. 42,000,000/= is within the jurisdiction of the Chief Magistrate's Court. The application is only meant to delay the trial. He prayed that it is dismissed with costs.

Submissions in support of the application;

- [3] In her submission, counsel for the applicant elucidated the grounds in support of the application.

Submissions opposing the application;

- [4] Counsel for the first respondent contended that the application is misconceived since the sum of mesne profits is only increased by the exaggerated claim for disturbance allowance. There is no justification in law or in contract for the claim of a liquidated rate of interest on that amount. The application was filed three years after the filing of the suit and is only intended to delay the trial. Counsel for the second respondent argued that a suit filed in a court without jurisdiction cannot be transferred to another court. By amendment of the plaint, the matter was taken out of the jurisdiction of the Chief Magistrate's Court and therefore cannot be transferred. He prayed that the application be dismissed.

Considerations for the transfer of a civil suit;

- [5] Under section 18 (1) (b) of *The Civil Procedure Act*, the High Court may at any stage withdraw any suit or other proceeding pending in any court subordinate to

it, and; (i) try or dispose of the suit or proceeding; (ii) transfer the suit or proceeding for trial or disposal to any court subordinate to it and competent to try or dispose of it; or (iii) retransfer the suit or proceeding for trial or disposal to the court from which it was withdrawn.

- [6] That provision does not prescribe any grounds on basis which the transfer of a case may be ordered from one court to another but the more common reason is the existence of a reasonable apprehension in the mind of a party that it will not get justice at the hands of the presiding judicial officer. Transfer of cases from one court to another though is a serious matter, because it indirectly casts doubt on the integrity or competence of the judicial Officer from whom the matter gets transferred. For administrative reasons and in the interest of justice, the High court has wide powers to transfer a case in the interest of justice and fair play but it is a power which must be exercised after due consideration that it does not unnecessarily impute dishonourable or unjustifiable disgrace or slur on the Court from which the suit is transferred.
- [7] When exercising that power, Court must act judicially guided by its sense of justice, on objective considerations and not subjectively. Before a valid order for transfer can be passed, the Court must be satisfied that; (i) the suit is pending in a court competent to try it. The High Court can only exercise its powers of transfer with respect to matters that were properly and legally filed in the correct court clothed with jurisdiction in the first place (see *Musisi Kibugujju Badman v. Namakula Zam and another, H.C. Miscellaneous Application No. 303 of 2016*); (ii) the court from which the suit is sought to be transferred must be subordinate to the High Court; and (iii) the High Court should be competent to try or dispose of the suit, which competency does not only include pecuniary, but also territorial competency.
- [8] The transfer of a suit is not to be made in a light-hearted fashion. This is particularly so, when the party seeking the transfer is the very same person who

opted for one of the places available to him or her for instituting the suit. A mere balance of convenience in favour of the proceedings in another Court is not sufficient ground though it is a relevant consideration (see *Kithita Ngeana v. Mwaniki Kisume [2018] eKLR, Civil Case 2 of 2016*). Convenience of other parties and the expenses likely to be incurred by them is a factor to be considered. The belated nature of the application for transfer and the fact that the proceedings are at an advanced stage are factors which have to weigh with the court for declining an application for transfer.

[9] The principal considerations are; balance of convenience (see *Mukisa Patrick v. UMEME Ltd H. C. Misc. Cause No. 168 of 2014*), questions of expense, the possibilities of undue hardship, convenience or in convenience of a particular place of trial having regard to the nature of evidence on the points involved in the suit, the issues raised by the parties, existence of reasonable apprehension in the mind of the litigant that he or she might not get justice in the court in which the suit is pending, important questions of law are involved, or a consideration of the "interest of justice." These are, however, illustrative in nature and by no means may they be treated as exhaustive on what constitutes a just cause or reason for invoking that power.

[10] A mere balance of convenience in favour of the trial in the alternative forum, though a material consideration, may not always be a sure criterion justifying transfer. The paramount consideration is that it ought to be demonstrated that trial in the current forum would occasion a miscarriage of justice. 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 (see *Kagenyi v. Misiramo and another [1968] EA 43*). When a case is transferred by judicial order the Court passing the order should fix a date on which the parties should attend the Court to which the case is transferred.

[11] According to article 126 (2) (c) of *The Constitution of the Republic of Uganda, 1995* in adjudicating cases of a civil nature, the courts are required, subject to the law, to ensure that adequate compensation is awarded to victims of wrongs. Since a forum must be approached in order to resolve every dispute, in each civil dispute, the offended party has the privilege to choose the forum where he or she wishes to file the suit on the basis that it has the jurisdiction to try the suit. When the plaintiff has filed a suit in a forum of his or her choice, the defendant has the choice either to accept the forum and file a written statement or to file the application for the transfer of the suit in case if he is not satisfied with the place of suing.

[12] It is the constitutional obligation of this court to guarantee a reasonable trial and promote the interests of justice. I have carefully perused the pleadings and considered the submissions. I am satisfied that justice will more likely be done between the parties by permitting the plaintiff to transfer the suit to the High Court, as the forum of his own choice necessitated by . When the court is satisfied that the applicant is not likely to have a “fair trial” in the court from which he or she seeks to transfer a case, it is not only the power, but the duty of the court to make such order.

Order:

- [13] In the final result, the application is allowed. Accordingly;
- a) Gulu Chief Magistrates Court Civil Suit No. 079 of 2015 is forthwith transferred to this court for hearing.
 - b) The court file should be submitted to the Deputy registrar of this court forthwith to be entered in the register of this court.
 - c) The parties are to appear before this court on a date specified by the Deputy Registrar for further management of the suit.
 - d) The costs of the application are to abide the result of the suit.

Stephen Mubiru
Resident Judge, Gulu

Appearances:

For the applicant : Ms. Kunihiro Roselyn.

For the respondents: Mr. Silver Oyet (for the first respondent).

Mr. Kilama Komakech (for the second respondent)..