



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. E565 OF 2020

**PRISCILLA CIAMWARI MUTEGI (Suing on behalf of the
Estate of the late JULLIET KANGAI MUTEGI).....APPLICANT**

VERSUS

DR M WARSHOW.....1ST RESPONDENT

MR. EDWIN MOGERE.....2ND RESPONDENT

AGA KHAN UNIVERSITY HOSPITAL.....3RD RESPONDENT

RULING

There is before the lower court case No. CMCC 4166 of 2018 between the parties named above as applicant and respondents respectively. From the record before me the proceedings before the lower court are presided over by a Senior Resident Magistrate. Those proceedings are actually complete save that the court has allowed the plaintiff to reopen the case to allow the plaintiff produce documents in support of claim of special damages.

By an application dated 21st December, 2020 the applicant has moved the court for the substantive order that the lower court file be transferred to this court. The reasons for seeking the said order are that the expected award is likely to exceed the jurisdiction of the lower court.

The application is brought under Section 18 of the Civil Procedure Act, Order 50 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act. It is supported by grounds set out therein and a supporting affidavit sworn by the applicant.

The application is opposed and there is a replying affidavit sworn by the advocate for the 1st defendant and grounds of opposition filed by the 2nd and 3rd respondents. Parties have also filed their respective submissions except by the 2nd and 3rd respondent. Section 18 of the Civil Procedure Act 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to try or dispose of the same; or (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.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.”

The power to transfer any case under Section 18 aforesaid is discretionary. In so doing, the court has to consider all the circumstances and the facts attendant thereto so that no prejudice is visited upon any of the parties involved. The facts relied upon by the applicant should have been clear right from the institution of the suit in the lower court.

As already observed, the lower court proceedings are at the tail end and as correctly observed in the affidavit filed on behalf of the 1st respondent, considerable costs must have been incurred in the presentation of evidence and there is no doubt a lot of judicial time has been spent in that regard. It is also not in doubt that the lower court has had the advantage of seeing the witnesses and observing their respective demeanour.

Vigilance is a tool that must be deployed in every case that is likely to or has been presented to the court. A party standing on the opposite side should never be placed in a disadvantageous position by another who fails to exercise due diligence before bringing any action to the court. One may be tempted to allow such a prayer if no prejudice is likely to be visited upon the other party. In fact the court would readily be inclined to grant such an order if it was sought before the defence case. In this case it has been sought too late in the proceedings to rule out prejudice to the defendants.

Taking into considerations the facts of this case I find that it would be prejudicial to the defendants to grant the orders sought. The application dated 21st December, 2020 is hereby dismissed. The cost shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF MAY, 2021.

A. MBOGHOLI MSAGHA

JUDGE

In the presence of:

Mr. Wangai for the applicant

Ms. Obwangi h/b for Mr. Fraser for the 1st respondent

Mr. Obara for the 2nd respondent