



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**HC. MISC. APPL. NO. 40 OF 2017**

**BENJAMIN NICK OMOITE.....APPLICANT**

**VERSUS**

**SIMON OKIDOR OJUMA.....RESPONDENT**

**RULING**

By way of plaint dated 14.01.2015 the Plaintiff/Applicant filed this suit against the Respondent seeking the following prayers:

- i. General damages, past, present and future medical expenses*
- ii. Special damages Kshs.3,500/=*
- iii. Costs*
- iv. Interest*
- v. Further or other relief*

Simultaneously to the plaint the Plaintiff/Applicant filed a Notice of Motion application dated 19.06.2017 seeking the following prayers;

- i. That the present application be certified urgent and be heard on priority basis.*
- ii. That this Honorable Court do issues an order to transfer BUNGOMA CMCC NO.27 OF 2015 to the CHIEF MAGISTRATES'S COURT AT BUSIA for hearing and determination.*
- iii. That the costs of this application be provided for.*

Respondent was served with the application and he filed response stating that;

- i. On the 21<sup>st</sup> April 2014 the applicant assaulted him per claim Bungoma CMCC No. 27 of 2015.*
- ii. That cause of action arose in Amakura area which is near Bungoma compared to Busia and the doctor who prepared the medical report hails from Bungoma which makes it easier availing him court to testify. He further stated that that the chief magistrate court in Bungoma has jurisdiction to hear and determine this suit.*

This court directed that the application be heard and canvassed by way of written submission. Mr. Bw' Onchiri for the respondent briefly submitted that the application must fail stating supporting authority on the same. The Applicant did not file submissions to the application.

From the above, the pleadings, the application, the affidavits and the submissions of the parties filed herein, I am in a position to decipher the major issues for determination is;

1. Whether This Honorable court can order transfer **BUNGOMA CMCC NO.27 OF 2015** to the **CHIEF MAGISTRATES'S COURT AT BUSIA** for hearing and determination.

**Determination:**

The issue that this court has to determine is whether or not the Applicant has presented sufficient reasons to warrant transfer of suit from **Bungoma**

Chief Magistrate's Court to Busia Chief Magistrate Court and further whether the Defendant stand to be prejudiced by the said transfer. Indeed the power of this court to transfer cases instituted in subordinate courts is contained in the provision of Section 18 (1) and (2) of the Civil Procedure Act which provides as follows: -

**18 (1) On the Application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice the High Court may at any stage:**

**(a) Transfer any suit or other proceedings pending before it for trial or disposal to any subordinate to it and competent to try or dispose of the same; or**

**(b) Withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter-**

**(i) Try or dispose of the same,**

**(ii) Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same,**

**(iii) Transfer the same for trial or disposal to the court from which it was withdrawn.**

(2) Where any suit or proceedings 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 to retry it or proceed from the point at which it was transferred or withdrawn.

Also Section 15 of the Civil procedure Act provides that suit should be instituted in the place where the cause of action arose or where the Defendant resides or carries on businesses.

The Applicant has laid down a basis upon which he seeks to have this suit now before Bungoma CM's Court transferred to Busia Law Courts and the grounds advanced include cause of action arose within the jurisdiction of the court, his place of abode is Busia County and that the Defendant will suffer no prejudice. The principles upon which this court will exercise its discretion as regards the transfer of cases have been well laid down in the Ugandan case of **DAVID KABUNGU =VS= ZIKARENGA & 4 OTHERS KAMPALA HCCS NO. 36 OF 1995** (unreported) in which **Okello J** stated as follows:-

**"Section 18(1) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the Applicant to make out a 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 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 or the suit has been filed in a particular court for the purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction ..... It is a 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 expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication 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 could be refused....."**

Looking at the Defendant's Application and the supporting grounds as well, as the Affidavit, I am satisfied that he has satisfied the conditions for an order of transfer of the suit from Bungoma CM's Court to Busia CM'S Court for trial and determination. He has indicated that the cause of action arose within Amukura which is within the geographical jurisdiction of Busia Law Courts and further that both parties who are witnesses hail from Busia County. Again the Applicant has indicated the Respondent/Plaintiff would not suffer any prejudice if the transfer is effected. I must add that it would be convenient for the matter to be heard and determined at Busia Law courts as it would be convenient and just for all involved in the suit that it would be prudent to transfer the same.

For the foregoing observations I find the applicant's Application dated 19/06/2017 has merit. The same is allowed. Costs shall be in the cause. Bungoma CMCC No. 27/2015 be transferred to CM's Court Busia for hearing and determination.

Dated and Delivered at **BUNGOMA** this 23<sup>rd</sup> day of **July**, 2019.

**S.N.RIECHI**

**JUDGE**