



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL CASE NO. 2 OF 2016

KITHITA NGEANA.....PLAINTIFF

VERSUS

MWANIKI KISUME.....DEFENDANT

RULING

1. **Mwaniki Kisume**, the Applicant/defendant approached this Court by way of Notice of Motion seeking transfer of the suit to the Principal Magistrate's Court Mwingi for hearing and determination.
2. The Application is premised on grounds that the cause of action arose at **Mwanziu Sublocation, Migwani Sub County** within the local limits of the jurisdiction of the Principal Magistrate's Court at Mwingi which is the lowest court of competent jurisdiction to hear and dispose of the suit herein. That parties herein are neighbours and residents of Migwani within the jurisdiction of the Principal Magistrate's Court at Mwingi therefore it will serve the ends of justice if the suit is transferred.
3. The application is supported by an affidavit sworn by the Applicant where he stated inter alia that the pecuniary jurisdiction of the Principal Magistrate's Court is up to 10 million a sum the anticipated award is not expected to exceed.
4. In response the Plaintiff/Respondent filed a replying affidavit where he deponed that the application is meant to obstruct justice and delay the expeditious disposal of the matter. That the Court in Mwingi did speak its mind in Inquest NO. 1 of 2012 and as such he is apprehensive that its decision will be prejudicial to him and the trial will not be fair and impartial. That the High Court has original jurisdiction to hear civil matters. That the intention of the applicant is to have the matter transferred so as to intimidate and interfere with witnesses.
5. The Application was canvassed by way of written submissions. The Applicant/defendant stated that though the High Court has original jurisdiction in civil matters, **Section 11 of the Civil Procedure Act (CPA)** provides that a suit be instituted in a court of lowest grade competent to try it and that the respondent failed to show that there would be bias on the part of the court that would try the matter in Mwingi.
6. It was the submission of the Respondent that although **Section 18 of the CPA** empowers the High Court to transfer a suit to a subordinate court, it must consider several issues before ordering a transfer of the suit. He cited the case of **David Kabungu –Vs. Zikarenga & 4 others, Kampala HCCS NO. 36 of 1995** and asked the court to be guided by **order 46 of the Civil Procedure Rules and Section 1A, AB & 3A of the CPA**.
7. Further, he argued that the cause of action arose in **Nzatani location, Migwani Division** in Mwingi, an

area that falls within the jurisdiction of this High Court and his wife has since relocated to Nairobi where his advocates are, therefore the expenses to be incurred will be more if the matter is tried at Mwingi. That to do justice, the court should take into consideration the interest of both parties. He expressed his fear that the intended transfer was aimed at enabling the defendant to interrupt and delay the determination of the case by seizing the opportunity to file unnecessary applications to delay the matter. He called upon the court to exercise its discretionary power by granting an order that will meet ends of justice.

8. The power bestowed upon the High Court to transfer suits of a Civil nature is provided for in Section 18 of the Civil Procedure Act that stipulate thus:

“(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”.

9. A suit ought to be instituted in a court of the lowest grade that is competent to try it. This is provided in **Section 11** of the CPA that provides thus:

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:

Provided that—

(i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and

(ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district”.

10. Circumstances that would move a court to grant the order sought were considered in the *David Kabungu Case (Supra)* where *Okello J* stated that;

“Section 18 (1) (b) 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 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...”

11. The Applicant herein has called upon the court to find that both parties reside in Migwani, Mwingi where the cause of action arose therefore the best placed court to hear the case is the Mwingi Court. The Respondent on the other hand though not denying the fact that the cause of action arose in Migwani Mwingi argues that it would be in the interest of justice to have the matter heard by the High court. He cited the likelihood of the Applicant interfering with the subordinate court at Mwingi.

12. In the case of *Hangzhou Agrochemicals Industries Ltd –Vs Panda Flowers Ltd (2012) eKLR* the court addressed conditions to be considered in determining whether or not to grant an order transferring a suit, thus:

“ ..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”.

13. At the outset the Respondent filed this suit in Machakos High Court, probably considering the pecuniary jurisdiction of the subordinate courts then. Following the amendment of the Magistrate’s Courts Act, A Senior Principal Magistrates Court pecuniary jurisdiction stands at fifteen (15) million. Therefore the Senior Principal Magistrate is seized of the requisite jurisdiction to determine the matter.

14. After the establishment of Kitui High Court, this matter was transferred to this court. The Respondent has faulted the Applicant to have not moved the court to hear the matter but instead to have continued to file applications to delay the matter. The Respondent being the plaintiff was duty bound to move the court to hear the matter.

15. In an endeavour to demonstrate the fear to have the matter heard at Mwingi court, the Respondent has alluded to the Inquest that was heard that was delayed purportedly due to dubious practices like the court files missing. If the Inquest came up in 2012, there has since been change of Judicial officers at Mwingi law courts which is now presided over by a Senior Principal Magistrate. The court is good in case management therefore the Respondent’s apprehension is farfetched.

16. It is further argued that travelling from Nairobi to Mwingi by the advocates of the Respondent and his

wife will be more expensive than travelling to Kitui. The distance between Nairobi and Kitui is approximately 175 kilometers while the distance from Nairobi to Mwingi is approximately 172 kilometers. A difference of approximately 3 kilometers is inconsequential. The issue of expenses to be incurred by the parties does not arise.

17. The balance of convenience calls upon this court to have the matter heard where the cause of action arose which is a place of residence of both the plaintiff and defendant.

18. In the premises, I do order that this suit be and is hereby transferred to the **Senior Principal Magistrate's Court** at **Mwingi** for trial and disposal on **priority basis**, it shall be mentioned before the court on **21st** day of **March, 2018**.

19. Costs of the application shall abide the outcome of the trial.

20. It is so ordered.

Dated, Signed and Delivered at Kitui this 14th day of March,

2018

L.N. MUTENDE

JUDGE