



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

MISC. NO. 68 OF 2017

(CORAM: J. A. MAKAU – J.)

OHULO BUILDING CONSTRUCTION CO. LTD.....APPLICANT

VS

BOARD OF MANAGEMENT

OSIEKO PRIMARY SCHOOL.....RESPONDENT

RULING

1. **OHULO BUILDING CONSTRUCTION CO. LTD** through a Notice of Motion dated 21st August 2017 pursuant to **Section 18(1)(b)(ii) of the Civil Procedure Act** seeks the following orders: -

a) That this Honourable Court be pleased to order the transfer of the proceedings and file in Siaya PMCC No. 86 of 2017 to the Chief Magistrate's Court in Busia for hearing and disposal.

b) That the cost of this application be provided for.

2. The Application is based on the grounds on the face of the application thus: -

a) That the respondent school is in the border of Siaya and Busia County.

b) That the client has always been of the view that the school is located in Siaya County.

c) That further research has indicated that the school is located in Busia County.

d) That the said transfer will see this suit being speedily disposed off.

e) That it is in the best interest of justice that this application be allowed.

3. The Application is further supported by the affidavit of Effie Okoth, an Advocate of the High Court of Kenya in the firm of Bruce Odeny & Company Advocates, in which it is deponed that the Counsel instituted, PMCC No. 86 of 2017 at Siaya PM's Court against the respondent as per annexed Plaint marked "EAO-1", and the Plaintiff had always been of the view, the Respondent school is located in Siaya County; that upon research the counsel discovered that the respondent school is located in Busia County; that the confusion has been based on the fact that the school is located in the border of Siaya and Busia County; that the Chief Magistrate's court in Busia has the statutory, pecuniary and geographical jurisdiction to hear and determine this suit.

4. The Respondent is alleged to have been served on 5th September 2017 with copies of the Notice of Motion, and it signed and stamped the copy. That it is further deponed that the Respondent was served with a hearing and Notice as per affidavit dated 30th January 2018 who also accepted service, signed copy of the hearing notice and stamped the same. The Respondent did not appear, nor file Replying affidavit or grounds of opposition; consequently the matter proceeded in her absence.

5. M/s Opondo, Learned Advocate appearing for Mr. Odeny for the Applicant relied on the grounds on the face of the application and urged the court to grant the application as prayed.

6. The application is premised on **Section 18(1)(b)(ii) of the Civil Procedure Act** which provides: -

“18. (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-

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter-

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or”

7. The High Court in view of **Section 18 of Civil Procedure Act** is vested with jurisdiction to withdraw and transfer case instituted in a subordinate court as is the case in this application, however before the High Court can do so, it has to be satisfied the subordinate court before which the case is filed and is sought to be withdrawn and transferred from having had initial jurisdiction to determine the matter. Similarly, the court should be satisfied the court to which the matter is sought to be transferred to, has jurisdiction to hear and determine the matter.

8. **Section 11 of the Civil Procedure Act** states courts in which suit is to be instituted. **Section 11 of the Civil Procedure Act** provides: -

“11. 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.”

9. Further **Section 12 of the Civil Procedure Act** provides suit are to be instituted where the subject matter is situated. Whereas **Section 14 of the Civil Procedure Act** provides: -

“14. Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts.

Illustration.- (a) A residing in Mombasa beats B in Nairobi. B may sue A either in Mombasa or Nairobi.

Illustration.- (b) A residing in Mombasa publishes at Nairobi statements defamatory of B. B may sue A either in Mombasa or Nairobi.”

10. As regards other suits, **Section 15 of the Civil Procedure Act** provides the suits shall be instituted in a court within the local limits of whose jurisdiction the Defendant resides or cause of action arose.

11. As I deal with this application, I am alive to the fact that jurisdiction is everything, and everything here is not relative, if a court has no jurisdiction then it virtually means that its hands are firmly tied, it is not privy to that matter whatsoever. Thus whatever order, judgment or jurisdiction a court may purport to have or exercise over a matter is inconsequential. Where a court acts without jurisdiction all that it does is an exercise in futility and amounts to nothing. In case of **Owners of the Motor Vessel “Lilian S” V Caltex Oil (Kenya) Ltd (1989)KLR1**, Justice Nyarangi of Court of Appeal, as he then was, held thus: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

12. In the instant application, the Applicant through his counsel admits that the Defendant school is not within the local limits of whose jurisdiction the matter has been instituted as the school is in Busia County and not Siaya County. It is not deponed that in Busia County, there is no Court of the lowest grade competent to try this suit, previously prompting the filing of this suit in Siaya County being a neighbouring county. In view of the provisions of **Section 11, 12, 14 and 15 of the Civil Procedure Act**, I find and hold Siaya Principal Magistrate Court, the property being in, not in Siaya County and the Respondent school being in Busia County is not competent to try the PMCC 86 of 2017, filed before it for want of jurisdiction. The suit filed at Siaya Principal Magistrate Court which has no jurisdiction to try it cannot be transferred but the applicant can either withdraw it and file a fresh suit at a Court of competent jurisdiction or await for its striking out for want of jurisdiction.

13. In view of the above, I find no merits in the Notice of Motion dated 21st August 2017. The same is dismissed with no orders as to costs.

DATED AND SIGNED AT SIAYA THIS 8TH DAY OF MARCH 2018.

HON. J. A. MAKAU

JUDGE

DELIVERED IN OPEN COURT.

In the presence of:

M/s Bruce Odeny & Co. Advocates: for the Applicant

N/A: for Respondent

HON. J.A. MAKAU

JUDGE