



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

MISCELLANEOUS APPLICATION NO. 3 OF 2016

MEELI OLE NAISEWA.....APPLICANT

VERSUS

BENSON GACHUKI KINYANJUI.....RESPONDENT

RULING

I have before me a notice of motion filed and dated 2nd January 2016 brought pursuant to section 1A, 1B, 3, 3A, 18(b) (ii) and section 63(e) of the Civil Procedure Act and Order 4 Rule 9(1) & (2) of the Civil Procedure Rules 2010.

The applicant is seeking an order that this honourable court be pleased to transfer Nairobi Chief Magistrate Civil Case No. 2234 of 2012 to Kajiado Chief Magistrate Court.

The application is based on the grounds that:

- (1) This court has unfettered jurisdiction to transfer cases from one subordinate court to another in the interest of justice.**
- (2) That the claim by the litigants herein arose within Oloosirikon/Sholinke within Kajiado County, hence the Chief Magistrate Court Kajiado has both territorial and pecuniary jurisdiction to hear and determine the matter.**
- (3) That in line with the law and to decongest Nairobi Chief Magistrate Court Civil Division.**
- (4) It is expedient to transfer this case to Kajiado Law Courts.**

It is expected the applicant file an affidavit in support of the application of this nature.

The respondent was served with the application and several notices sent by the applicant and Deputy Registrar of the court to file a reply and attend the hearing.

When the application was set down for hearing he had not filed a replying affidavit and/or grounds of opposition to the application dated 2nd January 2016. The application was therefore argued before me *ex parte*.

In his submissions Mr. Agina counsel for the applicant dwelt at length on the merits of the application. He

submitted that under Section 18 of the Civil Procedure Act the high court is vested with jurisdiction to transfer Nairobi CMCC No. 2234 of 2012 to Chief Magistrate Kajiado for adjudication and determination. He further submitted that the cause of action arose within the territorial jurisdiction of the court and therefore properly placed to try the case.

It was his contention that the defendant/applicant resides within Kajiado East Sub-County and therefore the suit should have been filed within Kajiado subordinate court registry which has both territorial and pecuniary jurisdiction.

I have now considered the pleadings as filed in Nairobi CMCC No. 2234 of 2012, the affidavit on record and the submissions by learned counsel Mr. Agina for the applicant.

It is well settled in law that the High Court under Section 18 of the Civil Procedure Act Cap 21 of the Laws of Kenya is empowered:

“To withdraw and transfer any suit instituted before a lower court to itself or to another subordinate court competent to try and dispose of the same.”

I consider that under the provisions of section 18 before the procedure and order of transfer is resorted to, the court must satisfy itself whether there is a competent suit in the original court capable of being tried and disposed of. The relevant things to be considered by the court in determining jurisdiction being the facts as deposed in the plaint, affidavit and statement of claim served upon the defendant. The basis of this being that it is the plaintiff who in the determination of his rights invokes the jurisdiction of the court conferred by the constitution and statute.

It is important to bear in mind that the issue of my decision is whether the application as it stands has merits to enable me make an order of transfer.

The application was therefore to be tested whether the court from which the suit is being transferred had jurisdiction.

Secondly whether the applicant satisfies the provisions of Section 15 of the Civil Procedure Act.

Under section 15 it provides that:

“Suits of this nature like the ones filed by the plaintiff in Milimani Chief Magistrate Court shall be instituted in a court within the local limits of whose jurisdiction the defendant resides; carries on business, or works”.

The section also provides that such suits may be instituted where the cause of action arose whether wholly or in part.

The applicant in his affidavit which is not contested has met the criteria on jurisdiction and provisions of section 15 of Civil Procedure Act.

Under section 18(1) of the Civil Procedure Act the High Court is vested with wide powers on transfer and withdrawal of suits necessary for the ends of justice to be met.

The question of application of section 18 1(b) of the Uganda Civil Procedure Act which provisions are equivalent to our own Civil Procedure Act 2010; in the case of **DAVID KABUNGA VS. ZIKARENGA & 4 OTHERS** (Kampala HCC No. 36 of 1995) Okello J stated as follows:

‘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 enough, 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 or the suit has been filed in a particular court for the purpose of working in justice. 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 by the plaintiff and hearing 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, question of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all 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 not ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused.....”

The provisions of section 18 of the Civil Procedure Act are fortified by sections 1A, 1B and 3A which provisions all pertinent in administration of civil justice in Kenya.

Section 1A (1) provides for, **“an overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.”**

Section 1B (1) sets out the guiding principles in functioning the overriding objective. Such action include the necessity of:

- “a. The just determination of the proceedings.**
- b. The efficient disposal of the business of the court.**
- c. The efficient use of the available judicial and administration of resources.**
- d. The timely disposal of proceedings at a cost affordable by the respective parties.**
- e. The use of available technology.”**

Under section 3A the court is clothed with inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

I have considered the application, affidavit in support and applicable law as outlined in the Civil Procedure Act of 2010. This court has further taken into account the interpretation of section 18(1) of the Civil Procedure Act in the holding of **DAVID KABUNGA** case (**Supra**). It is worthy to note that the application as filed was not contested by the respondent.

This court finds that there is competent application to make an order of transfer of CMCC No. 2234 of 2012 from Nairobi Milimani to Kajiado Senior Principal Magistrate’s Court. The affidavit in support thereof do indicate that the Chief Magistrate Nairobi Milimani Commercial had jurisdiction to try and dispose of the matter. The issue of jurisdiction is not wanting in the original suit set to be transferred.

Secondly the defendant/applicant has brought himself within the provisions of section 15 of the Civil Procedure Act. The defendant has deponed that he resides within Kajiado Sub-County within greater Kajiado County. The cause of action arose as deduced from the statement of claim by the plaintiff was within Kajiado County. The defendant has therefore satisfied the test of local/territorial limits provided under the law.

As a consequence the defendant’s notice of motion dated 2nd January 2016 is hereby allowed as follows:

(1) That the Executive Officer Chief Magistrate's Court do transfer Civil Suit No. 2234 of 2012 to Kajiado Chief Magistrate Court forthwith.

(2) That the Chief Magistrate Court Kajiado upon receipt of the file sets down the case for hearing on a priority basis.

(3) That this order be served upon both parties by the Deputy Registrar Kajiado High Court for compliance.

(4) The costs of this application to abide the outcome of the main suit.

It is so ordered.

Dated, delivered in open court at Kajiado on 18th day of April 2016.

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R. NYAKUNDI

JUDGE

Representation

In the absence of the parties

Mr. Mateli Court Assistant