



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPL NO. 18 OF 2014**

**WALTER KIRIBA NDUNGU ..... APPLICANT**

**- V E R S U S -**

**1. LUC MICHEL LANGLOIS**

**2. MARIE THERESE FRANCINE LAGLOIS**

**3. KENYA COMMERCIAL BANK LIMITED .....RESPONDENTS**

**RULING**

1. The Notice of Motion dated 16th July, 2014 seeks to set aside the consent order made on 9th July 2014 whose effect transferred HCCC. NO. 177 of 2010 to the Principal Magistrate's court Kwale for hearing and determination. The applicant contends the consent was made in mistake as the counsel holding brief on behalf of the applicant had no such instructions neither was she privy to the value of the suit property whose value the applicant has attached at Kshs. 8,000,000.

2. The motion is opposed by the respondents who have sworn a replying affidavit highlighting the reasons why the motion should not be granted. The reasons include inter alia that the suit property value is Kshs. 5 million which the Kwale Principal Magistrate Court has pecuniary jurisdiction to determine. Secondly that the property is situated in Kwale and the 1st respondent lives in Kwale hence Kwale court would be more convenient to him.

3. The respondents commenced this suit by filing it in the High Court at Mombasa. The 1st plaintiff has not explained why in the initial instance the suit was not filed in Kwale Court which is near to them as he now attempts to bring out in the replying affidavit. Be that as it may, it is a fact that the value of this property is not being agreed upon by the parties in dispute. The plaintiff have through their valuation report placed the value at Kshs. 5,000,000 while the 2nd defendant's valuation report give a value at Kshs. 8,000,000. From the prayers contained in the plaint, the value of the property is not brought to question. The defense was not annexed so I am not able to make an inclusive decision on the basis of opposition to the prayers in the plaint.

4. In paragraph 9 of the replying affidavit, the plaintiff introduced the value of the property at Kshs. 600,000 to the court and sought to have the matter transferred to Kwale Court for hearing and determination. In paragraph 10, he deposes that this position was accepted by all the parties advocates on record on that day thus the order was made transferring the suit. The applicant points this consent was reached by mistake because Ms Anyumba advocate holding their brief did not have such instructions.

5. It is clear from the pleadings in this misc. application that there was a mistake on the value given to the court on the date the order transferring the suit was made. This is because the respondent gave the value at Kshs. 600,000 but later in their report annexed to the replying affidavit the value is given at Kshs. 5,000,000. In the case of *Flora Wasike vs Wamboko (1982- 88)1KAR 625* the Court of Appeal laid grounds for setting aside and or varying consent order and mistake is one of them. It is clear in this instance that there was genuine mistake as the value given by the plaintiff when the order was made is totally different to the value of the property.

6. As to whether the true value is Kshs. 5 million or 8 million, it is only safe not to venture there at this point as this require adduction of oral evidence. In the circumstances it is imperative to clear this uncertainty of value and pecuniary jurisdiction by leaving the suit no. HCCC. 177 of 2010 to proceed in the High Court where it was filed. Consequently the Notice of Motion dated 16th July 2014 is allowed with no order as to costs.

**Dated and delivered in open court at Mombasa this 20th day of February, 2015.**

**A. OMOLLO**

**JUDGE**

**20.2.2015**