



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
MISCELLANEOUS APPLICATION NO. 504 OF 2011

M.M (Minor suing through the

Mother and next of kin) PLAINTIFF..

VERSUS

PASTOR JOHN NJENGA 1ST DEFENDANT

BERNEDETTE NJERI KIHANYA 2ND DEFENDANT

R U L I N G

1. What is before this Court is the Plaintiff's Notice of Motion dated 20 April 2011. The Application seeks to withdraw *CMCC No. 8493 of 2005* as between the Plaintiff and the Defendants herein from the Chief Magistrate's Court at Milimani, Nairobi and transfer the same to the Thika Chief Magistrate's Court. The Application is brought under **sections 3A and 18** of the *Civil Procedure Act* as well as under the old **Order XLVI Rule 5 (2)** and **Order L**, *Civil Procedure Rules*. The Application is supported by the Affidavit of **Paul Mutunga**, the Advocate of this Court having the conduct of the Application on behalf on the Plaintiff/Applicant. The said Affidavit is sworn on 20 April 2011. The deponent maintained that since the filing of this suit, it had come to his attention that the road accident, being the subject matter and cause of action of this suit, occurred along the Thika- Matuu Road, the report of the same having been made at the Thika Police Station. It has also come to Mr. Mutunga's attention, having taken this matter over from another advocate on behalf of the Plaintiff/Applicant, that both the Plaintiff and the Defendants reside and/or carry on business at Thika. In his opinion, the suit should have been filed in Thika as that is where the defendants reside.
2. The Plaintiff's said Application is opposed and Mr. **Peter M. Gichuru**, an advocate of this Court practising in the firm on record for the Defendants, swore a Replying Affidavit on 6 July 2011. The deponent detailed that the suit was wrongly filed in the Chief Magistrate's Court at Nairobi which, he maintained, lacked the jurisdiction to hear and determine the matter. He went on to say that it was clear that by reason of the suit having been filed in a Court lacking jurisdiction, such renders the suit non-existent and therefore it cannot be transferred to another court. There was no suit in law that could now be transferred from Milimani to Thika.
3. In his submissions before Court on 24 April 2013, Mr. Mutunga noted that the Plaintiff detailed that the first Defendant was residing in Nairobi which is the reason why the suit was filed in the Chief Magistrate's Court in Nairobi, even though the Plaintiff resided in Thika. He noted that the first Defendant had no objection to the suit being transferred and only the second Defendant, who was latterly joined in the suit, was objecting to the same. The counsel for the second Defendant had produced before Court the authority of **Bishop Christopher Ndungu v Andrew Abungu (2006)**

- eKLR.** Mr. Mutunga distinguished in that authority as matters therein involved a dispute between 2 churches. He maintained that this suit should be transferred convenience of all bearing in mind that the accident, the subject matter of the suit, occurred at Thika where the majority of the witnesses reside.
4. In turn, **Mr. Mzungu** for the second Defendant submitted that he was opposing the Application on the grounds that the Orders being sought could not be granted by this Court. The suit was originally filed in the lower court, wrongly. The cause of action arose in Thika, a fact readily admitted in the Affidavit in support of the Application. Counsel noted that the Application had been brought under the old **Order XLVI** and **L** of the *Civil Procedure Rules* which no longer applied. In any event, **Order XLVI** only involved the transfer of cases as between different High Court Registries. Counsel then referred to **sections 13 and 14** of the *Civil Procedure Act*. He maintained that as the suit was filed in the wrong court, the Plaintiff should not be allowed to correct the error. He referred to the Ruling of **Kimaru J.** in the **Bishop Ndungu** case (supra). He maintained that the principle of law to be gleaned from that authority was that the High Court cannot exercise its discretion to transfer the suit from one lower court to another if the suit is filed, in the first place, in a court which did not have the pecuniary and/or territorial jurisdiction to try it. He reiterated that the dispute was whether the suit was filed in the wrong court or not. It was not in dispute that the second Defendant is resident in Nairobi. Finally, Mr. Mzungu noted that Order 25 Rule 1 permitted the Court to allow a party to withdraw its suit in the one court and re-file it in another or the proper court. In a brief rejoinder, Mr. Mutunga submitted that the Civil Procedure Act provided that the suit may be filed in the place where the cause of action arose or where the Defendant resides – see **section 14**.
 5. There is no dispute between the parties as regards pecuniary jurisdiction of the lower court. Consequently **section 11** of the *Civil Procedure Act* is inapplicable to the Application before Court. Similarly, as the suit is based on negligence arising out of a road accident, the provisions of **sections 12 and 13** of the *Civil Procedure Act* are also not applicable. Counsel for the second Defendant is quite correct in referring this Court to **section 14** as that applies to suits for compensation for wrong to the person or movable. The section reads as follows:

“14. Where a suit is for compensation for wrong done to the person or to moveable 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”.**

6. To my mind, the section is perfectly clear. The Plaintiff has a choice of suing in one of 2 courts. Firstly, he may sue in the Court within whose jurisdiction the wrong was done. The wrong in this case was the road traffic accident which took place on 8 February 2005 along the Thika - Matuu Road. Thus the place that the wrong was done was within the local limits of the Thika Magistrates’ Court. Secondly, the Plaintiff may sue in the Court within whose jurisdiction the defendant resides or carries on business or personally works for gain. In the original Plaint dated 3 August 2005, the first Defendant herein was the only Defendant at the time. The second Defendant was added to these proceedings later by the Amended Plaint dated 9 November 2005. The Summons herein was dated 3 August 2005 and identified the first Defendant being care of P. O. Box 760, Ruaraka which, of course, is within the local jurisdiction of the Courts situated in Nairobi. Thus, to my mind, there is no merit in the objection by the second Defendant that this suit was improperly filed in Nairobi. The authority to which this Court was referred by the second Defendant being the **Bishop Nungu** case (supra) involved the situation where the suit was originally filed in a court which did not have pecuniary and/or territorial jurisdiction to try it. With respect, it is distinguishable from this case in that I have found, as above, that the Chief

Magistrate's Court at Milimani did have jurisdiction to try *RMCC 8493 of 2005*.

7. The power of this Court to transfer cases instituted in subordinate courts is contained in the provisions of **section 18 (1) and (2)** of the *Civil Procedure Act*. Such reads 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 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”.

8. As to the principles upon which this Court will exercise its discretion as regards the transfer of cases, this Court is guided by the Ugandan case of **David Kabungu v Zikarenga & 4 Ors Kampala HCCS No. 36 of 1995 (unreported)** in which **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 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 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 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 expense, 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 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”.

9. As observed in the Supporting Affidavit to the Plaintiff's Application:

“a) The cause of action arose at Thika – Matuu Road within Thika District.

b) The applicant and all their witnesses reside or carry on business at Thika.

c) The respondents stand to suffer no prejudice.”

It seems to me that in view of the sub paragraphs a) and b) above, for the convenience of all involved in this suit, it would be prudent to transfer the same from the Resident Magistrate’s Court at Milimani, Nairobi to the Thika Resident Magistrates Court, invoking the powers that this Court has in this connection under **section 18** of the *Civil Procedure Act*. It is so ordered.

DATED and delivered at Nairobi this 28th June, 2013.

J. B. HAVELOCK

JUDGE