



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT KAKAMEGA  
MISCELLANEOUS CIVIL APPLICATION NO.62 OF 2011**

**ALRED GIDALI  
GEORGE GUNYANYI  
DOUGLAS**

**ASWANI**

**MUSUMBA**

**MMBONE.....APPLICANTS**

**WALTER**

**SHARROLINE**

**VERSUS**

**NEBERT MWIKA**

**LUMIRE.....RESPONDENT**

**R U L I N G**

The application by way of Notice of Motion dated 21<sup>st</sup>, October 2011 seeks orders for the withdrawal of Senior Resident Magistrate's Court, Hamisi, Civil Suit No. 47/2011 and a transfer of the same to the High Court Kakamega for trial and appropriate directions.

The application is supported by the annexed affidavit of the applicant. In the said affidavit, the applicant depones that the property the subject matter of these proceedings is plot No. 32 at Chavakali market which is registered in the name of the parties herein. That the District Magistrate issued orders in the aforesaid suit barring other members of the family from accessing the suit property of the deceased. It is further stated that the District Magistrate and the Senior Resident Magistrate at Hamisi Law Courts have no jurisdiction to deal with a property of a deceased person when the value of the property is above Kshs.100,000/=. It is further stated that the suit property is situated within Chavakali area within the territorial jurisdiction of the Vihiga Court. There are therefore suspicions of forum shopping.

The application is opposed as per the replying affidavit sworn by the Respondent on 3.11.2011.

In the said affidavit, the Respondent contends that the suit before the Senior Resident magistrate's court, Hamisi concerns the business that the Respondent is carrying out at the suit premises. That there are no Succession proceedings at the Hamisi Court. According to the Respondent, the issue of jurisdiction ought to be raised before the trial court. The Respondent also stated that the applicant herein has no legal capacity to prosecute this application.

I have considered the application, the reply to the same and the oral submissions made by the counsels in court.

The bone of contention is whether the Senior Resident Magistrate's court in Hamisi had the jurisdiction to entertain the case filed there. Although no certified copy of the proceedings from the said Senior Resident Magistrate's court have been annexed, it is observed that the orders issued were in connection with the operations of the Respondent's business. The order that was issued by the District Magistrate has since

expired.

The issue of jurisdiction ought to be raised in the trial court. If the suit was filed in a court without jurisdiction, then it is an incompetent suit which is not capable of being transferred. I am therefore in agreement with the persuasive authority cited by the Respondent's counsel (**ADERO & ANO. V. ULINZI SACCO SOCIETY LTD. 2002 1 KLR 577**).

The applicants have alluded to suspicions of forum shopping. It is argued for the applicant that the case was not filed in Vihiga Court where the suit property is situated. If that is the case, an appropriate application ought to have been made before the trial court. Mere suspicions without any basis cannot be a ground for a transfer of the suit.

On the basis of the foregoing, I find the application has no merit and the same is dismissed with costs.

***Delivered, dated and signed in open court at Kakamega this 23<sup>rd</sup> day of February, 2012***

**B. THURANIRA JADEN**  
**J U D G E**