



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

Miscellaneous Application 134 of 2011

JACKSON M KITULU PLAINTIFF/APPLICANT

VERSUS

1.

BERNARD MUTUNE MWENGEA

2.THOMAS MUOKI DEFENDANT/RESPONDENT

R U L I N G

Before me is a Notice of Motion dated 25th May 2011. It was filed by the Plaintiff Jackson M Kitulu. It seeks orders that:-

1. (Spent).

2. This court be pleased to transfer MACHAKOS PMCC No. 643/03 Jackson M Kitulu –vs- Bernard Mutune Mwengea & Thomas Muoki from the Chief Magistrate’s Court Machakos to the High Court at Machakos for determination and disposal.

3. This Honourable Court be pleased to allow the plaintiff/applicant leave to reopen his case, recall witnesses and produce evidence upon such notice to the Defendant as the court may direct.

4. This Honourable Court be pleased to allow amendment of the plaint herein and the interim draft amended plaint annexed hereto and marked “A” be deemed as duly filed and served upon the defendants.

5. Such orders and/or directions be made as will advance the interests of justice in the case.

6. The costs of this application be in the cause.

The application is opposed by the 2nd defendant. The plaintiff and 2nd defendant filed written submissions to the application. On the hearing date, Mr Mwalimu, appeared for the plaintiff while Mr Makau, appeared for the 2nd defendant.

This is a civil case that was filed in the Chief Magistrate's Court. From the contents of submissions filed, judgment on liability was entered therein. The formal proof case has now been closed, and a final decision of the magistrate is awaited.

The plaintiff has now come to this court through the application, seeking several orders. He claims that this application was necessitated by the subsequent death of the victim after the case was instituted in the magistrate's court, and additional expenses incurred. Therefore, the Chief Magistrate might not be having the monetary jurisdiction to accommodate the damages that can be awarded.

In my view, this application is premature with regard to the request for transfer of the case and amending the plaint. Judgment having been entered by the Chief Magistrate's Court and proceedings having been closed, the reopening of the case has to be addressed first. Such reopening of the case, can only be done in the magistrate's court. This court cannot reopen the proceedings in the magistrate's court unless on appeal, if the Magistrate's Court refuses to reopen the case. This court cannot through such an application reopen a case or matter which has been determined by another court.

It is after the case is reopened, that an application can be made to this court for transfer of the case from the subordinate court, and for amendment of the plaint.

The case of **Kassam –vs- Bank of Baroda (Kenya) Ltd (2002), KLR 294** is distinguishable, as it deals with a request for amendment of pleadings in the court which is seized of the matter. In the present case, the High Court is not seized of the case Machakos CMCC No. 642 of 2003.

In the result, I find this application as premature and misplaced, and strike out the same with costs to the 2nd defendant.

It is so ordered.

Dated and delivered at Machakos this **12th** day of **June** 2012.

George Dulu

Judge

In presence of:-

N/A for Plaintiff/Applicant

N/A Defendant/Respondent

Nyalo – Court clerk.