



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & TAX DIVISION – MILIMANI**

**MISC. CASE NO. 926 OF 2010**

**HUSSEIN AHMED ALI**

**HEBATULA.....PLAINTIFF**

**VERSUS**

**NAIROBI WATER & SEWERAGE COMPANY  
LTD.....DEFENDANT**

**RULING**

The Applicant in the Notice of Motion dated 22<sup>nd</sup> September 2010, seeks orders of the court for the transfer of **Milimani CMCC No. 7065 of 2006** from the Chief Magistrate’s Court to the **Water Appeals Board**. The application is brought under **Section 18 (b) (ii)** of the **Civil Procedure Rules** (2009 Revised Edition) and pursuant to the **Kenya Gazette Notice No. 133 of 2008** and **Legal Notice No. 144 of 2007**.

The Suit sought to be transferred was filed prior to the Establishment of the Water Appeals Board. Under the **Legal Notice No. 144 of 2007** and the **Gazette Notice No. 133 of 2008**, the High Court and the Magistrate’s Courts were divested of their jurisdiction to hear any dispute under **Water Act**, save for Judicial Review Matters. By virtue of the Gazette Notice, disputes pending before courts were required to be transferred to the **Water Appeal Board** with 30 days from the date of the publication. The applicant did not do so then, hence the filing of the application.

The application is opposed on the grounds firstly, that it is without merit, is misconceived and a gross abuse of the process of the court, and secondly, that this court has no power to transfer the suit as prayed. The Respondent argues that the orders prayed for, having been sought under **Section 18 (1) (b) (ii)** of the **Civil Procedure Rules** cannot issue since, according to counsel, the said section applies to the transfer of suits between subordinate courts and not from such courts to tribunals. It has been submitted also that the Applicant, having failed to act within the 30 days imposed by the Gazette Notice, time to transfer the suit has lapsed and the applicant has no recourse.

To support the opposition to the application the Respondents have cited the persuasive decision of Waweru J in **Miscellaneous Application No. 318 of 2008 – MWIKI WATER PROJECT “B” –VS- NAIROBI WATER & SEWERAGE CO. LTD & CITY COUNCIL OF NAIROBI** (unreported) which the Applicants say is distinguishable. In the said ruling the learned judge agreed with an earlier decision of Lenaola J in **MERU H.C. MISC. Application NO. 77 OF 2006 JOHN NYAWIRA KIAMA & ANOTHER –VS- NANYUKI EQUATOR SACCO LTD** (unreported) to the effect that a transfer such as is sought herein cannot issue under **Section 18 (1) (b) (ii)** of the **Civil Procedure Act Cap 22** of the **Laws Of Kenya**. The said provision 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)-----

(b) **withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter**

(i).....; or

(ii) **transfer the same for trial and disposal to any court subordinate to is and competent to try or dispose of the same-----”** (Underlining provided)

The holdings in the two decisions referred to hereinabove were based on the interpretation of the word **“Court”** which under **Section 2** of the **Civil Procedure Act** is defined as *“The High Court or a subordinate court, acting in the exercise of its Civil Jurisdiction”*.

Whereas the application before Lenaola J appears to have been disallowed, the one before Waweru J was allowed on the basis that the same had not been brought under **Section 18** but the Applicant had invoked the inherent powers of the court. I am of the considered view that a party need not invoke the inherent powers of the court to benefit from the same. Any court keen to accord justice to the citizens of the Republic of Kenya is mandated under the Constitution to take cognisance of its own inherent powers under **Section 3A** and invoke them in the interests of justice. The said Section reads as follows;-

**“3A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the court.”**

Although the drafters of **Section 18** of the Civil Procedure Act may not have envisaged a situation where a suit may require to be transferred to a tribunal or other body other than *“a court”*, as defined under **Section 2**, I am of the view that the saving of the inherent powers of the Court under **Section 3A** was intended for such situations. To refuse the transfer of the suit herein, merely on the grounds advanced by the Respondents would be to deny the Applicants justice, since the subordinate court no longer has jurisdiction to try the suit. It would, in effect, amount to a closure of the suit, without a hearing, purely on technicalities. Such a move clearly goes against the principle that a court should aim at sustaining a suit rather than terminating it. I believe that it is in that spirit that **Section 18** gives the High Court the power to transfer a suit, where appropriate, even on its on motion without an application being brought before it.

Whereas I find the arguments by the Respondents sound, nonetheless I find that justice demands that the application be allowed, in exercise of the inherent powers bestowed upon me.

Accordingly, the application is allowed and orders granted as prayed, with an order that the Applicants do pay costs of the same to the Respondent in any event.

**DATED SIGNED and DELIVERED at NAIROBI this 9<sup>TH</sup> day of FEBRUARY, 2011.**

**M. G. MUGO**

**JUDGE**

In the presence of:

No appearance

For the Applicant

Mr. Amadi

For the Respondent