



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC. APP. NO. 99 OF 2011

MARY ATIENO OGANA.....APPLICANT

VERSUS

JOHN NABOTH OTIENO.....1ST RESPONDENT

NAOMI AKINYI ACHIENG.....2ND RESPONDENT

RULING

The applicant moved to the seat of justice vide an application dated 1st March 2011 by way of notice of motion. It is brought under sections 1A, 1B3, 3A and 18 of the CPA and all other enabling provision of the law. It seeks 3 reliefs namely:-

- (1) The honourable court be pleased to withdraw and transfer Maseno PMCC No. 253 of 2010 from the Maseno Principal Magistrate's court to any other court of competent jurisdiction for hearing and determination.**
- (2) Costs of this application be borne by the plaintiff/Respondent.**
- (3) Such further orders and other orders be made as the court may deem fit and expedient.**

The grounds are set out in the body of the application, supporting affidavit and written submissions. This court has perused all of the documentation on the record and in its opinion, the following are the grounds stressed:-

- **There is in place Maseno PMCC Case No. 253 of 2010 which involves a burial dispute involving a son of the applicant.**
- **The plaintiffs in the said suit are husband and wife with the first plaintiff claiming to be the biological father of the deceased, a matter contested by the applicant.**
- **Their source of complaint is that they filed a defence on behalf of the applicant herein and a consent to enjoin other interested parties but these documents did not find their way into the court file till after a ruling adversely affecting the position of the applicant in the said proceedings was made.**
- **As at the time the applicant moved to the court, the consent enjoining other interested parties to the proceedings had not been filed.**
- **They accuse a staff member at the said law courts to be involved in the saga by name Mrs. Obudho.**
- **The issue was brought to the attention of the magistrate who was handling the matter and who disqualified himself from the matter without giving directions on how the matter should proceed thereafter.**
- **The applicant seeks that although there is another magistrate at Maseno who could handle the matter, justice will not be served because of failure of the disqualified magistrate to give directions on the complaints raised.**
- **That it has now transpired that the said court official Mrs. Obudho is related to the first plaintiff and if the matter is handled at the same venue interference will persist, hence the need for revoking of the said proceedings to some neutral location**

The respondents were served but they filed no papers in response, neither did they attend court for the inter parties hearing. The court has perused the return of service deposed by one James Odhiambo Obondi on a date not indicated but filed in court on the 15-3-2011 and seen a copy of the receipt stamp of counsel for the respondent who received the hearing notice under protest that he will be engaged in another matter in Kakamega law courts. It is observed from the said return of service that the service was effected on 10-3-2011, five days before the hearing date. No papers in response were filed neither did the respondents' counsel request another counsel to hold his brief to seek more time. The applicants counsel was therefore entitled to proceed ex-parte.

The applicants counsel has filed written submissions and authorities. This court has perused the counsel's written submissions and has confirmed that these reiterate the content of the grounds in the body of the application and the supporting affidavit and stressed that there is a genuine fear that the applicant will not get justice. If the trial continues at the current venue.

There is reliance placed on the ruling by Waki judge as he then was now judge of appeal decided at Mombasa on the 11th day of July 1997. A perusal of the said ruling reveals that the learned judge as he then was now judge of appeal quoted with approval "The case of Kaluba –VS- Kajaya [1957] EA 312

where it had been held that the **“discretion should not be exercised without some reason stronger than the mere balance of convenience”**. The case of Kageny –VS- Musiramo & Another [1968] EA 43 where it had been held that:- **“an order for the transfer from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it.....”**

The learned judge then went on at line 8 from the bottom at page 2 to draw out the following applicable principles **“principal matters to be taken into consideration are balance of convenience, question of expense, interests of justice and possibilities of undue hardship.**

At page 3 of the said ruling the learned judge as he then was now judge of appeal quoted with approval from Halisburys laws of England but did not give the citation It reads:-

“The courts power to transfer proceedings from one court to another is useful, corrective to ensure that proceedings wherever began or whatever forums the plaintiff has initially chosen should be dealt with or heard or determined by the court most appropriate or suitable for those proceedings. When making or refusing an order of transfer the court will have regard to the nature and character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case”.

At the same page 3 the learned judge as he the was now judge of appeal quoted from Mulla on the Indian code of civil procedure section 24 to be in paramateria with section 18 CPA. It goes :-

“The plaintiff as arbites litis or dominus litis has the right to choose any forum the law allows him. This right is subject to control under section 22 and 24 (section 17 and 18). The burden lies on the applicant to make out a strong case for a transfer. A mere balance of conveniences in favour of 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 working injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the door of the court in which the suit is brought and leaving him to seek his remedy in another jurisdiction”.

This court takes judicial notice of the fact that the cited decision the said was made by the learned judge when his lordship was holding a court of concurrent jurisdiction to this court, and as such the same is not binding on this court. However as regards the principles of law quoted with approval therein, they are well known acceptable principles and there is no reason for departing from the same. This court makes a finding that they are the correct principles applicable to the situation herein.

This court has dully applied them to the facts herein and this court proceeds to make the following findings on the same:

(i) This court is a live to the fact that what the applicant seeks from this court is the exercise of its discretion. This being the case the principles of law that this court has to bear in mind are that the exercise of the said discretion is unfiltered with the only letter attached to it being that it be exercised with reason and in the interest of justice to both parties.

(ii) The court has noted that the reason the transfer has been sought is because there is a perceived interference with the cause of justice at the venue where the trial is taking place. That this was brought to the attention of the learned trial magistrate in charge who simply disqualified himself but gave no directions regarding the disposal of the matter.

(iii) That the perceived interference is connected to a staff member of the court from which the transfer is being sought and that relocation to the other magistrate at the same station will not serve any purpose because the same staff member will still have access to the said court file.

(iv) There has been no controversial of the said allegations by the respondents or the court staff.

(v) It is noted that the dispute is a burial dispute commenced way back in October 2010, and it is only in the interest of justice that it be disposed off speedily.

This court has given due consideration to the above findings in number 1 – 5 above and it is of the opinion that justice would demand that the trial of the subject matter of the proceedings in the lower court be rerouted to Kisumu in order for ends of justice to be met to both parties.

(1) It is also the findings of this court that no prejudice will be suffered by the respondent. Their protest at short notice notwithstanding they had ample time and opportunity to file countering papers which they did not utilize. prayer 1 of the application dated 1st March 2011 and filed on the same 1st March 2011 be and is hereby allowed.

(2) The transfer be effected to Kisumu Law Courts forthwith.

(3) That being a burial saga, the Chief Magistrate Kisumu upon receipt of the file do allocate another magistrate of competent jurisdiction to try the same on priority basis on a day today basis.

(4) Costs will be in the cause since it is a court staff who has necessitated the transfer and as such there is no justification for punishing the respondents.

Dated, signed and delivered at Kisumu this 21st day of March 2011

R. N. NAMBUYE

JUDGE

RNN/va