



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MISC APPLICATION NO. 102 OF 2011

SAMUEL OGODO

WAGA.....APPLICANT

VERSUS

FISH PROCESSOR (2000) LTD.....RESPONDENT

RULING

The applicant herein has moved to the seat of justice seeking relief by way of Notice of Motion dated 9th day of March 2011 and filed on 16th March 2011. Four (4) reliefs are sought namely that the honourable judge in the Civil Appeal granted an order that PMCCC No. 16 of 2011 at Winam be heard before another court of competent jurisdiction, that he feels he will get fair justice if the file is transferred from Winam Court to the Chief Magistrate's Court, that the applicant has two cases before Winam Court namely PMCC 164 of 2006 and PMCCC No. 16 of 2010 but he has not received any fair fairness and for this reason he seeks rerouting of the trial venue.

The supporting affidavit simply reiterates the content of the reliefs sought and annexed a ruling of the high court ordering the rerouting of the case from the magistrate who had made the grieving orders. Apparently, there are only two magistrates at the said Winam Court. The applicant alleges not to have faith in the other magistrate as well hence the request to have the matter rerouted to the Chief Magistrate Court.

The Respondent has put in a replying affidavit and the central theme in it is that the reasons given for transfer do not fall within the ambit of the ingredients required to be established before one can earn a relief of transfer, that the fact that a party has succeeded in a higher court does not mean the lower court was unfair.

- They have personal knowledge that the court has not been unfair and for this reason they contend that, the orders sought by the applicant have not been sought in good faith and the entire application should be dismissed.

This court has given due consideration to the above rival arguments and in its opinion all that the applicant is required to do is to demonstrate that he is within the ambit of the principles governing the discretionary exercise of the high court supervisory power of transferring litigation from one subordinate court to another. These are contained in Section 18 of the Civil Procedure Act. This court has perused the same and in its opinion on construction, the following are the ingredients to be established by an applicant wishing to avail himself of this relief:-

(i) The applicant has to present an application to that effect. This has been complied with by the presentation of the application subject of this ruling.

(ii) Notice of presentation of the application has to be made to the other party participating in the proceedings, which has been complied with and it is the this same notice which prompted the filing of the replying affidavit.

The exercise of the power is discretionary as signified by the use of the words "May". This power is exercised under Section 18 (i) (b) (iii). The particulars of the criteria for transfer are not given. This brings to the fore the principles governing the exercise of the courts discretion that this court has judicial notice of. These are:-

(i) The exercise of the court's discretion is unfettered, with the only fetter being that the same be exercised judiciously and with a reason and for ends of justice to be done to both parties

When applied to the arguments herein its clear that the particulars of unfairness has not been given. But in view of the fact that the high court has divested one court of jurisdiction and given it to another, it cannot be a cannot be ignored. Unfortunately there are only two (2) magistrates at the station affected. The applicant says he is uncomfortable with the other magistrate and though no reasons are given for apprehension about the other magistrate, the fact that the applicant has had two cases at the same court cannot be ignored.

It is also clear that the replying affidavit has not mentioned of any in convenience that it may encounter to its detriment should the transfer be effected.

This court is alive to the cardinal guiding principles that litigants should not be allowed to engage in a forum the shopping exercise under which they can excuses create to hop from one court to another, it cannot be ignored that the fact of confidence and belief in the likelihood of one receiving justice from a court is central in litigation and where a litigant exercise genuine doubt which has been confirmed by a higher forum, there should be leaning towards rerouting in order to save on judicial time as well as prevent the judicial process being tainted with accusations of unfairness whether real or perceived. Where no in convenience has been alleged like in this case, it should be readily accepted.

For the reason given in the assessment, the applicants application dated 9th March 2011 and filed on 10th March 2011 be and is hereby allowed as prayed.

(2) The respondent will be compensated by way of costs.

(3) To prevent the applicant using the order as a sword and shield at the same time, the court grants him sixty (60) days from the date of the reading of this ruling to ensure that the file is relocated to the Chief Magistrate's Court for having it set down for hearing and disposal.

(4) In default the transfer order should stand lapsed.

(5) There will be liberty to apply

Dated, signed and delivered at Kisumu this 8th day of July 2011.

R. N. NAMBUYE

JUDGE

RNN/aao