



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Miscellaneous Civil Application 103 of 2009

PATRICK MWANGI MUCHERU.....PLAINTIFF/APPLICANT

VERSUS

CYNTHIA t/a NYAWINY ENTERPRISES.....DEFENDANT/RESPONDENT

RULING

The plaintiff moved the Court by Notice of Motion dated

20th February, 2009 and brought under s.18(1) of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The application carried one substantive prayer:

“THAT the Honourable Court be pleased to transfer SRMCC No. 1551 of 2007 Mombasa, to the Chief Magistrate’s Court at Kisumu [for] hearing and disposal.”

The grounds in support of the application were, firstly, that the cause of action in SRMCC No.1551 of 2007 Mombasa arose at Kisumu; and secondly, that the Chief Magistrate’s Court at Mombasa lacks territorial jurisdiction to hear the matter in question.

Mr. Mwangi Njenga, the advocate with the conduct of the matter for the plaintiff, swore an affidavit in support of the application, in which he says “*it is in the interest of justice and in the interest of both parties*” that SRMCC No.1551 of 2007 Mombasa be heard and disposed of expeditiously. The deponent annexes to his affidavit photocopies of the ruling of the Mombasa Senior Resident Magistrate on 19th February, 2008, that the Chief Magistrate’s Court at Mombasa lacks jurisdiction to hear the matter, and where it was directed that steps be taken to have it transferred to Kisumu for hearing and determination.

In his submissions, learned counsel **Mr. Mwangi Njenga** departed from his deposition that the cause of action had arisen at Kisumu; he stated:

“It is the plaintiff’s submission that his application dated 20th February, 2009 be allowed because the cause of action in SRMCC No.1551 of 2007, Mombasa between the parties herein arose in Mombasa as per the plaint but the defendant resides in Kisumu.”

Mr. Njenga urged that the application if granted, “*will not in any way inconvenience the defendant because the defendant actually resides in Kisumu where the suit is intended to be transferred.*” Counsel submitted that his position was supported by case law, **Rapid Kate Services Limited vs. Freight Forwarders Kenya Limited & 2 Others** [2005] 1 KLR 292. Counsel did not, however, identify the aspect of the said High Court decision which validated his contention.

Learned counsel submitted that the High Court has inherent and unlimited civil jurisdiction under s.3A of the Civil Procedure Act to order the transfer of any suit “*in a Court which is competent to hear it so as not to cause any injustice to either of the parties.*”

The application was contested by the defendant, on whose behalf learned counsel, **Mr. Oloo** submitted that the plaintiff had not satisfied the conditions required before granting a prayer such as the one being made. In this regard, counsel relied on the High Court of Uganda decision in ***Kagenyi v. Musiramo & Another*** [1968] 1 E.A. 43 in which the following passage appears:

“an order for the transfer of a suit 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.”

Counsel proceeded from the content of s.15 of the Civil Procedure Act, which stipulates that –

“Every suit shall be instituted in a Court within the local limits of whose jurisdiction (a) the defendant resides; (b) where the cause of action arose.”

It was urged that the cause of action had arisen in Kisumu, and the defendant resides in Kisumu: and that, therefore, the suit should have been instituted in Kisumu in the first instance; the Court in Mombasa, consequently, lacked jurisdiction in the first instance to try the matter. Counsel submitted: “this Honourable Court cannot order this suit to be transferred to the Chief Magistrate’s Court at Kisumu as it was instituted in a Court without jurisdiction to determine it.”

The pertinent principle of law on the transfer of cases from one Court to another is the same throughout East Africa, and this arises from the common history of the three countries which once had a single Court of Appeal. That principle is well stated in the ***Kagenyi*** case. A case must in the first place have been filed in a Court possessed of jurisdiction, where it is later sought to transfer the case to a different Court. If the case was not in the first place before a Court having jurisdiction, then its filing would have been a nullity; but this Court cannot convert such a status into one of validity by ordering a transfer of the case.

From the facts, it is evident that the proper jurisdiction for the filing of the case in question was the Kisumu Court, and not the Mombasa Court.

Consequently, the applicant has not made a proper case for the transfer of the main cause from Mombasa to Kisumu. The application of 20th February, 2009 is dismissed, with costs to the respondent.

SIGNED:

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J.B. OJWANG

JUDGE

DATED and DELIVERED at

MOMBASA this 12th day of March, 2010.

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JUDGE