



**REPUBLIC OF KENYA**  
**HIGH COURT OF KENYA AT KAKAMENGA**

**Miscellaneous Civil Application 5 of 2009**

**PATER WAKABA THARAU ----- APPLICANT**

**VERSUS**

**THE HON. ATTORNEY GENERAL -----**

**RESPONDENT**

**RULING**

This is an application brought pursuant to **section 18 (1)** of the Civil Procedure Act. That section empowers the High Court to order that a case which was filed in the subordinate court be transferred to another subordinate court, provided that the court to which the case is transferred was competent to try and dispose of the case.

The applicant herein has told this court that he had filed a case before the Chief Magistrate's Court at Kakamega. The said case, which was filed against the respondent herein, is CMCC No. 431 of 2006.

As at the date when the suit was instituted, on 26<sup>th</sup> July 2006, the applicant was a resident of Kakamega. However, his home and his business were burnt down in the unfortunate political crisis which engulfed this country subsequent to the national elections held in December 2007.

Following the destruction of his properties, the applicant was forced to relocate from Kakamega. He is now resident at Kimende village, Limuru Division, Kiambu District.

As Kimende is close to Nairobi, the applicant asks this court to transfer CMCC NO. 432 of 2006 to the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi.

The applicant says that if the case is transferred to Nairobi, the defendant would not be prejudiced because the defendant's witnesses were based in Nairobi. According to the applicant, the witnesses for the defendant were the officials of the Medical Practitioners & Dentists Board, who reside in Nairobi.

In answer to the application, the respondent submitted that the said application was bad in law as the pleadings in the case which the applicant wishes to have transferred, were not placed before this court.

The respondent also said that his witnesses were resident at Kakamega. And, in an endeavour to further explain himself, the respondent said that the witnesses he would be calling were the police officers who effected the arrest of the applicant.

The respondent pointed out that the Medical Practitioners & Dentists Board were not a party to the suit.

In giving due consideration to the application, I have first taken into account the fact that both parties do

agree that the cause of action accrued at Kakamega.

Pursuant to the provisions of Section 15 (c) of the Civil Procedure Act, every suit shall be instituted in a court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. It is for that reason that the applicant filed the case at Kakamega, and he confirmed as much to this court.

Once the case was filed at the appropriate court, there would have to be a very good reason to move it to another Court.

The applicant says that the defendant and his witnesses are in Nairobi.

As regards the defendant's witnesses, the applicant has assumed that the defendant will call the officials of the Medical Practitioners and Dentists Board. However, the defendant says that his witnesses will be the police officers who arrested the applicant.

Obviously, the applicant cannot choose witnesses for the defendant. Therefore, the applicant has no sound basis for contending that the defendant's witnesses are based in Nairobi. On that issue, I have to accept the defendant's contention, that his witnesses will be the police officers who are based at Kakamega, and who arrested the applicant.

As regards the place at which the Attorney General is located, the fact is that the state law offices are located at Sheria House Nairobi. It is at that place that the Attorney General's office is situated. Therefore, in the literal sense, the Attorney General is located in Nairobi. However, it must be borne in mind that just because the Attorney General is the person named as the defendant, the applicant's claim is not necessarily directed at the holder of that office.

In that respect, it would have been helpful to this court, had the applicant placed before me, copies of the pleadings in CMCC No. 431 of 2006. I say so because that would have enabled me to ascertain the particulars of the claim. Be that as it may, it would appear that the claim emanated from the arrest of the applicant, after his business premises had been inspected by officials of the Medical Practitioners & Dentists Board. That impression is derived from the contents of paragraph (vii) of the applicant's affidavit.

If I am right in that respect, it means that the Attorney General was only sued in his capacity as the person against whom claims directed at the Government institutions or departments are supposed to be directed. In the event, the fact that the Attorney General's office is at Nairobi would not, of itself, count for much. One must go beyond the case title, to ascertain which institution or department is alleged to have done the things which gave rise to the claim, in the first instance.

It is also necessary to bear in mind the fact that the Attorney General has his officers in many parts of the country, including Kakamega. The said officers are the state counsels. One cannot therefore argue that the Attorney General is only located in Nairobi.

Whilst I do appreciate the difficult circumstances that the applicant has found himself in, I regret that that alone cannot be a good enough reason, in law, for transferring the case to Nairobi. The application is therefore dismissed with costs.

***Dated, Signed and Delivered at Kakamega, this 30<sup>th</sup> day of April, 2009.***

**FRED A. OCHIENG**

**J U D G E**