



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
MISCELLANEOUS CIVIL CASE 294 OF 2009

FRANCIS KARIUKI WANDIE PLAINTIFF

VERSUS

WAMUGURE HOLDINGS LIMITED RESPONDENT

RULING

Before me is an application dated 20th April, 2009 brought by the Applicant by way of Notice of Motion. The same is supported by the Affidavit of *Francis Kariuki Wandie*. The Notice of Motion is brought under S. 18 & S. 3A of the Civil Procedure Rules.

The said Notice of Motion is seeking for orders

1. **That this court do withdraw Kiambu CMCC No.21 of 2007 between the parties herein and transfer the same to Thika Chief Magistrate and/or in the alternative to Chief Magistrate Court at Milimani Courts for trial and final determination.**
2. **That the costs of this application be in the cause.**

The gist of the application for the transfer of a suit from Kiambu as the Chief Magistrate lacks territorial jurisdiction to a court with Jurisdiction.

S. 18 of the Civil Procedure Act relied upon by the counsel for the Plaintiff provides:

“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 notice with such notice, the High Court may at any stage

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- (a) transfer any suit, appeal or other proceedings pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**
- (b) Withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter.**

- (i) **Try to dispose of the same; or**
- (ii) **Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or**
- (iii) **Transfer the same for trial or disposal to the court from which it was withdrawn.”**

The annexure to the applicant’s affidavit shows that in its defence the defendant in paragraph 10 thereof gave indication that it would raise a preliminary objection either at the hearing or before on the issue of jurisdiction with a view to having the entire suit struck out.

The issue for determination before the court is whether this court has jurisdiction to order the suit filed in a subordinate court without jurisdiction to another with jurisdiction. The applicant’s counsel submitted that this court has jurisdiction to transfer the case from Chief Magistrate Kiambu to Chief Magistrate Thika or Chief Magistrate Nairobi Milimani court.

In *Omwoyo vs. African Highlands & Produce Ltd (2002) 1 KLR 698 at 699* Ringera (as he then was) held

1. **That High court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first place in a court which does not have the pecuniary and/or territorial jurisdiction to try it**
2. **The Nairobi Resident Magistrate’s Court did not have the jurisdiction to entertain the plaintiff’s suit as the Lowest Court of competent jurisdiction to handle it was Kericho Magistrate’s Court.**
3. **It may be that to dismiss the application for transfer would be to punish the plaintiff for the mistake of his advocate but if the court has no jurisdiction to do something it cannot do so in what is said to be in the interest of justice.”**

In *KAGENYI vs MISIRAMO & ANOTHER (1968) E.A. 48, Sir Udoma Udoma CJ* held in relation to section 18 of the Uganda Civil Provision which is in *pari Materia* with section 18 of our code – that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. In that case the applicant had sought to transfer a suit from the Magistrate’s Court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court. And in the very early case of *MEDONCA vs. RODRIGUES (1906-1908) 2 KLR 51*, Hamilton J. held that the High Court did not have power to order a transfer of a suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local jurisdiction of the lower court in which it had been filed.

In *NDYKAK INVESTMENT LIMITED vs JOSEPH IRUNGU KINORU* Misc. Civil Application 38 of 2006 pg 2 Kimaru J had this to say-

“ this court cannot invoke its jurisdiction under Section 18 of the Civil Procedure Act to transfer a suit which was filed in a court without jurisdiction to a court with jurisdiction; Before this court can exercise its discretion as provided by section 18 of the Civil Procedure Act, it must first be satisfied that the suit was filed in a court which had jurisdiction. In effect section 18 of the Civil Procedure Act only Empowers this court to transfer a suit from one court of competent jurisdiction to another court of competent jurisdiction.”

From the admission of the applicant the court where the suit was originally filed lacked territorial jurisdiction. Guided by the above quoted authorities that have addressed the issue before me extensively, it is clear that the Kiambu Chief Magistrates Court lacked territorial Jurisdiction and not competent to hear the matter subject of this application, it follows therefore that this court cannot exercise its discretion under section 18 to Transfer the suit subject matter herein from a court without jurisdiction to

another court with jurisdiction I therefore dismiss the application and make no orders as to costs.

Dated and delivered this 20th May, 2009.

ALI ARONI

JUDGE