



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Miscellaneous Application 167 of 2009

NICKSON M. CHANDA APPLICANT

V E R S U S

ANGELA KAMWARIA RESPONDENT

R U L I N G

The application before the court is brought by a Notice of Motion dated 3rd March, 2009 and is made under Sections 3, 3A and 18(b) (ii) of the Civil Procedure Act, Order L of the Civil Procedure Rules, and all other enabling provisions of the law. The Applicant seeks an order that Children’s Case No. 1 of 2009 (Children’s Court at Tononoka, Mombasa), be transferred to the Children’s Court in Malindi.

The application is supported by the annexed affidavit sworn by the applicant, and is based on the ground that it has come to the knowledge of the applicant that the court at Mombasa lacks the territorial jurisdiction to hear this matter since the defendant resides in Malindi.

Opposing the application, the Respondent contends in the grounds of opposition that this court lacks jurisdiction to transfer a suit filed in a lower court admittedly without the necessary territorial jurisdiction.

The only issue for determination in this matter is whether the High court has jurisdiction to transfer a suit filed in one lower court without territorial jurisdiction to another court with territorial jurisdiction. Mrs. Omondi for the Applicant submitted that this court has jurisdiction to do so, while Ms. Muyaa for the respondent argued and submitted that this court does not have the jurisdiction to effect the transfer. None of the counsel cited any authority in support of the respective rival submissions.

Section II of the Civil Procedure Act states that-

“Every suit shall be instituted in the court of the lowest grade competent to try it ...”

Subject to the limitations spelt out in Sections 12,13 and 14 of the Act, Section 15(a) then adds that-

“... Every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant at the time of commencement of the suit actually and voluntarily resides or carries on business, or personally works for gain ...”

It is notable that both these sections are couched in mandatory terms. Consequently, failure to institute a suit in the court of the lowest grade competent to try it within the local limits of whose jurisdiction the

defendants resides renders the suit incurably defective, and as good as non-existent. And that is the position in this case. The suit filed in Tononoka Children's Court is as good as non-existent since it ought to have been filed at Malindi where the defendant resides. And where a suit is as good as non-existent, there would be nothing to be transferred.

In the case of OMWOYO v. AFRICAN HIGHLANDS & PRODUCE LTD [202]I KLR 698, Ringera J., as he then was, was confronted with a similar situation. He referred to the Ugandan case of KAGENYI v. MISIRAMO & ANOR [1968] E.A. 48 in which it was held in relation to Section 18 of the Uganda Civil Procedure Act, which is "*in pari materia*" with Section 18 of our Act, that an order for the transfer of a suit from one court to another cannot be made unless the suit had been in the first place brought to a court which has jurisdiction to try it. After referring to MENDONCA v. RODRIGUEZ (1906-1908)2 KLR 51 in which a similar decision was made, the learned judge concluded thus-

"The principle of law to be gleaned from those authorities is that the 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. That is the case here ..."

That is also the position in this matter. The Tononoka Children's Court does not have the territorial jurisdiction to entertain the Applicant's suit as the lowest court of competent jurisdiction to handle it is the Malindi Children's Court. Therefore, there is nothing competent to be transferred to Malindi.

For the above reasons, this application fails and it is hereby dismissed with costs.

Dated and delivered at Mombasa this 26th day of June, 2009.

L. NJAGI

JUDGE