



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS Miscellaneous Application 159 of 2009

KEVIN NGOTHO NJENGA APPLICANT

VERSUS

DAVID PETER KANYENZE 1ST RESPONDENT

PENESA KAMAU 2ND RESPONDENT

KAHOW SALAT 3RD RESPONDENT

RULING

1. The Application dated 18/5/2009 is premised on Section 3 and Section 18 (1) of the Civil Procedure Code as well as Order XXI Rule 25 of the Civil Procedure Rules and the Applicant seeks orders that CMCC No. 185/2005 be transferred from Makueni Law Courts to this court for hearing and determination.

2. In his Supporting Affidavit sworn on 15/5/2009, the Applicant depones that he is the Defendant in the case quoted above and that he is apprehensive that he will not receive a fair trial in the subordinate court and his grounds for saying so are;

- a. “That the applicant was wrongly enjoined in the instant matter on the 16th day of April 2009.
- b. That immediately after being enjoined the plaintiff applied for execution.
- c. That the applicant was served with a Notice to Show Cause before court at Makueni on the 21st of April 2009.
- d. That in the absence of the applicant the court in violation of all rules of procedures issued an order of committal.
- e. That the matter has been conducted in a most unjust and oppressive manner and the applicant herein has suffered.
- f. That the applicant strongly feels that there has been abuse of court process and that he is not being accorded a fair trial.”

3. In his Replying Affidavit sworn on 26/5/2009, Francis Kalwa, advocate for the Plaintiff in the case before the subordinate court depones that the Applicant has consistently blocked any attempts at enforcing the judgment lawfully obtained against him and that even after attachment, all his promises to

pay the decretal sum come to naught. At paragraph 27 of the Replying Affidavit, he further depones as follows:-

“27. THAT it is incorrect and quite subordinating to the dignity of the court for the Applicant to allege that the Court has acted at the behest of the Plaintiff for the following reasons:-

a) The Court dully acted on consent freely and voluntarily executed by the Applicant whereof he took personal charge of the decrees herein.

b) The court dully requested the applicant through a notice to show cause why execution should not issue against him but he despised the court till it issued warrants for him to appear and explain why he cannot pay.

c) The court acted properly and judiciously in that an offer to pay by installment which the applicant orally made through his advocate cannot be properly acted upon unless an affidavit of means is shown as to how much the Applicant earns his expenses and commitments.

d) The Applicant does not hold the court in High esteem in that he only changed his mind and made offers to pay Kshs.500,000/= when the court sent him to jail.”

4. That therefore the Application should be dismissed with costs and having carefully considered the rival arguments before me, my opinion is as follows;

Firstly, it is clear to me that the Applicant was properly enjoined in the proceedings and even if he was not, the remedy lies in an application for review, setting aside or even an appeal and not an order for transfer.

Secondly, there is no evidence that the suit in the subordinate court was conducted in an oppressive, unjust or biased manner. Allegations that the court was acting at the behest of the Plaintiff is nothing more than a scandalous attack on that court with little more than innuendo to back it up. The Applicant had the representation of advocates throughout the proceedings and it is interesting that these allegations were never raised before that court for redress. To raise them now with no evidence smirks of an action made in bad faith.

5. In the end, a transfer of a suit is not made to enable a party to escape his duty under a lawfully obtained decree but to ensure that justice is done and that no party suffers any prejudice. In this case, the decree holder will certainly suffer prejudice more so noting that for 5 years, the Applicant has schemed round his obligation under the law.

6. This is one Application that must meet its fate swiftly; it is dismissed with costs to the Respondent.

7. Orders accordingly.

Dated and delivered at Machakos this 29th day of October 2009.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Mutia h/b for Mr Kalwa for Respondent**

N/A for Applicant

ISAAC LENAOLA

JUDGE