



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF MERU**

**Misc Appli 1 of 2008**

**AYUB TAR MOHAMMED ..... 1<sup>ST</sup> APPLICANT**

**FERZINA AYUB ..... 2<sup>ND</sup> APPLICANT**

**VERSUS**

**TAR MOHAMMED AYUB ..... RESPONDENT**

**RULING**

The applicant in this motion on notice is seeking two main orders, namely, transfer of Isiolo Kadhi's Court Civil Suit No. 25 of 2007 for hearing and disposal before this court and stay of proceeding in that suit pending the determination of this application.

The application is premised on the grounds that the Kadhi's court lacks jurisdiction in the matter and that the presiding Kadhi is biased. The plaint filed in the Kadhi's court in case 25 of 2007 is seeking orders of permanent injunction against the applicants and their eviction from plot No. NTIMA/IGOKI/4904. Counsel for the respondent submitted that the plaint has been amended doing away with the prayer for a permanent injunction. In the amended plaint the respondent is only seeking to remove the applicants from the suit property, it was submitted. The amended plaint was not annexed to the replying affidavit and therefore I am unable to confirm this contention.

However, looking at the pleadings generally, what emerges is that the respondent is the father of the 1<sup>st</sup> applicant. The 2<sup>nd</sup> applicant is the wife to the 1<sup>st</sup> applicant hence the respondent's daughter in law. It is also clear the respondent is the registered owner of the suit land, where the applicants are accommodated. The dispute between the parties is that the applicants have been abusive towards the respondent and generally lack respect.

For that reason, the respondent has sought to exclude them from the suit land and has in fact leased accommodation for them elsewhere but they have declined to move out. That dispute was filed in the Kadhi's court and the applicants argue in this application that that court does not have jurisdiction to entertain it. With respect, I agree with that argument.

Section 5 of the Kadhi's Courts Act provides:-

**“5. A Kadhi’s Court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion:.....”.**

Section 66(5) of the Constitution also makes similar provision.

Learned counsel for the respondent argued that the suit before the Kadhi’s Court relates to personal status of the applicants. That in my view is to overstretch the interpretation of section 5 above. The issues of personal status envisaged in section 5 must relate to Muslim law.

I find no Muslim law raised in both the plaint and defence. I therefore hold that the Kadhi’s court at Isiolo lacks jurisdiction to entertain the dispute. Can this court therefore transfer the case from Isiolo Kadhi’s Court to itself as prayed? Section 18(1) (b) (i) of the Civil Procedure Act provides this court with the power to withdraw, at any stage, any suit pending in any court subordinate to it and thereafter try it or dispose of the same itself. The law is now settled that the High Court can only transfer a matter where the court from which it is sought to be transferred has jurisdiction in the first place to entertain it. Conversely, the suit can only be transferred to court with jurisdiction. See **Omwoyo V. African Highlands & Produce Co. Ltd**, (2002) I KLR 698.

The only option available in such a situation is to withdraw the suit and file a fresh one, limitation of time allowing, in a court with jurisdiction. For this reason, the application for transfer fails and is dismissed with costs to the respondent.

Dated and delivered at Meru this ...27th... day of February 2008.

**W. OUKO**

**JUDGE**