



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 128 OF 2008

JACOB M. NGUTHU.....PLAINTIFF

VERSUS

MALDIP CHANNA

CHANNA CONSTRUCTION LTD.....DEFENDANT

RULING

The applicant Jacob M. Nguthu who is the plaintiff in Mombasa CMCC No. 3185 of 2007 seeks withdrawal of the suit from that court and transfer of the same to Nairobi Chief Magistrate's Court for hearing and determination. The application is essentially brought under Section 18 of the Civil Procedure Act although Section 3A has also been invoked. Under Section 18 this court has discretion to withdraw and transfer cases instituted in subordinate courts either on application of any of the parties or of its own motion. The grounds for the application are that the cause of action arose at Kongoni Naivasha and that the defendant resides in Nairobi within the local limits of Nairobi Court's jurisdiction.

The application is supported by the plaintiff's affidavit sworn on 4th March 2008 which merely elaborates the above grounds.

The respondents, Maldip Channa and Channa Construction Limited who are the defendants in the said suit, oppose the application on several grounds. The primary ones are that the plaintiff has filed this application to pre-empt the respondent's application in the lower court to dismiss the applicant's suit under Order VI Rule 13 (1) (b), (c) and (d); that the applicant knew at the time of filing the suit that the lower court had no jurisdiction and that the respondent will be prejudiced if this application is allowed.

I will briefly dispose of the first objection above. I do not see how the mere filing of this application can pre-empt the respondent's application lodged under Order VI Rule 13 (1) (b), (c) and (d) since the foundation of that application is not solely the want of jurisdiction of the lower court. A transfer will not take wind out of the sails of the respondent's application as that application is multiburrelled.

With regard to the objection that the respondent stands to suffer prejudice if this application is allowed, the respondent has not demonstrated the prejudice alleged. In my view a mere say so is not sufficient.

Turning now to what, in my view, is the crux of the respondent's objection, that the lower court has

no jurisdiction to entertain the plaintiff's suit and consequently that this court cannot transfer such a suit, the respondents rely upon several decisions of the High Court. In **Kagenyi – v – Musivamo & Another [1968] EA 43**, it was held that Section 18 of the Ugandan Civil Procedure Act (which is identical to Section 18 of our Civil Procedure Act) gives a general power of transfer of all suits, which may be exercised at any stage of the proceedings even *suo motu* by the court, but an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to hear it. Ringera, J as he then was persuaded by the decision in the Ugandan case and applied the same in **Omwoyo – v – African Highlands & Produce Co. Ltd. [2002] 1KLR 698**. Ojwang J. held the same view in **Amritlal Bhagwanji Shah – v – Mash Express Limited and 3 others H.C.MISC CIV. APPL. NO. 1095 OF 2005 (UR)** and **Bonface Wawru Mbiyu – v – Mary Njeru & Another H.C. MISC. APPL. NO. 639 OF 2005 (UR)**.

The Chief Magistrate Mombasa indeed any Chief Magistrate by dint of Section 3 of the Magistrate's Court's Act has jurisdiction throughout Kenya. It cannot be seriously argued therefore that Mombasa Chief Magistrate has no jurisdiction to entertain the plaintiff's suit. In my view Mombasa Chief Magistrate's Court is vested with jurisdiction to entertain the claim. There is however no doubt that the suit was filed in Mombasa in contravention of Section 15 of the Civil Procedure Act. Apart from that contravention, there is no other limitation on the jurisdiction of Mombasa Chief Magistrate's Court.

Contravention of Section 15 of the Civil Procedure Act does not in my view automatically attract the sanction of striking out. Indeed no penalty for contravention is imposed or stipulated in the Act. However, under Section 18 of the same Act, the High Court has the power to control the filing and hearing of cases in subordinate courts and may *inter alia* transfer any case for trial or disposal to any other court subordinate to it. There are no limits or restrictions on a judges' discretion to withdraw any suit or other proceeding pending in any court subordinate to the High Court and thereafter try or dispose of the same or transfer the same.

Ringera J. as he then was in **Omwoyo – v – African Highlands & Another (supra)** and Ojwang J. in **Amritlal Bhagwanji Shah – v – Mash Express Limited & 3 Others (supra)** and **Bonface Waweru Mbiyu – v – Mary Njeri & Another (supra)** imposed limitations on the jurisdiction of the High Court which limitations are not in Section 18 of the Civil Procedure Act. Such limitations in my view with all due respect are not necessary and may on occasions fail to advance the cause of justice.

The plaintiff filed his suit at the Chief Magistrate's Court at Mombasa in contravention of Section 15 of the Civil Procedure Act. The Chief Magistrate could have rejected the plaintiff's plaint on presentation. But having accepted the same he could still subsequently return the same to the plaintiff under the provisions of Order VII Rule 9 of the Civil Procedure Rules. That has not happened with the result that the suit is still pending before the Mombasa Chief Magistrate's Court.

In the end, the Order that commends itself to me is that Mombasa Chief Magistrate's Court Civil Case Number 3185 of 2007 be and is hereby withdrawn from that court and is transferred to the Nairobi (Milimani) Chief Magistrate's Court for hearing and disposal.

With regard to costs, the same cannot follow the event because it is the plaintiff himself who chose Mombasa court as the place of suing when he should have filed his suit either in Nairobi or Naivasha. He must therefore pay the respondent's costs which costs should be assessed or be agreed and paid before the plaintiff lists the transferred suit for hearing.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF APRIL 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Mabeya H/B for Mungatana and Company for the applicant.

JUDGE

18TH APRIL 2008