



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**MISCELLANEOUS CIVIL APPLICATION 17 OF 2005**

**BONIFACE OUNDO MALOBA** (Suing as the

Legal representatives Administrator

**MARY TABITHA MBUTO (DECEASED)** ..... **1<sup>ST</sup> APPLICANT**

**JAMES MBUTO** Suing equally as dependant of

**MARY TABITHA MBUTO (DECEASED)** ..... .. **2<sup>ND</sup> APPLICANT**

**VERSUS**

**MIWA HAULIERS LLIMITED** ..... **1<sup>ST</sup> RESPONDENT**

**MOSES SHIKOKHA WETABA** ..... **2<sup>ND</sup> RESPONDENT**

**R U L I N G**

The Applicants, **BONIFACE OUNDO MALOBA** and **JAMES MBUTO**, are the administrator and dependant of the estate of the late **MARY TABITHA MBUTO**, respectively.

They have moved this court by way of a Notice of Motion made pursuant to the provisions of sections **3A** and **18** of the Civil Procedure Act, as read together with the provisions of **Order 46 rule 5(2)** of the Civil Procedure Rules. The application is for the transfer of a civil suit from the Chief Magistrate's Court Milimani, to the Magistrate's Court at Kakamega.

It is the applicants' case that as at the time when they instituted the proceedings, both of them were resident in Nairobi. However, both applicants had since relocated to Mumias, which town is located within the same geographical and administrative region as the magistrate's court at Kakamega.

The applicants also said that 2<sup>nd</sup> defendant was resident in Mumias, whilst the 1<sup>st</sup> defendant was said to be carrying on business within the Mumias area.

For those reasons, the applicants contended that if the case was transferred to the Magistrate's court at Kakamega, it would be convenient for the hearing and determination thereof.

Furthermore, the applicants drew the court's attention to the pleading at paragraph 5 of the Plaint, wherein they had asserted that the accident which gave rise to the cause of action, upon which the suit was founded, occurred at the Bungoma-Busia Road junction. In other words, the cause of action is said to have accrued within the jurisdiction of the Magistrate's court at Kakamega.

In the defence, the respondents to the application before me raised the issue of jurisdiction, indicating that they reserved their right to raise a Preliminary Objection in that regard. The respondents put the applicants on notice that they would seek to have the suit struck out.

After the application was served on the respondents, their advocates wrote to the learned Deputy Registrar to this court protesting about the fact that the application had been filed at Kakamega. In the opinion of the respondents' advocates, the application ought to have been filed before the High Court at Nairobi. Therefore, the advocates offered the view that the High Court at Kakamega should have declined the filing of the application.

Although those views were expressed in correspondence addressed to the learned Deputy Registrar, the respondents did not deem it necessary to swear any replying affidavit, or to file any grounds of opposition.

On 26<sup>th</sup> February 2008 the application came up for hearing. However, the respondents did not attend court either in person or through their advocates. Consequently, the depositions in the affidavit supporting the application were uncontroverted.

In effect, all the parties to the suit either reside or are carrying on business within the area of Mumias.

By virtue of the provisions of **section 18 (1)** of the Civil Procedure Act, the High Court has powers to transfer any suit or other proceedings pending before any court subordinate to it, and either try or dispose of the same, or transfer it for trial or disposal to any court subordinate to it, but which is competent to try and dispose of the same.

And pursuant to the Provisions of **Order 46 rule 5(2)**, the High Court is enjoined to have regard to the convenience of the parties and their witnesses, and to the date on which the trial is to take place, and all other circumstances of the case, when appointing the particular place for trial.

In this case, the court has taken into account those factors, as well as the fact that the trial had not yet commenced before the court at Milimani. Having done so, I am satisfied that the most convenient place for the trial of **Milimani CMCC No. 9505 of 2002** is the Chief Magistrate's Court, Kakamega. Accordingly, I now order that the case be transferred forthwith to the Chief Magistrate's Court, Kakamega, for hearing and determination.

I also order that the costs of the application dated 15/2/2005 shall be in the cause, as I hold the considered view that the transfer of the case is for the convenience of all the parties to the suit.

*Dated, signed and Delivered at Kakamega this 15<sup>th</sup> day of Apri., 2008.*

**FRED A. OCHIENG**

**J U D G E**