

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Suit 174 of 2003 (RD)

CAXTON KYEVA MWANZAPLAINTIFF

VERSUS

MOTREX LIMITEDDEFENDANT

R U L I N G

On 22nd June 2006, this court made an order *suo moto* in which this suit was withdrawn and transferred from the High Court to the Chief Magistrate's court from hearing and determination. The order was made in the presence of Mr. Tindika, learned advocate for the plaintiff and in the absence of the defendant and its counsel. Being aggrieved by that order, the plaintiff has now taken a motion pursuant to order XLIV rule 2 of the Civil Procedure rules and Section 3A of the Civil Procedure Act. The motion is opposed by the defendant who filed grounds of oppositions dated 13th February 2008.

It is the argument of the plaintiffs that this court made the orders without exercising its discretion judiciously. It is said that this court did not take into account the facts of the plaint before making the orders. The plaintiff is of the view that he expects to be given an award in excess of the pecuniary jurisdiction of the Chief Magistrate's court.

On its part, the defendant is of the view that the motion was filed too late in the day hence there was an inordinate delay. It is also argued that the motion does not meet the requirements set under order XLIV of the Civil Procedure Rules.

I have considered the arguments made by learned counsels from both sides. I have also perused the motion plus the supporting affidavit and the grounds of opposition. It is apparent from the motion that the applicant has invoked the provisions of order XLIV rules 1(1) and 2 of the Civil Procedure Rules to seek for an order of review. The court of Appeal restated the legal position in respect of such applications in Civil Appeal No. 347 of 2000 between Joshua Otieno Buyu and Petro Ochieng Wasambwa as follows:

“In an application for review, an applicant has to show that there has been discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or any other sufficient reason.”

In this case it is said that there is an apparent mistake on the face of record in that this court did not consider the facts of the plaint before making the order of transfer. What is clear is that this court made an order transferring this case to the Chief Magistrate's Court for hearing and determination. From the order it is obvious that the plaint was considered before the order was made. It has been argued that the order should be set aside because the plaintiff and his counsel were not heard first before the order was made. It is said that this court exercised its discretion injudiciously. I have already stated that this court made the order *suo moto*. In my view this cannot be said to be an error or mistake apparent on the face of record. Such a ground can only be determined on appeal and not by way of review because this court is now *fuctus officio* in the matter.

For the above reasons I dismiss the motion with costs to the defendants.

Dated and delivered at Mombasa this 8th day of April, 2008.

J.K. SERGON

J U D G E