



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

Misc Civ. Appli. 4 of 2008

SILAS SHIHENJI ::: APPLICANT

VERSUS

1. ROSA ADISA MAGALA }

2. MELISA AWINJA OGINA}::: RESPONDENTS

RULING

This application seeks the transfer of MOMBASA CMCC No. 2376 of 2007, to the Chief Magistrate’s Court, Kakamega, for hearing and determination.

It is the contention of the 1st Defendant that the cause of action arose at Kakamega, and also that the defendants as well as their witnesses are all resident at Kakamega.

Annexed to the application are copies of the Plaintiff and the 1st Defendant’s defence.

Interestingly, the Plaintiffs themselves both state that the Defendants are resident at Kakamega. Furthermore, at paragraph 5 of the Plaintiff it is stated that the unfortunate accident which gave rise to the cause of action in the case in issue, occurred along the KAKAMEGA-KISUMU ROAD.

Because of the fact that the accident occurred along that road, the plaintiff states as follows, at paragraph 11;

“The cause of action arose at Kakamega within the jurisdiction of this Honourable Court.”

After the 1st Defendant was served with the Plaintiff he filed a Defence, in which he stated as follows, at paragraph 14;

“Jurisdiction to this Honourable Court is not admitted as the alleged cause of action arose at Kakamega and the 1st defendant will raise a Preliminary Objection on jurisdiction.”

Subsequent to the filing of the Defence, the 1st Defendant filed this application.

By virtue of the provisions of section 18 (1) (b) (ii) of the Civil Procedure Act, the High Court may, upon hearing an application by any of the parties, withdraw any suit pending in any court subordinate to it, and thereafter transfer the same for trial or disposal to any other subordinate court, which is competent to try or to dispose of the same.

In determining the most appropriate court before which a suit ought to be instituted regard should be had to the provisions of sections 11 to 18, both inclusive.

And in this particular instance, I believe that the relevant provision is to be found in section 15 (a), which stipulates that

every suit should be instituted in a court within the local limits of whose jurisdiction the defendant or each of the defendants, actually and voluntarily resides or carries on business or personally works for gain, as at the date when the suit is commenced.

The cause of action herein arose in Kakamega, and the defendants both reside at Kakamega. Therefore, the suit ought to have been instituted at Kakamega.

Accordingly, in order to remedy the mistake made by the plaintiffs, in the choice they made for the court at which to bring the case, I hereby order that the case be transferred to the Kakamega Chief Magistrate's Court, for hearing and determination.

The costs of the application are awarded to the 1st Defendant.

Dated, Signed and Delivered at Kakamega, this 30th day of September, 2008.

FRED A. OCHIENG

J U D G E