



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Misc Appli 1088 of 2005**

**1. LINDA ALAL OCHIENG (a minor suing through her father  
and next friend, NELSON ADHOK CHIENG)**

**2. DAMARIS ODHIAMBO .....APPLICANTS**

**V E R S U S**

**1. MOSES MAINA**

**2. AFRO MEAT KISUMU LIMITED .....RESPONDENTS**

**R U L I N G**

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

This is an application (by notice of motion dated 5<sup>th</sup> December, 2005) under section 18 of the Civil Procedure Act (the Act) for transfer of Milimani PMCC No. 5954 of 1998 from that court to the Senior Resident Magistrate's Court, Kisumu for disposal. The grounds for the application appearing on the face thereof are:-

1. That the cause of action arose along the Kericho–Nairobi Highway which is within the jurisdiction of the Senior Resident Magistrate's Court at Kisumu.
2. That the defendants are residents of Kisumu within the jurisdiction of Resident Magistrate's Court at Kisumu.
3. That the defendants have raised a preliminary objection on the issue of jurisdiction which has been upheld by the Chief Magistrate's Court at Milimani Commercial Courts necessitating the application for transfer.
4. That the Respondents will not suffer any prejudice if the order sought for transfer is granted.

There is a supporting affidavit sworn by one **CHRISTINE ADHIAMBO ORARO**, the advocate for the Applicants. The Applicants are the plaintiffs in the suit sought to be transferred while the Respondents are the defendants.

The Respondents have opposed the application. There are two grounds in the grounds of opposition dated 17<sup>th</sup> January, 2006:-

1. That the suit sought to be transferred was dismissed on 28<sup>th</sup> November 2005 and consequently there is now no suit to be transferred.
2. That in any event the court lacks jurisdiction to transfer the suit.

There is no replying affidavit filed.

I have considered the submissions of the learned counsels appearing, including the authority cited. The first ground of objection, that is, that the suit was dismissed on 28<sup>th</sup> November, 2005, was abandoned. Only the second ground was urged.

It is common ground that the suit was filed before a court that lacked the necessary territorial jurisdiction to hear and determine it. It appears that objection to the suit upon that ground was raised before the subordinate court which upheld the objection; however, it did not strike out the suit but apparently stayed it pending this present application.

The well-known Ugandan case of **KAGENYI- vs -MUSIRAMO & ANOTHER, [1968] E.A. 48** established the principle that the High Court has no jurisdiction to transfer a suit from a court that had no jurisdiction in the first place to hear and determine the suit to another court with jurisdiction. That case has been cited with approval by this court on numerous occasions – see, for instance, the case of **CHARLES OMWATA OMWOYO –vs- AFRICAN HIGHLANDS & PRODUCE CO. LTD., Nairobi HC Misc. Application No. 308 of 2002 (unreported)**. The principle of law also appears to have been approved by our Court of Appeal. See the case of **KENYA SEED CO. LTD. –vs- JOSEPH BOSIRE, Court of Appeal, Nairobi Civil Appeal No. 72 of 2002 (unreported)**.

Milimani PMCC No. 5954 of 1998 having been filed in a court without the necessary jurisdiction to hear and determine it, this court has no jurisdiction to transfer the suit to another court with jurisdiction. In the event, I must refuse the application by notice of motion dated 5<sup>th</sup> December, 2005. It is hereby dismissed with costs to the Respondent.

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY OF SEPTEMBER, 2007**

**H. P. G. WAWERU**

**J U D G E**

**DELIVERED THIS 7<sup>TH</sup> DAY OF SEPTEMBER, 2007**