

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KERICHO

Misc. Civ Appli. 105 of 2005

**JULIUS PANYAKO SAMBU (Suing as personal representative of JOSEPH KIPKOSGEI
(Deceased)).....PLAINTIFF**

VERSUS

KHALID SEIF MBARUK t/a TAKRIM BUS SERVICES.....DEFENDANT

RULING

The applicant, Julius Panyako Sambu filed suit on behalf of the estate of Joseph Kipkosgei Ngetich (*deceased*) against Khalid Seif Mbaruk t/a Takrim Bus Services seeking to be paid damages on account of the death of the deceased which allegedly occurred in an accident involving respondent's motor vehicle registration number KAD 646D on the 6th of November 1997 wherein the deceased was traveling as a lawful passenger. The accident is said to have occurred along Mombasa-Nairobi road. The applicant filed the suit against the respondent at the Kericho Principal Magistrate's Court (*Kericho PMCCC No. 1000 of 2004*). On the 7th of November 2005, the applicant filed this application seeking the orders of this court to have the said suit transferred from the Principal Magistrate's Court Kericho to the High Court Kericho for hearing and final disposal. The said application is purportedly made under **Section 18 of the Civil Procedure Act**. The reasons for the applicant's request to have the said suit transferred from the Principal Magistrate's Court to the High Court is that the applicant's advocate had realized that the damages which the applicant would ask the court to assess would most likely exceed the jurisdiction of the said Principal Magistrate's Court. The application is supported by the annexed affidavit of the applicant. The application is opposed. Paul Murimi Kiongo, the advocate of the respondent has sworn a replying affidavit in opposition of the application.

At the hearing of the application, Mr Motanya Learned Counsel for the applicant submitted that the applicant had realized that the damages that he would be seeking in respect of the deceased's estate would most likely exceed the pecuniary jurisdiction of the said Principal Magistrate's Court. It is on this realization that the plaintiff has made an application to this court to have the said suit transferred to this court for hearing and determination. He further submitted that the respondent, a transport concern, had offices at Kericho and therefore the applicant had properly filed the suit where the respondent had a branch office (*he referred the court to Section 15 of the Civil Procedure Act*). He further submitted that it was convenient for the applicant to file the suit at Kericho and not anywhere else. He further submitted that the Principal Magistrate's Court Kericho had territorial jurisdiction to hear and determine the suit. The only jurisdiction the said court lacked was pecuniary jurisdiction. He urged the court to allow the application for the transfer of the suit to the High Court.

Mr Ndumia, Learned Counsel for the respondent opposed the application. He submitted that the applicant had filed a suit before the Kericho Principal Magistrate's Court which lacked territorial jurisdiction to hear and determine the matter. He submitted that when the respondent was served with the plaint, he filed a defence and gave notice to the applicant that he would be raising an objection to the jurisdiction of the said Principal Magistrate's Court. He further submitted that the applicant had filed the current application in a bid to defeat the said objection that was to have been raised by the respondent during the trial of the said case at the Principal Magistrate's Court. He argued that the applicant had filed a suit in contravention of **Section 14 and 15 of the Civil Procedure Act**. The applicant had further contravened the provisions of **Sections 2 and 5 of the Magistrate's Courts Act**. He submitted that this court lacked jurisdiction to transfer a case from one court to another where in the first place the original court lacked

jurisdiction to hear the matter. He urged this court to dismiss the application for transfer with costs.

I have carefully considered the submissions made before me by the parties to this application. The issue for determination by this court is whether the application to have the suit transferred from the Principal Magistrate's Court to this court has merit. The applicant has submitted that he has made this application because he realized that the general damages that he is likely to ask on behalf of the deceased's estate would exceed the pecuniary jurisdiction of the Principal Magistrate's Court. He otherwise submits that the said Principal Magistrate's Court had territorial jurisdiction to hear and determine the case. The applicant referred this court to the decision of **Mohammed Shaban –vs- George Mwangi Kariuki Bungoma HC Civil Application No. 13 of 2002** (*unreported*). The applicant also referred this court to the decision made in **Akamba Public Road Service Ltd. –vs- Emily Caroline Barassa Nairobi HC Misc. No. 10 of 2002** (*unreported*) to support his submission that he had the choice to file the suit at Kericho, a place where he claims the respondent maintain a branch office.

I have perused the pleadings filed by the applicant in support of his application. Nowhere is it indicated that the respondent has a branch office at Kericho. What we have here is the unsubstantiated allegation made by Counsel for the applicant from the bar. The true position appears to be that the applicant filed the suit at the Kericho Principal Magistrate's Court knowing very well that the said court lacked territorial jurisdiction to hear and determine the said suit (*See Section 14 and 15 of the Civil Procedure Act*). The cause of action in this case arose along Nairobi-Mombasa road. From the pleadings filed in court the defendant resides at Mombasa. He maintains his offices in Mombasa. The applicant had the choice of filing the suit where the cause of action arose or alternatively where the defendants resides.

In this case the applicant opted to file the suit at Kericho where the Principal Magistrate's Court clearly lacked territorial jurisdiction to hear and determine the suit. I am inclined to agree with the submissions made by the respondent's counsel that the application to have the suit transferred from the Principal Magistrate's Court to the High Court has been made specifically to forestall the respondent's objection to the territorial jurisdiction of the said Principal Magistrate's Court. As was held in the case of **Omwoyo – vs- African Highlands and Produce Limited [2002]1KLR 698** at page 699 by Ringera J.

“(in) Kagenyi –vs- Misiramo & Another [1968]E.A. 48 Sir Udoma CJ held in relation to Section 18 of the Uganda Civil Procedure Act – a provision which is in pari materia with Section 18 of our Code – that an order for transfer of a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. In that case, the appellant had sought to transfer a suit from the magistrate's court to the High court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court.... The principle of law to be gleaned from those authorities is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first place in a court which does not have pecuniary and/or territorial jurisdiction to try it. That is the case here. The Nairobi Resident Magistrate's Court did not have jurisdiction to entertain the plaintiff's suit as the lowest court of competent jurisdiction to handle it was the Kericho Magistrate's Court. The application fails for that reason only.”

It is instructive that it is the same Learned Judge who made the decision in the **Mohammed Shaban case** (*referred to herein above*) where he had ruled that a magistrate's court had countrywide territorial jurisdiction after interpreting the provisions of **Section 15 of the Civil Procedure Act** as contra posed with the provisions of **Section 3(2) of the Magistrate's Court Act**. Clearly the Learned Judge's decision in the **Mohammed Shaban** case was per incurium. It was not the correct interpretation of the law. I agree with the Learned Judge's reasoning in the **Omwoyo case** (*referred to herein above*).

The upshot of the above is that the applicant having filed the suit before the Kericho Principal Magistrate's court which lacked territorial jurisdiction to hear the matter cannot mischievously make an application to this court to have the said suit transferred from the said court to the High Court so that that aspect of jurisdiction can be cured. This court does not have discretion to transfer a suit from a court which lacked jurisdiction in the first place. In my considered opinion, the issue of pecuniary jurisdiction has been raised as a red herring to divert this court's attention from the real issue that the applicant in making this application intended to cure.

This application for transfer therefore lacks merit and the same is dismissed with costs to the respondent.

DATED at NAKURU this 22nd day of February 2006.

L. KIMARU

JUDGE