



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Misc Civ Appli 38 of 2006

NDYKAK INVESTMENTS LIMITED.....APPLICANT

VERSUS

JOSEPH IRUNGU KINORU.....RESPONDENT

RULING

The applicant, Ndykak Investments Limited has made an application under the provisions of **Order L rule 1** of the **Civil Procedure Rules** and **Sections 3A and 18 of the Civil Procedure Act** seeking the order of this court to transfer **Nakuru CMCC No. 963 of 2005 Ndykak Investments Limited –vs- Joseph Irungu Kinoru** to the High court sitting at Nakuru for hearing and final determination. The grounds in support of the application are that the Senior Resident Magistrate had ruled on the 16<sup>th</sup> of December 2005 that the subordinate court lacked jurisdiction to hear the matter and therefore the suit should either be tried by the High Court or by the Land Disputes Tribunal as provided under the **Land Disputes Tribunal Act (Act No. 18 of 1990)**. The application is supported by the annexed affidavit of Musembi Ndolo, the advocate for the applicant. The application is opposed. The respondent, Joseph Irungu Kinoru, filed grounds in opposition to the said application.

At the hearing of the application, Mr Musembi learned counsel for the applicant reiterated the contents of the application and the supporting affidavit. He submitted that the subordinate court lacked the requisite jurisdiction to hear and determine the dispute between the parties to this application which had been placed before it. He submitted that the said subordinate court had ordered the said suit to be transferred to the High Court or the Land Disputes Tribunal for hearing and determination. He further submitted that this court has unfettered jurisdiction to order the said transfer under the provisions of **Section 18** of the **Civil Procedure Act**. He urged this court to allow the application.

Mr. Murimi learned counsel for the respondent opposed the application. He relied on the grounds of opposition filed. He submitted that this court lacked jurisdiction to transfer a suit which was incompetently filed before the subordinate court to a court with jurisdiction. He submitted that the suit which was filed in the lower court was a nullity and therefore it could not be transferred to a court with jurisdiction because to do so would amount to this court condoning an illegality. He referred this court to several decided cases in support of his argument. He urged this court to dismiss the application with costs.

I have read the pleadings filed by the parties in support of their respective cases. I have also considered the rival arguments that were made by the learned counsel for the applicant and the learned counsel for the respondent. The issue for determination by this court is whether this court has jurisdiction to order the suit which was filed in the subordinate court without jurisdiction to be transferred to the High Court, a court with jurisdiction. The applicant has submitted that this court has the necessary jurisdiction and discretion to transfer the suit as prayed under the provisions of **Section 18** of the **Civil Procedure Act**. On the other hand it is the respondent's argument that this court lacked jurisdiction to transfer an incompetent suit from a court where it was filed without jurisdiction to a court with jurisdiction. What is the position of the law as regard the matter in dispute between the parties in this application? As was held by Ringera J. (*as he was then*) in **Omwoyo –vs- African Highlands & Produce Co. Ltd.** [2002]1KLR 698 at page 699;

*“That being the case, the sole issue for determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. (In) Kagenyi –vs- Misiramo & Anor [1968] EA 48, Sir Udoma 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 the 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. And in the very early case of Mendonca –vs- Rodrigues [1906-1908] 2 KLR 51, Hamilton J. held that the High court did not have power to order a transfer of a suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local jurisdiction of the lower court in which it had been filed. The principle of law to be gleaned from this 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.”*

In the current application, it is clear, and it has been admitted by the applicant, that the suit in the subordinate court was filed in a court without jurisdiction. The applicant argued that since the subordinate court is the one which made the order that the suit be transferred from the subordinate court to the High Court, then this court had no option but to allow the application. Having carefully considered the arguments made, I think the true position of the law as stated in the above quoted case is that this court cannot invoke its discretion under **Section 18** of the **Civil Procedure Act** to transfer a suit which was filed in a court without jurisdiction to a court with jurisdiction. Before this court can exercise its discretion as provided by **Section 18** of the **Civil Procedure Act**, it must first be satisfied that the suit was filed in a court which had jurisdiction. In effect **Section 18** of the **Civil Procedure Act** only empowers this court to transfer a suit from one court of competent jurisdiction to another court of competent jurisdiction.

In the circumstances of this application, it is clear that this court cannot transfer an incompetent suit from a court without jurisdiction to a court with jurisdiction. The only recourse available to the applicant is to withdraw the suit filed in a court without jurisdiction and filed a fresh one in a court with the requisite jurisdiction. The application therefore lacks merit and is dismissed with costs.

**DATED at NAKURU this 20<sup>th</sup> day of July 2006.**

**L. KIMARU**

**JUDGE**