



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**Misc Civ Appli 3 of 2006**

**PRIVATE DEVELOPMENT CO. LTD.....APPLICANT**

**VERSUS**

**REBECCA NGONYO.....1<sup>ST</sup> RESPONDENT**

**SAMUEL KAMAU MACHARIA.....2<sup>ND</sup> RESPONDENT**

**RULING**

The applicant, Private Developers Co. Limited has filed this application under **Section 18(1)(b)(i)** and **Section 3A** of the **Civil Procedure Act** seeking the order of this court to transfer to the High Court at Nakuru, **Nakuru CMCCC No. 2125 of 2005** which it had filed against the respondents, Rebecca Ngonyo and Samuel Kamau Macharia. The grounds in support of the said application are that the subject matter of the suit was Kshs 5 million which was beyond the jurisdiction of the Chief Magistrate's Court Nakuru whose jurisdiction was up to the sum of Kshs 3 million. The applicant pleaded with this court to order the said transfer so that the ends of justice could be met. The application is supported by the annexed affidavit of Hosea Kimotho Gitonga, the Manager of the applicant. The application is opposed. The respondents have filed a notice of preliminary objection objecting to the application as being fatally defective and an abuse of the due process of the court which was incapable of being granted by this court.

At the hearing of the application, Mr. Cheche learned counsel for the applicants reiterated the contents of the application and the supporting affidavit. He submitted that at the time the applicant filed suit against the respondents in the subordinate court, he honestly believed that the Chief Magistrate had jurisdiction to hear the matter in dispute whose value was Kshs 4 million. He submitted that this court had jurisdiction under **Section 18(1)** of the **Civil Procedure Act** to transfer a suit from one court to another on its own motion or on application by an affected party. He argued that the respondent would not be prejudiced if the suit was transferred from the subordinate court to the High Court, a court which was seized with jurisdiction to hear and determine the matters in dispute. He urged this court to invoke its inherent jurisdiction and allow the application.

Mr. Njiru, learned counsel for the respondents opposed the application. He submitted that **Section 18** of the **Civil Procedure Act** did not envisage a situation where a suit would be transferred from one court without jurisdiction to the other which had jurisdiction. He submitted that the applicant had filed the suit in the subordinate court without jurisdiction and therefore the said suit was a non-suit. He relied on three decided cases in support of his submission. He submitted that the mistake on jurisdiction was by the applicant and not by the court. He therefore submitted that the only remedy available to the applicant was to have the said suit withdrawn and a fresh suit be filed at the High Court, a court with jurisdiction. He urged this court to dismiss the application with costs because it was incompetent.

I have considered the rival submissions made before me by the parties to this application. I have also considered the decided cases that were referred to me by the learned counsel for the respondents. The issue for determination by this court is whether the applicant has established a case to have the suit which it filed in the subordinate court transferred to the High Court. Certain facts are not in dispute in this application. It is not disputed that the applicant filed a suit at the Chief Magistrate's Court Nakuru over a

property whose subject matter was valued at Kshs 4 million. It is not disputed that the applicant realises that the said suit was filed before the said subordinate court whose pecuniary jurisdiction is Kshs 3 million. The applicant has submitted that this court has jurisdiction to transfer the suit from the subordinate court to the High court, a court which has jurisdiction, for hearing and final disposal. On their part, the respondents have submitted that this court lacked jurisdiction to transfer a suit from a court which lacked jurisdiction to a court with jurisdiction.

What is the law that is applicable in the circumstances of this case? 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.”*

In the present case, the applicant has admitted that it has filed a case before the Chief Magistrate’s Court Nakuru which lacked the pecuniary jurisdiction to hear a dispute involving a subject matter whose value exceeded Kshs 3 million. The applicant therefore filed the said suit in a court which lacked jurisdiction. The applicant wants to remedy the situation by transferring the suit from a court without jurisdiction to a court with jurisdiction. Whereas I agree with the applicant that under **Section 18(1)** of the **Civil Procedure Act**, this court has jurisdiction to transfer a suit from one court to the other, I also agree with the submission made by the respondents that the power of this court under the said Section is circumscribed by the requirement that this court can only transfer a suit from a court with competent jurisdiction to another court of competent jurisdiction.

In the circumstances of this case, it is clear that the applicant seeks to transfer the suit from the subordinate court to the High Court so that it could clothe its incompetent suit with jurisdiction. I agree with the *dictum* of Mwera J. in **Joseph K. Gitau -vs- Francis Waiagwa Waithaka & Another Nairobi HCMisc Civil Application No. 53 of 2002 (unreported)** where he held that the High Court could not exercise its jurisdiction as provided by **Section 18(1)** of the **Civil Procedure Act** to transfer a suit from a court without jurisdiction to a court with jurisdiction. He held that the High Court could not transfer a case which in his opinion was a nullity to the High Court for hearing and disposal.

The upshot of the above reasons is obvious. The applicant has not satisfied this court that the suit now pending before the subordinate court was competently filed before the said court and is therefore amenable to be transferred to another court, in this case the High Court, a court of competent jurisdiction. The applicant’s application therefore lacks merit and is hereby dismissed with costs to the respondents.

**DATED at NAKURU this 14<sup>th</sup> day of July, 2006.**

**L. KIMARU**

**JUDGE**