



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Misc Appli 890 of 2006**

**ALI HABSHI.....APPLICANT**

**VERSUS**

**JOHN NJOROGE.....RESPONDENT**

**RULING**

Pursuant to the provisions of Section 18 of the Civil Procedure Act, Ali Habshi, the Applicant herein, took out a motion in which he beseeched this court to withdraw and transfer civil case no. 239 of 2006 from Kilifi Senior Resident Magistrate's court to Mombasa Chief Magistrate's court for hearing and determination. The Motion is supported by the affidavit of William Mogaka advocate for the Applicant. The Motion is strenuously opposed by John Njoroge, the Respondent herein. The Respondent never filed a replying affidavit nor grounds of opposition but nevertheless this court allowed Mr. Njoroge his advocate to contest the Motion.

The main reason advanced by the Applicant in support of the Motion is that the Kilifi Senior Resident Magistrate's Court lacks the pecuniary jurisdiction to hear and determine the intended counter-claim which is to the tune of kshs. 1,041,000/= whereas the magistrate sitting at Kilifi has a pecuniary jurisdiction of up to Kshs. 800,000/=. The Respondent did not dispute the fact that the Kilifi court has the pecuniary jurisdiction of up to kshs. 800,000/=. The Respondent's contention is that if the application is allowed it would delay the speedy disposal of the matter in that it will require that an amendment will have to be undertaken in which new causes of action and a new party would be introduced. It is the view of the Respondent that the Applicant should file a fresh action.

The facts leading to this case are that on the 5<sup>th</sup> day of May 2005, John Njoroge, the Respondent herein was driving motor vehicle registration number KAP 653F along Mombasa-Malindi road and upon reaching Tezo area the aforesaid motor vehicle collided with motor vehicle registration number KAS 479K, a lorry owned by Ali Habshy the Applicant herein. As a result of the accident it is alleged that the Respondent sustained serious injuries. The Respondent then filed civil suit no. 239 of 2006 in which he claimed both special and general damages in his plaint dated 6<sup>th</sup> April 2006 at Kilifi Senior Resident Magistrate's Court. When served with the summons and the plaint, the Applicant filed a defence substantially denying the Respondent's claim while pleading for contributory negligence on the Plaintiff's part. Within the defence, the Applicant filed a counter-claim against the Respondent and one Rose Achieng Ataka in which he prayed for inter-alia: damages for the total loss of motor vehicle registration number KAS 479K plus costs of the counter-claim. There is an annexure showing that the Applicant intends to claim a sum of kshs. 1,041,000/= from the Respondent and Rose Achieng Ataka, the owner of motor vehicle registration No. KAP 653F. It would appear at the end of the day the defence and counterclaim would have to be amended to include Rose Achieng Ataka as a party to the suit. It is on the basis of the counterclaim that the Applicant now seeks to have the suit withdrawn from Kilifi Senior Resident Magistrate's Court.

This court has a very wide power in Section 18 of the Civil Procedure Act to withdraw and transfer suits from one subordinate court to another. In exercising that power it is not a must for the court to be moved by any party. The court may even act suo moto. The Section does not prescribe the considerations the court must take into account. This was intended not to hinder the court's power to determine such

matters according to the circumstance of each case. In my view an Applicant must show that the action which is proposed to be transferred must be competently before the subordinate court. In essence this court can only transfer a matter which is properly and competently before the trial court. I think the matter now before the Kilifi Senior Resident Magistrate's court is properly before that court save that the amount prayed for by way of a counter-claim may well be beyond that court's pecuniary jurisdiction. It has been argued by the Respondent that the Applicant should file a fresh action. I do not see the logic of this argument because at the end of the day, the case will involve the same witnesses. The best way is to have one suit heard by one court. That way, the parties will save costs and of course the court will save valuable time which commodity is rare to come by nowadays. The sum total of my decision is that I am satisfied that the reasons advanced in support of the Motion are good enough to enable me exercise my discretion in the Applicant's favour. Consequently I hereby order for the Kilifi SRMCC No. 239 of 2006 to be withdrawn from Kilifi and transferred to Mombasa Chief Magistrate's court for hearing and determination. Costs of the motion to abide the outcome of the action.

Dated and delivered this 25<sup>th</sup> day of October 2006

**J. K. SERGON**

**JUDGE**

In open court in absence of the parties.