

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

Misc Civ Appli 15B of 2005

LAZARUS MUKUTA KALEVE PLAINTIFF/RESPONDENT

VERSUS

PHILIP NGILI MUTUNGA 1ST DEFENDANT/APPLICANT

DERECK WAMBUA SINGI 2ND DEFENDANT/APPLICANT

R U L I N G

The Notice of Motion dated 3.2.2005 is brought pursuant to section 18(1) and 27 Civil Procedure Act, Order 50 Rule 1 Civil Procedure Rules seeking orders that this court do order the transfer of Principal Magistrate's Civil Case 107/2004 Kitui Court, to the High Court in Machakos for trial and disposal. The applicant also asks for costs of the application. The application is based on grounds found in the body of the application and an affidavit sworn by Kiogora Mutai Counsel for the Defendants/Applicants.

The Principal Magistrate Kitui entered judgement in Principal Magistrate Civil Case 107/2004 on 20.10.2004 for the sum of Kshs. 1,044,750/-. The Defendants/Applicants were aggrieved by the said judgement and counsel was instructed to file the Chamber Summons dated 10.1.2005 seeking to set aside the exparte judgement and which application was supposed to be heard on 21.2.2005 but the court had no jurisdiction as the Magistrate in Kitui has jurisdiction of upto 800,000/= because the magistrate who gave judgement had been transferred from Kitui. That is what has prompted this application, to have the case transferred to this court so that the application dated 10.1.2005 can be heard and determined by this court.

The plaintiff/Respondent opposed this application and a replying affidavit was sworn by Lazarus Mukuta Kaleve, the plaintiff, in which he urges that Principal Magistrate Civil Case 107/2004 was tried by a competent court who made an award in general damages and special damages and costs were assessed. That the plaintiffs informed the Defendant/Applicant of the progress of the case at every stage but they never challenged the entry of the judgement and it is the Respondents belief that this application was brought in bad faith after the transfer of the Trial Magistrate from Kitui and is therefore an abuse of court process. It is submitted that if the applicants were aggrieved by the courts judgement of 28.10.2004 they should have appealed.

I have no doubt in my mind that Section 18 (1) gives this court wide discretion to withdraw and transfer cases from one subordinate court to another, or from a subordinate court to itself, or from itself to a subordinate court or a retransfer back to the court from which a case was withdrawn upon application or on its own motion it can make such orders.

From the annexures to the application, it is apparent that interlocutory judgement was entered herein on 22.4.2004 and the defendant/applicant were notified of this entry of judgement. After the entry of that judgement the defence counsel suggested negotiations to settle the matter out of court as evidenced by Mr. Kiogora Mutai's letter to the defendants SMM 3 and 4. The applicants did not want to have judgement set aside. The judgement could have been set aside even before it went for formal proof but the applicants waited for final entry of judgement that they came up with this application to set aside the judgement and all consequential orders. No explanation has been given by the Defendants/Applicants why they never took steps to set aside interlocutory judgement but instead opted for negotiations which must have failed that then resulted in the application of 10.1.2005. Though the court is not dealing with that application to set aside judgement, yet there is no way it can deal with the present application for transfer without making mention of what has prompted this application for transfer of this suit. To my

mind the applicants have not acted diligently and with haste as is required in such applications to set aside judgement. Courts are normally reluctant to assist the indolent.

Judgement has been entered in the suit sought to be transferred and costs assessed. Ideally the suit is finalised. In my considered view, this court can only exercise appellate jurisdiction over that matter and I therefore agree with the respondent that it can only be brought to this court for purposes of appeal. The lower courts jurisdiction cannot be exercised along with this courts jurisdiction. The best option for the applicant would have been for the applicants to seek to transfer this suit to a subordinate court of competent jurisdiction but not to this court. It can only be brought to this for purposes of appeal. For the above reason, the applicants application can therefore not be granted.

As earlier noted however, under Section 18 (1) Civil Procedure Act this court can on its motion have a suit transferred to another court for hearing and disposal. So that the applicant is not locked out and so that justice is done, this court will exercise its discretion and order that Principal Magistrate Civil Case 107/2004 be transferred to Machakos Chief Magistrate's Court for hearing of the application dated 10.1.2005 on merit and any other application that may follow. The applicant will bear costs of the application dated 3.2.2005.

Dated at Machakos this 21st day of April 2005.

R. V. WENDOH

JUDGE