



**REPUBLIC OF KENYA**

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

**MISC CIV APPLI 1095 OF 2005**

**AMRITLAL BHAGWANJI SHAH.....APPLICANT**

**-VERSUS-**

**MASH EXPRESS LIMITED.....1ST RESPONDENT**

**ATHUMANI OMAR MULANDWA.....2ND RESPONDENT**

**MEHARI KEFELA T/A MEHERI AUTO GARAGE.....3RD RESPONDENT**

**GEDAM GEBREHINER.....4TH RESPONDENT**

**JUDGEMENT**

The applicant's Originating Motion dated and filed on 19th July, 2005 was brought under section 18 of the Civil Procedure Act (Cap.21). The substantive prayer in the application was:

"That Civil Case No. 13097 of 2003 in the Chief Magistrate's Court at Milimani as consolidated with Civil Case No. 13095 of 2003 be transferred to this Honourable Court for trial and disposal." This application was premised on the grounds, firstly, that the plaintiff's claim in CMCC No. 1309 of 2005 is likely to exceed Kshs.3,000,000/= and so will not fall within the pecuniary jurisdiction of the Chief Magistrate; and secondly and consequently, that the issue of liability in the two suits as consolidated, will surpass the jurisdiction of the Chief Magistrate's Court. In these circumstances, the applicant states, "it would be prudent to bring over the consolidated suits to the High Court."

The evidentiary basis of the application is in the supporting affidavit of Mr. Justice Amritlal Bhagwanji Shah, sworn on 19th July, 2005.

The deponent avers that he had filed Milimani C.M.C.C. No. 13097 of 2003, in his capacity as administrator of the estate of his late daughter, Tejal Shah, who was 25 years old at the time of her death. It is deposed that at the time of filing suit at the Milimani Chief Magistrate's Court, the applicant "knew that damages claimed...may exceed Shs.3,000,000/=" but he nonetheless filed it as he did, for the reason that more expeditious hearing could be achieved in this way. Two consecutive occasions of failure of the hearing to proceed, on account of the defendants' not bringing their witnesses to Court, led the applicant to reconsider the premium which he had laid on expedition of process. He also reconsidered the issue of damages claimed, and concluded "that general damages will exceed Shs.3,000,000/=" It is the deponent's reckoning that general damages under just one head, in the claims in the suit, could very well run to a considerable figure like Shs.7,200,000/=. It is deposed that the fact that the plaintiff's suit in C.M.C.C. No. 13097 of 2003 is consolidated with another suit, C.M.C.C. No. 13095 of 2003, and both are Fatal Accidents and Law Reform Act claims, makes it prudent to have the issue of liability decided, and the plaintiff in CMCC No. 13095 of 2003 has given consent that his claim too, be heard and

determined in the High Court.

From the depositions on record, the liability issue has already been determined in respect of the 2nd defendant who failed to enter appearance. Although it is not expressly stated, it must be the case that it is in the Chief Magistrate's Court that the 2nd defendant has been thus fixed with liability. Counsel has not stated by what procedure formal proof arising from such an interlocutory judgement in the subordinate Court would now come before the High Court, if transfer were allowed as prayed. This, I think, may be seen as a gap in learned counsel's submission in making the case for transfer of proceedings from the Chief Magistrate's Court to the High Court.

The 3rd and 4th defendants responded to the instant application by filing grounds of opposition. As they brought no evidence before the Court, it is to be assumed that they are not challenging the applicant's evidence as such, but they are raising points of law to contest the propriety of the case being made for transfer of the suits to the High Court. I will assess the merits of these grounds contemporaneously with my account and analysis of the submissions of Mrs. Wachira, learned counsel for the 3rd and 4th defendants. For the applicant, learned counsel Ms. Quadros, noted that proper service of the application and supporting documents had been effected on 13th September, 2005 even though the 1st defendant had made no response, and was not represented in Court on the occasion of hearing this application.

The burden of Ms. Quadros' submissions was aimed at the grounds of opposition by the 3rd and 4th respondents, so these grounds may be set out at this stage. Firstly it is contended that the applicant's Originating Motion is "incompetent." Secondly it is asserted that Civil Case No. 13097 of 2003 at Milimani as consolidated with Civil Case No. 13095 of 2003 is not capable of being transferred to the High Court, as jurisdiction cannot be conferred where there was none in the first place — in the Subordinate Court. Thirdly it is stated that already, the applicant has admitted filing his claim in the Lower Court where the pecuniary jurisdiction to award him the damages sought, is lacking. It is asserted that the only available remedy for the applicant is to withdraw the civil case, CMCC No. 13095 of 2003 at the Milimani Court, and re-file it in the High Court.

Ms. Quadros submitted that the suit in question, CMCC No. 13095, was a competent suit before the Chief Magistrate's Court. Learned counsel noted that there was relevant authority in a matter such as the instant one: *Kagenyi v. Musiramo & Another* [1968] E.A. 43; *Boniface Waweru Mbiyu v. Mary Njeri & Tai Yun Hwang*, Misc. Application No. 639 of 2005; [2005] eKLR. The *Musiramo* case carries the following statement on the governing principles in a matter such as this (p.46 – Sir Udo Udoma, C.J. (Uganda)): "The editors [of MULLA's CIVIL PROCEDURE CODE (10th ed.), p.130] further state that an order for the transfer of a suit from one court to another cannot be made under s.24 of the Indian Code, unless the suit has been in the first instance brought in a court which has jurisdiction to try it; and that if, after the transfer is made, the parties without objection join issues and go to trial upon the merits, the order of transfer cannot be subsequently impeached." Relying on the principles set out in the *Musiramo* case I had, in the *Boniface Waweru Mbiyu* case, thus held:

"The entry point into any Court proceeding is jurisdiction. If a Court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question." I would still uphold that general principle as the vital factor in determining whether a case should be transferred from one Court to another. However, in the light of the facts in the instant application, a new issue emerges. Suppose the presence or absence of jurisdiction in a Court, is in respect of a pecuniary matter, who, in the first place, determines whether or not there is jurisdiction? For certain, the presence or absence of jurisdiction in these circumstances is not determined purely by a legal consideration. It will be for the suitor, in the first place, to determine how much money he will be claiming – and it is precisely this choosing of his that must determine whether or not there is jurisdiction. If he chooses conservatively, then the Court may have jurisdiction; if not, then the Court will have no competence to determine the matter. So the suitor's preferences will in this manner influence the transferability of the suit to the High Court, from the Magistrate's Court. How does that apply in the instant case? It is deponed that the applicant knew at the time of filing suit "that damages claimed by me may exceed Shs.3,000,000/= but advisedly I filed suit

there for an expeditious hearing.” So, expeditious hearing was a trade-off in respect of which the applicant chose to limit his claim to the maximum sum in the pecuniary jurisdiction of the Chief Magistrate. Therefore, so long as his reparations-claim remained set at Kshs.3,000,000/=, then, clearly, his claim was properly within the jurisdiction of the Subordinate Court. If he decided to raise his claim above that figure, then, logically, he would have taken his case outside the jurisdiction of the Chief Magistrate – and so his case would not have been properly filed in the Subordinate Court.

Learned counsel attempted to distinguish the Musiramo case, arguing that in that case, the suit in the Magistrate’s Court was invalid and so could not be transferred to the High Court. Such, counsel urged, was not the case in the instant matter. Learned counsel also sought to distinguish the Boniface Waweru Mbiyu case. Ms. Quadros argued that whereas there was no jurisdiction in those two cases, that does not apply in the instant case – because if the applicant went back to the Chief Magistrate’s Court, he would still get judgement. This, in my view, is not self-evident; for a return to the Subordinate Court would mean confining the plaintiff’s claim to the figure of Kshs.3,000,000/=. Yet it is clear that the figure intended to be claimed could be more than double that figure. So long as such an expansive claim is contemplated, then the Chief Magistrate’s Court would have no jurisdiction – a consideration which would rule out the possibility of transferring the case to the High Court; both the Musiramo case and the Boniface Waweru Mbiyu case would then become highly relevant.

Learned counsel for the 3rd and 4th respondents, Mrs. Wachira, submitted, I believe correctly, that the Subordinate Court could only have jurisdiction if the plaintiff’s claim was limited to Kshs.3,000,000/=. She indicated she would not contest the application to transfer the case, if the applicant still limited his claim to Kshs.3,000,000/=. In support of this argument, counsel cited Justice R. Kuloba’s Judicial Hints on Civil Procedure (Nairobi Professional Publications Ltd., 1984), Vol. 1, p.80:

“The practice in Kenya is to refuse to transfer a suit from one court to another...unless the suit was, in the first instance, brought in a court that had jurisdiction to try it.”

The foregoing review of the application, its prayers and supporting grounds, the depositions, and the submissions of counsel, I think, upholds a position that does not favour a transfer of the case as the applicant proposes. It is particularly pertinent that Ms. Quadros did not attempt to resolve the puzzle regarding the interlocutory judgement which has already been awarded in the Subordinate Court against the 2nd defendant. It cannot be right in law that the formal proof attending such judgement must now be transferred to the High Court. If it is transferred, would there then be a new interlocutory judgement entered in the High Court? It would be irregular, because the question will now be *res judicata*. Since the applicant contemplates seeking recompense in money figures substantially larger than the figure allowed under the jurisdiction of the Chief Magistrate, the natural expectation is that he will formally withdraw the earlier suit, and then file an entirely new suit in the High Court. Alternatively he could limit himself to the figure of Kshs.3,000,000/=: and in that case, proceed with litigation before the Chief Magistrate’s Court.

I will, therefore, disallow the originating motion application dated 19th July, 2005.

The applicant shall bear the costs of the 3rd and 4th respondents.

Orders accordingly.

**DATED and DELIVERED at Nairobi this 7th day of October, 2005.**

**J. B. OJWANG**

**JUDGE**

**Coram: Ojwang, J.**

**Court clerk: Mwangi**

**For the Applicant: Ms. Quadros, instructed by M/s. B.M. Quadros, Advocate**

**For the 3rd and 4th Respondents: Mrs. Wachira, instructed by M/s. Ombonya & Co. Advocates.**