

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL MISC. 99 OF 2002

MUEKE MULINGE.....APPLICANT

VERSUS

KISIVO MULEI.....RESPONDENT

R U L I N G

The applicant seeks orders that this court do order the transfer of SPMCC 410/94 which is pending before the SPM court Machakos to be transferred to the High court for trial and final determination and that costs be in the course. The application is grounded on the fact that the suit involves agricultural land and the subordinate court lacks jurisdiction to hear such a case and that the said transfer would not prejudice the respondent in any way. The application is also supported by the affidavit of O. N. Makau. It was further submitted that the land is on a settlement scheme and the laws relating to adjudication do not apply but this court has jurisdiction and further that though the matter was referred to arbitration on 24.8.1995, no award has been filed and this court do allow application so that the matter is heard.

The application was opposed on grounds that the court lacks jurisdiction in the matter, the land being in a land adjudication area and secondly that the matter is pending for arbitration. The counsel further submitted that under S.18 CPA only a competent suit can be transferred from one court to another and this court cannot transfer a non existent suit there being none before the lower court. Counsel relied on an extract from Kuloba on Judicial Hints at page 80 paragraph 135 which states “the practice in Kenya is to refuse the transfer of a suit from one court to another under this section unless the suit was in the first instance brought in court that had jurisdiction to try it. Though this is not a Judicial precedent or statute, it is a book on what is practiced in our courts. In the case of KAGENYI VERSUS MUSIRAMO & ANOTHER 1968 EALR 43; which the court has considered in respect of transfer of suits, the High court in Uganda which has a similar section to our section 18CPA held inter alia 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 instance brought to a court which has jurisdiction to try it.” In that case it was observed that S.18 CPA gives general power of transfer of all suit. In the present case the case was filed in the lower court in 2002 when such land disputes were not handled by the lower courts the jurisdiction having been taken away by the Land Disputes Tribunal Act no. 18 of 1990. That court had no jurisdiction and from an understanding of how the courts have interpreted S.18 CPA if the lower court had no jurisdiction it means the suit was a non starter and there is therefore nothing to transfer the High court.

Application is refused and dismissed with costs to respondent.

Dated, read and delivered at Machakos this 16th day of January, 2004.

R. WENDOH

JUDGE