

REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT BUNGOMA
CIVIL MISC CAUSE NO. 22 OF 2004**

NAIBEI CHEKUROP

AND FOUR OTHERS APPLICANT

VS

WEKESA ERAPA RESPONDENT

R U L I N G

This is a motion instituted under Section 18 of the Civil Procedure Act. The applicant seeks to have BUNGOMA S.P.M.C.C.C. No. 186 of 1998 transferred to this court for hearing and final determination. The motion is supported by the affidavit of Julius Sawenja Khakula sworn on 2nd February 2004.

The applicants argued that the aforesaid suit involves Land Parcel No. ELGON/CHEMOGE/493 measuring about 5 hectares which is valued at Ksh.1,250,000 which is stated to be beyond the jurisdiction of the magistrate's court. It is also stated that there is a pending H.C.C.C. No 168 of 2000 before this court which involves the same parcel of Land. The applicants urged this court to withdraw the suit before the Senior Principal Magistrate's court and have it consolidated with Bungoma H.C.C.C. No. 168 of 2000.

The applicants further complained that the Senior Principal Magistrate was biased in favour of the Respondent hence they are apprehensive that they will not get justice unless that suit is transferred to this court for hearing and disposal. It is alleged that the lower court delayed in delivering a ruling for stay of execution and setting aside orders which were adverse making them vulnerable to police harassment on a purported mission to enforce eviction orders which are said to have been given prematurely. The Respondent opposed the motion by filing a replying affidavit sworn by Simiyu Makokha, the Respondent's Advocate. The main ground raised in opposition is that the suit which is being sought to be transferred has been heard and determined by the Senior Principal Magistrate. The Respondent therefore viewed the motion as frivolous, vexatious and unmeritorious. It is further averred that there exists a lawful decree that has never been set aside, reviewed and or varied in any way.

The Respondent pointed out that the applicants have not shown how the trial court was biased. It was further argued that even if there was evidence of bias on the part of the trial court, it was incumbent upon the applicants to make an application for that court to disqualify itself.

I have considered the submissions of both sides. What is succinctly clear is that Bungoma S.P.M.C.C.C. No. 186 of 1998 has been heard and finally determined by the lower court. In fact the applicants annexed copies of the proceedings and Judgment to the affidavit of Julius Khakula. It is not denied that the Judgment has not been set aside: The law under section 18 of the Civil Procedure Act did not envisage a suit which has been heard and determined to be transferred. I think I have no jurisdiction to transfer a Judgment. There is nothing to be heard and to determine. I am in agreement with the submissions of Mr. Barasa who appeared for the Respondent that the motion is frivolous, and vexation and unmeritorious. The

upshot therefore is that the motion is ordered dismissed with costs to the Respondent.

READ AND DELIVERED THIS 26th DAY OF March 2004.

J.K.SERGON

JUDGE