



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISC. APPLICATION NO.120 OF 2004

ABDALLA NGONYAGA JUMA APPLICANT

VERSUS

NUR MOHAMMED YUNIS KANA RESPONDENT

Coram: Before Hon. Justice Mwera

Odiaga for applicant

Kilonzo for REPUBLIC OF KENYA

Court clerk Sango

R U L I N G

The applicant herein calls into play SS 3A, 18 Civil Procedure Act as per his application dated 24.2.04 for orders that the Mombasa SPMCC 3845/2002 be transferred from the lower court to this High Court for hearing and final determination.

The grounds on which the application is based state inter alia (in paraphrase):

- 1) That after the filing of this suit ----- other facts have come up requiring that the plaint be amended to accommodate those facts so that the same are properly determined.
- 2) That the magistrate's court where the suit is currently filed will not have jurisdiction to entertain the amended suit hence the need for the transfer to be followed by intended amendment.
- 3) That the suit touches on two title deeds one of which may fall to be revoked after the intended amendment.

The applicant swore an affidavit in support annexing both the plaint in the lower court and the draft amended one.

The respondent filed grounds of opposition to the effect that if the lower court had/has no

jurisdiction over the suit there then this court cannot transfer the lower court suit as the applicant desires and that instead he should withdraw that suit and file a proper one in a competent court (this court). That seemingly the applicant's move is intended to circumvent the need to pay requisite fees in the High Court and thus the application lacks merit.

The court heard briefly submissions from each side and without having to go into the contents of the annexed plaint and intended plaint or the law invoked, its view is that if the applicant has come to realise that the suit he filed in the lower court will fall outside the jurisdiction of that court if the plaint is amended he should withdraw that suit there of course on terms if so deemed, and file a proper and complete suit in the High Court. It does not sound neat or orderly to order the transfer of the suit in the lower court, bring it here so that the applicant amends it and thereafter this court entertains it. In sum if the suit as crafted falls within the lower court jurisdiction as Mr. Odiaga told this court, then let it be determined finally there. But if his client has realised that the reliefs that he seeks can only be given (or declined) by the High Court he should do well to file a fresh suit in the form he thinks/knows will accord him the reliefs sought.

In sum this application is dismissed with costs.

Delivered on 8th April 2004.

J.W. MWERA

JUDGE