



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MACHAKOS**

**HIGH COURT MISC. 184 OF 2004**

**ONESMUS MWANZA MUTUA ::::::::::::::::::::::::::::::: APPLICANT**

**VERSUS**

**DAIMA BANK LTD ::::::::::::::::::::::::::::::::::::::: RESPONDENT**

**R U L I N G**

The applicant herein, Onesmus Mwanza Mutua seeks orders that Civil Suit 147/04 be withdrawn from Milimani Commercial Court and be transferred to Machakos Chief Magistrate's Court for hearing and determination.

The applicant contends that the defendant resides at Machakos town within the geographical jurisdiction of Chief Magistrate's Court Machakos; that the alleged cause of action arose in Machakos town and it is both convenient and cheaper for the applicant to attend the Machakos Court. The applicant also filed an affidavit in support of the application in which he adds that when he received summons and plaint, a defence was filed in which the jurisdiction of the Milimani Court was denied.

The application was opposed by way of grounds of opposition and a replying affidavit sworn by one Simeon Ngeny a statutory manager with Daima Bank. It is the Respondent's contention that the application is incompetent; an abuse of court process brought in bad faith and calculated to delay the speedy hearing of the case. The Respondent further avers that the applicant was served with summons in Nairobi on 27/2/04 where he worked as Deputy Secretary in the Ministry of Trade at Teleposta Towers and that he presently works at Nairobi City Hall as Deputy Town Clerk and it is denied that the applicant has ever resided in Machakos town.

Section 15 of the Civil Procedure Act gives the parties direction on where to file suits other than those relating to immovable property (Section 13) or suits for compensation for wrong doing to a person (Section 14). Under the said Section 15 of the Civil Procedure Act every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant resides or carries on business or works for gain or, where the cause of action arose or anywhere else provided the defendant acquiesces to such institution.

Though the Respondents have alleged that the applicant worked in Nairobi at the time of service of summons, they have not availed any evidence in form of the Return of Service to show where he was served. It is also alleged at paragraph 4 of the replying affidavit that the applicant works as a town clerk in Nairobi. Again there is no evidence to that effect. The plaint annexed to the application was silent on where the applicant worked for gain. Neither has the applicant disclosed it.

It is, however, not denied that the cause of action arose in Machakos. I also note that the address which the plaintiff/Respondent indicates as place of service on the plaint is Box 2193 Machakos. Since that cause of action arose in Machakos and the applicant's address is Machakos, place of work or business having not been disclosed by the applicant, the suit should have been filed in Machakos court in the first instance.

The court does concede that under Section 18 of the Civil Procedure Act gives the High Court wide powers to withdraw and transfer suits from one court to another for good reason and expedience but the

court has to bear in mind whether the court in which the suit was first filed had jurisdiction to entertain the suit in the first place. From the material before this court, it seems that the Milimani Commercial Court did not have jurisdiction to hear the matter and, therefore, there is nothing for this court to transfer from Milimani Court to this court. The court cannot, therefore, make an order of transfer of the suit to Chief Magistrate's Court Machakos. If the Milimani Court lacks jurisdiction, let the applicant seek to have the suit struck out on account of want of jurisdiction by that court as it is indeed pleaded in the defence. The application by applicant is, therefore, dismissed with costs to the Respondent.

Dated at Machakos this 29th day of November 2004

Read and delivered in the presence of

**R.V. WENDOH**

***JUDGE***