



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 500 OF 2002**

**IN THE MATTER OF:- DISTRICT MAGISTRATE'S COURT**

**CIVIL CASE NO. 40 OF 2002 AT TAVETA**

**WAYUA KITETU –VS-CHARO KYALO**

**MULONZI**

**A N D**

**IN THE MATTER OF: AN APPLICATION BY WAYUA KITETU FOR TRANSFER OF THE ABOVE**

**CASE TO COURT OF COMPETENT JURISDICTION AT MOMBASA**

**B E T W E E N**

**WAYUA KITETU.....APPLICANT**

**VERSUS**

**CHARO KYALO MULONZI.....RESPONDENT**

**R U L I N G**

The applicant Wayua Kitetu filed a Notice of Motion dated 11th November 2002 seeking to have Taveta D.M.C.C.C. No. 40 of 2002 Wayua Kitetu =VS= Charo Kyalo Mulonzi transferred to Wundayi Resident's Court for trial and determination. The Notice of Motion set out the grounds relied upon which application is also supported by the affidavit of Wayua Kitetu.

The basis of the application is that the land in dispute would be in excess of KShs.300,000/= which is beyond the pecuniary jurisdiction of the Taveta court.

The Respondent opposed the application on the ground that it would cause inconvenience to the Respondent and that the applicant has not raised the basis of how she arrived at the value of KShs.300,000/=. The Respondent's Counsel that the intended amended plaint has not been annexed nor shown to court. The learned counsel further alluded to the fact that the Taveta Court may lack jurisdiction by virtue of the provisions of the Land Disputes Tribunal and that the transfer would occasion an unnecessary expense on the litigants when both reside in Taveta.

It is well settled that a party which seeks to have a suit transferred from one court to another by the High Court must satisfy the following conditions namely:-

First, the balance of convenience of the litigants should not greatly affect them.

Secondly, that question of expense on the litigants and witnesses should be considered.

Thirdly, that the interest of justice should be the overriding factor. Finally, the possibility of under hardship should be considered also.

It would appear that the applicant's main ground in support of the plaintiff's application is that the pecuniary jurisdiction of the Taveta court will humper the trial. It should be understood that the High Court has no jurisdiction to exercise its discretion under section 18 of the Civil Procedure Act if the court in which the action sought to be transferred had no jurisdiction to hear and determine. It is admitted that by the plaintiff that the Taveta court lacks the pecuniary jurisdiction to hear and determine the action sought to be transferred. This allegation was not established or stated in the annexed plaint. It remains merely presumptuous and speculative. A close perusal of the plaint annexed to the supporting affidavit reveals that the cause of action relates to Trespass. Paragraphs 4,5,6 and 7 of the annexed plaint points that the claim by the plaintiff is based on the tort of trespass. This issue was correctly pointed out by Mr.Odiaga the advocate to the Defendant. If that would be the position, then the provisions of section 9A (d) of the magistrate's Jurisdiction Act Chapter 10 of the Laws of Kenya will not confer any jurisdiction to either of the courts. However I must hesitate to point out that the issue I have just pointed out can only be decided by the Taveta court at the moment.

On the basis of what I have noted from the pleadings the submissions of both counsels I have come to the conclusion that this application does not meet the requirement set to enable me exercise my discretion to transfer Taveta D.M.C.C. No. 40 of 2002. This application is therefore dismissed as it lacks merit with costs to the Respondent.

**Dated at Mombasa this 15th day of May, 2003.**

**J.K. SERGON**

**J U D G E**