

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI COMMERCIAL COURTS NAIROBI

CIVIL SUIT NO.MISC.APPLICA TION 308 OF 2002

CHARLES OMWATA OMWOYO..... PLAINTIFF

VERSUS

AFRICAN HIGHLANDS & PRODUCE CO.LTD..... DEFENDANT

RULING

This is an application by the plaintiff to transfer the suit filed in the Nairobi Resident Magistrate's court as civil suit number 7859 of 1993 to the Kericho Chief Magistrate's Court for trial and disposal. The application is expressed to be under Section 3, 3A and 18(b) (ii) of the Civil Procedure Act. It is made on the grounds that the defendant has its registered and operational offices and/or carries on business within the local limits of the kericho Subordinate Court and that the cause of action arose within the geographical jurisdiction of the Kericho Court.

The application is predicated on what is common ground, namely, that in view of the provisions of Section II and 15 of the Civil Procedure Act, the suit should have been filed in the Resident Magistrates Court at Kericho and not Nairobi. That being the case, the sole issue for determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. **In KAGENYI V MISIRAMO & ANOTHER** [1968] E.A. 48, Sir Udoma Udoma C.J. held in relation to Section 18 of the Uganda Civil Procedure Act - a provision which is in **pari materia** with section 18 of our code- 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 place brought to a court which has jurisdiction to try it. In that case the appellant had sought to transfer a suit from the Magistrate's Court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court. And in the very early case of **MENDONCA V RODRIGUES** [1906-1908] 2KLR 51, Hamilton J. held that the High Court do not have power to order a transfer of the suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local limits of the jurisdiction of the lower court in which it had been filed. The principle of law to be gleaned from those authorities is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first place in a court which does not have the pecuniary and/or territorial jurisdiction to try it. That is the case here. The Nairobi Resident Magistrate's Court did not have the jurisdiction to entertain the plaintiff's suit as the lowest court of competent jurisdiction to handle it was the Kericho Magistrate's Court. The application fails for that reason only.

The plaintiff's advocate has made a passionate plea to this court that to dismiss the application would be tantamount to punishing the plaintiff for the mistake of his advocate. That may very well be so. However, I am of the opinion that if a court has no jurisdiction to do something it cannot do so in what is said to be the interests of justice. The interests of justice are forever best served by upholding the law and not bending it to suit the individual circumstances of cases before the court. But even if the court had discretion in the matter, it may be asked whether to file a suit in a court without jurisdiction may be treated as the kind of mistake by an advocate which the court may overlook. In **MAWJI V LAJI & OTHERS** [Civil application No.236 of 1992] Kwach J.A. drew a line between negligence, pure and simple and a genuine error or mistake on the part of an advocate. He went on to cite with approval the dicta of Lord Griffins in the case of **KETTLEMAN V HANSEL PROPERTIES LTD** [1988] 1 All ER. 38, at P.62, where the Learned Lord of Appeal in ordinary said:

"Another factor that a judge must weigh in the balance is the pressure on the courts caused by great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted, efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than allowing an amendment at a very late stage of the proceedings."

I am of the same persuasion. Even if the matter involved an exercise of discretion (and not want of jurisdiction as is the case here) I would have declined to exercise the court's discretion in favour of the applicant on the grounds that he found himself in a predicament as a result of his advocate's alleged mistake. I think the time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour.

For all those reasons, the applicant's application is dismissed with costs to the defendant.

DATED at Nairobi this 16th day of October 2002.

A.G. RINGERA

JUDGE

CIVIL PRACTICE AND PROCEDURE

1. TRANSFER OF SUIT

- Whether High Court can exercise its power under section 18 of the Civil Procedure Act to transfer a suit from a court without jurisdiction to a court with jurisdiction

2. MISTAKES OF ADVOCATES

- Whether mistake or negligence of an advocate is a good ground for relief to favour a client.