



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

MISC. CIVIL APPL. NO.11 OF 2018

SHEIKH ALI SAID BIRHANU & HUSSEIN MOHAMED ALIO

**(SUING ON BEHALF OF HAH LISUNU WAL-JAMA MOSQUE &
MADRASA MAYATTA BURJI APPLICANT**

VERSUS

ABDI ADAN ABUBAKAR.....1ST RESPONDENT

HUSSEIN YASSIN OSMAN.....2ND RESPONDENT

ABDIKADIR ABDI BANDO.....3RD RESPONDENT

RULING

The notice of motion dated 2.11.2018 seeks the following orders:-

- 1. That Moyale Senior Resident Magistrate Civil case number 2 of 2018 be transferred to Marsabit Lower Court for hearing and disposal.***
- 2. Costs of the application be provided for.***

The application is supported by the affidavit of Kiogora Mugambi Advocate sworn on the 2.11.2018 and a further affidavit sworn by Sheikh Ali said Birhanu on the 14.2.2019. The respondent filed grounds of opposition as well as replying affidavit sworn by the 1st respondent.

Mr. Kiogora appeared for the applicant. Counsel submit that unless the orders being sought are granted the applicant shall suffer irreparable loss. Counsel contend that Section 18 of the Civil Procedure Act gives this court the power to transfer suits between Courts. The trial court heard the applicant's application and issued an order on 4.6.2018 requiring the respondents to vacate the premises. That order has not been effected to date. It is the applicant's position that the trial court is biased and fears the respondents. While the matter was pending, the respondents went ahead and evicted the applicants from running the Mosque. The applicants have lost confidence in the magistrate handling the matter and he should recuse himself. There is likelihood of the trial court being biased. Counsel relies on the Ugandan case of **David Kabungu V- Zikarenga and four others, Kampala HCCS No.36 of 1995** where Justice Okello stated as follows:

“Section 18(1)(b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expenses and difficulties of the trial

would be so great as to lead to injustice or the suit has been filed in a particular court for the purpose of working injustice. What the court has to consider is whether the applicant has made out a case to justify if in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... It is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order

transfer, the application must be refusedWant of jurisdiction of the court from which the transfer is sought has jurisdiction to try the case, transfer would be refused.... Since the expense which the plaintiff/applicant in this case is likely to incur in transporting and maintaining the numerous various senior public officers from Kampala to Kabale to attend and give evidence in court in this case is bound to be so prohibitive as to deny the applicants justice and the plaintiff/applicant has the right to choose his court, he should not be denied justice by forcing him to have his case heard in a court to which he would not by reason of expense produce his witnesses to prove his case."

Counsel maintains that this court has jurisdiction to transfer the matter from Moyale Magistrate's Court to Marsabit Magistrate Court.

Mr. Yusuf from the firm of Ali & Company Advocates appeared for the respondents. Counsel submit that the application is hopeless, and unmeritorious, defective, vexatious and an abuse of the court process. It is the applicant who instituted the suit on 6.6.2018 before the Moyale Senior Resident Magistrate's Court. The suit stated that the Moyale Court has jurisdiction to handle the matter. The applicant also filed an application dated 6.6.2018 that was determined by way of written submissions by consent of both counsels. A ruling was delivered on 2.11.2018. It is only when the ruling was adverse to the applicants when they sought to transfer the matter yet all along they did not raise any issue with the trial court. Instead of logging an appeal against the ruling seek or review, the applicants preferred to have the matter transferred. There is no proof tendered to the court that the applicants' quested for justice in this matter has been compromised. The application is an afterthought. If indeed the applicants' are not satisfied with the trial court handling the matter, there is another Magistrate in Moyale who can handle the matter.

Counsel further submit that the applicants have not met the threshold for the transfer of the matter. Counsel relies on the case of **Hangzhou Agrochemical Industries Ltd -V- Panda Flowers Limited(2012)eKLR**. In that case Justice Odunga relied on the case of David Kabungu (Supra) where Justice Okello stated what has been cited by Mr. Kiogora hereinabove.

Both counsels have cited Section 18 of the Civil Procedure Act which states as follows:-

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage

(a) Transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) Withdraw any suit or other proceedings pending in any court subordinate to it and thereafter-

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceedings has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

Similarly Order 47 rule 6 (2) states as follows:-

(2) The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court.

Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.

Apart from the above Provisions, Article 165(6) and (7) of the Constitution gives the High Court supervisory powers over the subordinate courts and such powers include the calling of any proceedings before the subordinate court and making such orders as the High Court may consider to be appropriate to ensure there is fair administration of justice. The application herein is based on two main grounds, firstly, that the trial Court is biased against the applicants. The elements of this contention is that the Court gave interim orders in favour of the applicants but did not ensure that those orders were implemented. Instead, the respondents evicted the applicants from running the Mosque. The second limb of the applicants' contention is that they have lost confidence in the Court handling this matter.

On their part, the respondents maintain that the applicants only started complaining after their application for injunction was dismissed. It is the applicants who filed the case before the Moyale Court.

The law requires that cases be filed in the court which is nearer to the parties and which has jurisdiction to determine the dispute. This is in line with Article 48 of the Constitution which provides for access to justice. Kenyans should readily access courts in their pursuit of justice. They should not travel long distances seeking to file their cases. That is why the applicants readily filed their case before the Moyale Court. The Moyale Court has Jurisdiction to determine the dispute.

From the record of the trial Court, it is established that a ruling was delivered on 2.10.2015. The ruling is adverse to the applicants. There is no proceedings indicating how the trial court has handled the matter. At least that could have enabled the Court determine the issue as to whether the trial Court is biased. I believe the matter has not been heard. It is my finding that the applicants' allegation that the trial court is

biased has not been proved.

Litigants come to court to seek justice. It is clear that in most cases one of the parties would come out unhappy if his case is either dismissed or he does not get from the court what he/she expected. Courts are meant to administer justice. Whenever a decision is made which is against a litigant, the losing party should not lose confidence in the Court. He or she might have another dispute to file or defend before the same Court. The best way forward is to appeal against any adverse decision. The applicants herein contend that they have lost faith in the trial Court. The matter has not proceeded to full hearing apart from the interim ruling. In my view, if the ruling was in favour of the applicants, the allegations of bias would not have arisen. Equally the applicants would be the ones insisting that the matter be heard by the trial Court and would insist that they have great faith in the Court.

Given the nature of the application herein, I do find that the applicants have not established good reasons as to why the suit should be transferred from Moyale to Marsabit. The Court has to take into account the convenience of the parties and their witnesses. Moyale is about 245 kilometres from Marsabit. It would be quite difficult for the parties to travel all that distance together with their witnesses.

The respondents maintain that there are two Magistrates in Moyale. That position is correct. Since Justice has to be dispensed with by any Judicial officer, I do find that in order to erase the applicants' worries, and for the interest of Justice, the matter can be handled by the other Magistrate in Moyale. This will enable both parties start on an equal footing irrespective of the existing ruling. I believe what is remaining is the hearing of the substantive suit. The second Magistrate in Moyale has not dealt with this matter and there can be no allegations of bias being made against such a Judicial officer even before he handles the dispute.

I do find that there is no good reasons advanced by the applicants necessitating the transfer of the suit from Moyale to Marsabit subordinate Court. For the interest of Justice, I do order that Moyale Civil Suit number 2 of 2018 be heard by the second Magistrate in Moyale who has not handled the case.

In the end, the application dated 2.11.2018 is determined in the above terms. Parties shall meet their respective costs.

Dated and Delivered at Marsabit this 3rd day of April, 2019

S. CHITEMBWE

JUDGE