



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL MISC. APP. 59 OF 2010

VICTORIA KATUKU (Suing as the legal Representative of the Estate of
EUNICE MUENI MUTHAMBA**PLAINTIFF**

VERSUS

- 1. JESSINKAY ENTERPRISES****1ST DEFENDANT**
2. NESFOOD INDUSTRIES LIMITED**2ND DEFENDANT**
3. JULIUS KIBONI**3RD DEFENDANT**

RULING OF THE COURT

1. THE APPLICATION:

The Plaintiff/Applicant has filed a Notice of Motion dated 26th February, 2010 expressed to be brought under the provision of Section 3A and Section 18 of the Civil Procedure Act and all enabling Provisions of the law.

The Application seeks for the following orders namely:-

(1) THAT, this Honourable court be pleased to order that MKS CMCC No. 1062 of 2006 – MACHAKOS; VICTORIA KATUKU (Suing as the legal representatives of the estate of Estate of EUNICE MUENI MUTHAMBA) be transferred to the Chief Magistrate’s court at Mombasa for disposal.

(2) THAT, costs of the application be in the cause.

The Application is based on the following grounds and on the grounds deponed to the annexed Affidavit of **BENARD MUTETI MUNG’ATA ADVOCATE** namely:-

(I) THAT the Chief Magistrate’s Court at Machakos does not have the territorial jurisdiction to hear and determine the suit.

(II) THAT, the territorial jurisdiction hereof lies in Mombasa.

(III) THAT, filing of this suit in Machakos was an inadvertent mistake and or omission.

(IV) THAT, it is in the interest of justice if this application is allowed.

(V) THAT, the Defendant shall suffer no prejudice if the transfer is allowed.

2. The 2nd and 3rd Defendants opposed the application and filed grounds of opposition dated 8th April, 2010 to the effect that this Honourable Court does not have the power/cannot grant the order sought, the suit having originally been filed in a court without jurisdiction.

3. The Applicant's case is that she is aware that the cause of action arose in Mombasa along Mombasa – Malindi road and that the Defendants reside or work for gain in Mombasa but due to an inadvertent oversight or omission on the part of her advocates, the suit was filed in Machakos. The Applicant now requests the court to exercise discretion and transfer the matter to Mombasa, Chief Magistrate's Court for hearing and determination. The Applicant further contends that the Defendants will suffer no prejudice if the transfer sought is granted. The Applicant further averred that this Honourable court should not punish her for the mistakes of her advocate.

4. Counsel for the Plaintiff/Applicant made some oral submissions to the effect that there had been an error on the part of the part of counsel when they filed suit at Machakos instead of Mombasa. It was further submitted that there shall be no prejudice occasioned to the parties if the suit is transferred to Mombasa.

5. Determination:

The issue that this court has to consider is firstly whether or not the court in which the suit had initially been filed namely Machakos had the requisite jurisdiction to hear and determine the same. Secondly, whether the Applicant has presented sufficient reasons to warrant transfer of suit from Machakos, Chief Magistrate's to Mombasa Chief Magistrates Court. Thirdly, whether the Defendant stand to be prejudiced by the said transfer. Indeed the power of this court to transfer cases instituted in subordinate courts is contained in the provision of Section 18 (1) and (2) of the Civil Procedure Act which provides as follows:-

18(1) On the Application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice the High Court may at any stage:

(a) Transfer any suit or other proceedings pending before it for trial or disposal to any 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,

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

(iii) Transfer 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 to retry it or proceed from the point at which it was transferred or withdrawn.

Also Section 15 of the Civil procedure Act provides that suit should be instituted in the place where the cause of action arose or where the Defendant resides or carries on businesses.

The principles upon which this court will exercise its discretion as regards the transfer of cases have been well laid down in the Ugandan case of DAVID KABUNGU =VS= ZIKARENGA & 4 OTHERS KAMPALA HCCS NO. 36 OF 1995 (unreported) in which Okello J stated as follows:-

“Section 18(1) 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 relevant consideration. As a general rule, the court should not interfere unless the expense 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 purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a 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 expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused.....”

Looking at the Plaintiff’s Complaint dated 11th December, 2006 it is clear vide paragraphs 2, 3 and 5 thereof that the Defendants reside and work for gain in Mombasa and that the cause of action arose along Mombasa – Malindi road and therefore by dint of Section 15 of the Civil Procedure Act, the Plaintiff was under obligation to ensure that the suit was filed at Mombasa Law Courts or any other court not far from the cause of action or where the Defendants reside or carry on business. The Plaintiff has confirmed that the complaint was filed at Machakos law courts by error and now wants it transferred to Mombasa Law Courts. This now calls to mind a determination of the first issue namely whether Machakos Chief Magistrate’s Court had the requisite pecuniary or territorial jurisdiction. The Plaintiff’s Counsel indeed confirms that Machakos was not the proper place to have filed the suit. The Ugandan case of DAVID KABUNGO VS ZIKARENKA AND 4 OTHERS KAMPALA HCCS NO.36 OF 1995 (Supra) laid down the principles guiding the transfer of suits from one lower court to another by the High Court and that if it is shown that the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused. This seems to be the position as confirmed in the case of BISHOP CHRISTOPHER NDUNGU VS ANDREW ABUNGU [2006] e KLR where Justice Kimaru held that the High Court cannot exercise its discretion to transfer the suit from one lower court to another if the suit is filed, in the first place in a court which did not have the pecuniary and /or territorial jurisdiction to try it. Indeed there is no dispute at all as to the lack of the Machakos Chief Magistrate’s Court being without territorial jurisdiction to hear and determine the case in view of the clear provisions of section 15 of the Civil Procedure Act. The Plaintiff’s counsel admits this fact and is in agreement that the suit ought to have been filed at the Chief Magistrate’s Court at Mombasa. It is trite law that jurisdiction is everything and goes to the root of any matter that a court of law is seized and therefore if a court lacks jurisdiction to hear and determine a matter then it is not possible for it to seek to transfer that which it does not have power to do so. It follows therefore that the suit had been filed in a court without jurisdiction and thus the plaintiff’s prayer before this court for transfer is hereby refused.

As regards the other remaining issues, I note the Defendant filed defence on 28th February, 2007 in which it issued notice of the lack of jurisdiction by the court to hear and try the case herein and the Plaintiff has been aware of the same all this time but took no action such as seeking to withdraw suit and instituting it at Mombasa. The Plaintiff has not given a plausible explanation as to why she did not take any steps to have suit filed in Mombasa despite being alerted early in time by the Defendants. The Defendants issued the warning way back in 2007 and it has taken quite a long time for the Plaintiff to take appropriate steps. Hence the Plaintiff’s claim that no prejudice will be occasioned to the Defendants is not convincing for it is obvious that the Defendants have already been prejudiced by being sued in a court very far from where they reside or carry on business or where the cause of action arose. My considered view is that the Plaintiff has not made out a strong case for the transfer of the suit.

For the foregoing observations, it is the finding of this court that the Plaintiff's Notice of Motion dated 26th February, 2010 lacks merit. The same is ordered dismissed with costs to the 2nd and 3rd Defendants/Respondents.

Dated and delivered this 16th day of **February, 2017**.

D. K. KEMEI

JUDGE

In the presence of:

Gitonga for Tinogh for Applicant.....

Mulei for Menena for Respondent.....

C/A: Munyao.....