



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KAKAMEGA**  
**MISC CIVIL APPLICATION NO.81 OF 2015**

**COM PAUL MUTIVA .....APPLICANT**

**VERSUS**

**JOSEPH OTIENO .....RESPONDENT**

**RULING**

**Introduction**

1. The Application for determination is the Notice of Motion dated 16/09/2015 brought pursuant to Sections 1A, 1B Section 3A, 18 (1) (a,b), 2 of the Civil Procedure Act Cap 21 Order 47 Rules 6 (1,2) Order 51 Rules 1,3,4,5,7 and 10(2) of Civil Procedure Rules 2010, the inherent powers and jurisdiction of the Honourable Court and all other enabling provisions of the Law. The applicant seeks for ORDERS:
  1. ....spent
  2. **THAT this Court be pleased to transfer Vihiga Civil Suit No.79 of 2011 to the Chief Magistrate's Court sitting in Kakamega.**
  3. **THAT in the alternative Vihiga civil suit No.79 of 2011 be transferred to Hamisi law Courts for hearing and determination.**
  4. **THAT costs of this application be in the cause.**
  5. **THAT such further and other relief that this Honourable Court may deem just and fit to grant.**
2. The application is premised on the grounds set out on the face of the application itself and supported by the affidavit of the applicant CUM PAUL MUTIVA. He depones that he is the 1<sup>st</sup> Defendant in Vihiga SPMC No.79 of 2011 which was initially heard in his absence allegedly because he was not served with summons to enter appearance as he was out of the country. Judgment was then entered against him and his application to set aside the said judgment was disallowed. He appealed to this Court vide Civil Appeal No.90 of 2014 but before the same was heard the parties entered into a consent in Vihiga SPMCC no.79 of 2011 to set aside the exparte judgment entered against him. Under the said consent he deposited the decretal sum in a joint interest earning account.
3. The appeal was thereafter withdrawn by consent and Vihiga SPMC C No.79 of 2011 was set down for hearing before the same trial Court on 17/09/2015. The applicant says he is apprehensive that he will not have a fair trial before the same trial Court at Vihiga on grounds that there is likelihood of bias because both himself and the defendant live within the vicinity of the Vihiga Court. He asserts that the trial Magistrate who handled VIHIGA SPM CC No.79 of 2011 was biased in her decisions against him and he is not likely to get justice within the same Court even if the case was to be placed before a different judicial officer.

## **Response to the Application**

4. The application is opposed. JOSEPH OTIENO the Respondent has filed a replying affidavit on the 23/09/2015 wherein he explained that the trial Court dismissed the applicants application for setting aside judgment dated 17/06/2014 because the applicant who had been served and had appointed the firm of M/s D.C CHITWA & CO. ADVOCATES to act for him did not appear in Court to prosecute the application. See annexures "J.02 (a) and (b). That the Court could not therefore exercise its discretion in favour of the applicant if he (applicant) did not come to Court with clean hands. He also deponed that the applicant has not explained how the firm of D.C CHITWA & CO. ADVOCATES came to represent him and he had not taken action against the said firm of advocates for their initial failure to represent him. He maintained that the applicant's application dated 17/6/2014 at the Vihiga Law Courts was dismissed on merits and that such a decision by the trial Court does not amount to bias by the Court.
5. Further, the respondent contends that the consent to withdraw the appeal and set aside judgment was entered into on the basis that the matter should be disposed expeditiously, yet the applicant has on all occasions sought for adjournment in the case at the Vihiga Law Courts from the time it was set for hearing again and has at no time asked the trial Court to disqualify itself hence the present application is brought in bad faith with intent to delay the matter further. He claims that the applicant is out on a shopping spree to find a Court that is friendly to him and this should not be allowed. That there are no sufficient grounds to have the matter dealt with by a different Court and again there is a newly posted Magistrate at Vihiga Law Courts. The respondent contends that transferring the case to another Court will lead to unnecessary expenses to him.

## **The Submissions**

6. The application was canvassed orally by both advocates for the parties. Mr. Nyanga made submissions on behalf of the applicant whereas Mr. Athung'a made submissions on behalf of the Respondents.
7. Mr. Nyanga in his submissions explained how Vihiga Civil Case 79/2011 came into being, that it was filed after a criminal case between the applicant and Respondent was heard by Court 1 in Vihiga where the applicant was the complainant and the respondent the accused. He reiterates that Vihiga Civil case 79/2011 was heard by Court 2 and the case proceeded when the applicant was in America and judgment for kshs.180,000/= entered for the respondent. When the applicant came back he found his property had been proclaimed. His application to set aside the judgment was refused and he was asked to pay the decretal sum which prompted him to file an appeal. Parties agreed by consent that the suit be heard a fresh upon the applicant depositing the decretal sum into an interest earning account with the respondent.
8. He submitted that the applicant is not comfortable if the case proceeds at Vihiga as there is possibility of bias. He also stated that no prejudice will be caused to the Respondent if the case is transferred to either Kakamega CM's Court or Hamisi SPMS's Court. He denied that they are shopping for a Court but that the applicants position is that a Court which found against the applicant even when he had not been heard is unlikely to treat him fairly.
9. Mr. Athunga for Respondent submitted that the applicant had not laid down the basis for the alleged bias because the application to set aside "JO 1" invoked the discretionary powers of the Court. He added that any litigant seeking such orders must come to Court with clean hands and be truthful. He submitted that the applicant was not in America as alleged and that there is an affidavit of service which was not challenged. He also submitted that there was a notice of appointment of M/s Chitwa Advocates which shows that the applicant was served and he appointed an advocate to act on his behalf.
10. Mr. Athunga was of the view that it is the applicant's conduct that made to the trial Court to dismiss his (applicant's) application to set aside the judgment. He submitted that the real question was whether the mere fact that a decision was made by a Court amounts to bias as there is a right of appeal. He added that the applicant was condemning the whole of Vihiga Court whereas there is now a new Magistrate. He submitted that if the applicant is dissatisfied with the trial Court (No.3) then the matter can be taken to Court 1. He also submitted that the mere fact that parties live near Court precincts cannot be a ground for bias. He stated that if the case is transferred, the

respondent will suffer prejudice in terms of unnecessary financial expenses. He added that there is nothing in the pleadings that shows that the respondent has been intermeddling with the Court at Vihiga. He submitted that the applicant is clearly not desirous of having the case concluded because of his delaying tactics. Counsel finally submitted that the integrity of Courts must always be preserved.

### **Issues for Determination**

11. The issue for determination herein is whether this Court ought to transfer Vihiga Civil suit no.79 of 2011 to CM's Court sitting at Kakamega or transfer the same to Hamisi Law Courts. Section 18 of the Civil Procedure Code gives power to the High Court to withdraw and transfer cases instituted in subordinate Courts. The Section 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, 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 proceeding 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 proceeding 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.”**

### **Analysis and Findings**

12. Where a party seeks an order to transfer the trial of a suit pending in one Court to another Court having jurisdiction, the applicant must make out a reasonable and strong case for the transfer. The factors the High Court considers are more than the mere balance of convenience though balance of convenience is relevant. Other factors to be considered by the Court apart from the balance of convenience are questions of expense, the interest of justice and possibilities of undue hardship.

13. In the matter before me now, the applicant has raised the issue of bias for consideration in order to transfer his case from Vihiga Law Courts to either of the two Courts suggested. As rightly explained by Mr. Athunga in his submissions, the application that was made before the trial Court at Vihiga Law Courts for setting aside its judgment, invoked the discretionary powers of the Court and any litigant seeking such orders must always come to Court with clean hands and also be truthful.

14. The applicant, as shown by the evidence on record, was not candid to the trial Court. He actually lied to the trial Court at Vihiga when he annexed copies of the pages of his passport “(PM 2)” which on a closer reading show that the applicant was in Kenya at the time he alleged he was out of the country. It is evident also that he was served and he appointed a representative. He has not challenged the service or the appointment of Chitwa & co. Advocates. Because of this mischief the lower Court had no alternative but to exercise its discretion and dismiss the applicant's application as it did. I find that the trial Court was not biased as alleged and therefore this Court sees no reason to transfer the case from Vihiga on this ground. This Court will also not transfer the case from Vihiga because of alleged fear of interference by the respondent because he stays

- close to the Courts. This allegation is unfounded and has no basis because even the applicant stays close to the Court. This Court will also not transfer the applicants case from Vihiga Court simply because a criminal case involving the parties was heard in Court no.1 Vihiga and now Court 2 is hearing the civil case. Those reasons have no basis. If Courts were to transfer cases on such flimsy reasons no substantive justice would be done in any matter pending before them.
- 15.I also find that the respondent will be prejudiced financially if this case is transferred to any of the suggested Courts. Both the applicant and the Respondent reside at Vihiga and moving the case to another Court will mean that the respondent would be forced to spend more on transport and general upkeep as he pursues justice.
- 16.Lastly, and this is very important, though a reading of Section 18 of the Civil Procedure Act shows that a window exists through which proceedings instituted in the subordinate Courts and which subsequently become untenable in such Courts due to emergent developments dethroning the jurisdiction of the subordinate Courts can be transferred to the High Court or to other subordinate Courts for trial and disposal, the above procedure does not apply so as to give the High Court jurisdiction to transfer suits from itself to a subordinate Court or from a subordinate Court to any other dispute resolution agency as by Law established without a proper basis. This is the position adopted by Mutava J. in the case of **GIBSON K. LAGAT -VS- KENYA KAZI SERVICES LTD [2012]** e KLR. No proper basis has been laid in the instant case to warrant transfer of the case as prayed.
- 17.In that regard and for the reasons above stated, I find no merit in the applicants Notice of Motion dated 16/09/2015. The same is hereby dismissed with costs to the respondent.

Orders accordingly.

Ruling delivered, dated and signed in open Court at Kakamega this 8<sup>th</sup> day of October 2015.

In the presence of:-

Mr. Ariko h/b for Mr. Nyanga for Applicant

Mrs Muleshe h/b for Mr. Athunga for Respondent

Mr. S. Lagat - Court Assistant

**R.N. SITATI**

**J U D G E**