



REPUBLIC OF KENYA

High Court at Machakos

Miscellaneous Application 3 of 2012

JOSHUA MBAISI MACKENZIE.....PLAINTIFF

VERSUS

ATHI RIVER STEEL PLANT LTD.....DEFENDANT

RULING

1. The Applicant herein has filed two cases at the Kajiado Law Courts against the same Defendant. The cases are **Kajiado PMCC 359'B' of 2005** and **Kajiado PMCC 356'B' of 2005**. By a Notice of Motion dated 18th January 2012 he now seeks a transfer of both suits to the Chief Magistrate's Court in Machakos on the ground that the suits were filed in a court which does not have the geographical jurisdiction to entertain them. The Application is supported by an Affidavit sworn by Odeo Phanice Iyapa, the advocate handling the matter for the Plaintiff/Applicant. He states in the Affidavit that the Kajiado Law Courts do not have the jurisdiction to hear the cases, ostensibly because the Chief Justice gave practice directions on 19th February 2009 to the effect that suits should be filed where the cause of action arose.

2. During oral hearing, Mr. Odeo appeared for the Applicant. He argued that the suit should be transferred to the proper court since the mistakes of the previous advocate should not be visited on the litigant. He relied on **Urbanus Kioko v Athi River Steel Plant Ltd, Civil Appeal No. 95 of 2003** wherein Justice Visram stated that where a matter is filed in the wrong court, the litigant should be allowed to take it to the proper court.

3. Mr. Masika who opposed the Application argued that the case should not be transferred if the court had no jurisdiction to hear it.

4. The only issue in this case is whether the court should transfer a case which was filed in a court which lacked jurisdiction to hear it. Such question has been dealt with by several courts in the past. In **Kagenyi v Musirango & Another 1968 EA 43**, Sir Udo Udoma stated that an order for the transfer of a suit from one court to another cannot be made unless the suit has in the first instance been brought to a court which has jurisdiction to try it. The position in **Kageni v Musirango** was adopted by Justice Ringera in **Omwoyo v African Highlands & Produce Co Ltd (2002) 1 KLR 698** where he also stated that the High Court cannot transfer a suit where the initial court did not have the jurisdiction to entertain the case. Justice Ouko reiterated the same position in **Joseph Karisa Katsoma & 3 Others v Samuel Charo Marabu (2005) eKLR**.

5. The **Omwoyo** case, **Kagenyi v Musiramo** and **Joseph Karisa** are all emphatic that even though the High Court has inherent jurisdiction to transfer a suit, such power shall not be exercised when the initial suit was filed in a court which had no jurisdiction in the first place, to hear and determine the suit.

6. In this present case, the Applicant by his own admission filed the case in a court which did not have the territorial jurisdiction to hear it. The reason he advances to justify the transfer is that the practice directions issued by the Chief Justice in 2009 required that cases be filed in the places where the cause of action arose. With respect, counsel cannot claim that it is those practice directions that made it a rule that cases should be filed in the nearest court. This has always been the rule – Sections 11-18 of the Civil Procedure Act predate the practice directions, which only served to clarify the rule and to advise registry staff to insist on compliance.

7. I have read **Urbanus Kioko v Athi River Steel Plant Ltd, Civil Appeal No. 95 of 2003** which appears to go against the general rule that the High Court should not transfer a suit filed in a court which lacks jurisdiction. This was an appeal in a case which had been dismissed for want of jurisdiction. Justice Visram was of the opinion that this was too harsh, stating instead that the magistrate who first heard the matter should have allowed the litigant to transfer the suit to another court. He proceeded to allow the appeal and to order the suit to be transferred to another court. Looking at this case, I do not think it is applicable in the present application. What I am faced with is an Application for a transfer by the High Court rather than an appeal against a dismissal such as the one Justice Visram (as he then was) was faced with in **Urbanus Kioko Case**.

8. In the circumstances, I am bound by the rules which have been set by my predecessors in similar applications – that the High Court cannot order a transfer of a suit which was filed in a court which did not have jurisdiction to hear it in the first place. This Application must therefore fail. The Applicant shall pay the costs.

DATED at NAIROBI this 29th day of APRIL 2013.

JOEL NGUGI

JUDGE

DATED, SIGNED and DELIVERED at MACHAKOS this 9th day of May 2013.

L.N. MUTENDE

JUDGE