



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS

MISCELLANEOUS APPLICATION 141 OF 2007

AINSWORTH WASUA KILONZO..... APPLICANT

VERSUS

RUARAKA METALS LTD..... 1ST RESPONDENT

MOHAMED MALIO KILO..... 2ND RESPONDENT

RULING

1. The Application dated 16/7/2008 is premised on Section 13 (1) (b) (ii) and Section 3A of the Civil Procedure Act. The Applicant, Ainsworth Wasua Kilonzo seeks orders of transfer of **Kangundo SRMCC No.603/1999** to the Resident Magistrate’s Court at Voi for hearing and determination.
2. The grounds in support are that;
 - i. **THAT** the Plaintiff’s suit arises out of a Road Traffic Accident that occurred on 05/08/1996 along **NAIROBI-MOMBASA ROAD**.
 - ii. **THAT** by an oversight on the part of the Plaintiff’s advocate the suit was filed at the Senior Resident Magistrate’s Court at Kangundo.
 - iii. **THAT** all along the defence has not raised any issue on jurisdiction.
 - iv. **THAT** the Plaintiff sustained very serious injuries in the subject accident and it is only fair and just that the matter is adjudicated upon by the court of law.
 - v. **THAT** it is in the interest of justice that the orders sought are granted.”
3. I have read the Supporting Affidavit and I have heard the advocate for the Respondents in his submissions and clearly the Application has no merit for the following reasons;

Firstly, it is conceded that the court in Kangundo had no jurisdiction to determine the suit and that is indeed so. Once there is such an admission then I agree with the advocate for the Respondents that there is nothing to transfer because as Ibrahim J stated in **Charles Njehia vs Barclays Bank of Kenya H.C.C.Misc. 249/2005 (Eld.)**;

“The lack of jurisdiction has been conceded by the Plaintiff. Having been filed in a court without

jurisdiction, there is nothing to take out to be heard elsewhere or transferred to another court.”

4. Ringera J in **Omwoyo vs African Highlands & Produce Co. Ltd (2002) 1 KLR 698** stated as follows:-

“In *Kagenyi v Misiramo & Another* (1968) EA 48, Sir Udoma Udoma CJ 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.”

5. The Application before me is in the same category and must fail for that fundamental reason only.

6. Secondly, the Applicant has stated that he suffered serious injuries during the accident leading to the suit in issue and that his advocate filed the suit in the wrong court and further that the wider interests of justice would necessitate that he should be heard. That may well be so but the court’s judicial heart in the name of discretion cannot be invoked here. It has been said that jurisdiction is everything and without it there is nothing. Ibrahim J in **Wainaina J** (supra) said so and I agree. Ringera J was alive to that issue in **Omwoyo** (supra) and he approved the dicta of Lord Griffiths in **Kettleman vs Hansel Properties Ltd (1988) 1 ALL E.R. 38 at 62** where the learned judge expressed himself thus;

“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.”

7. How can I but agree and hold that the Application before me has no merit for the above reasons and is dismissed with costs.

8. Orders accordingly.

Dated and delivered at Machakos this 2nd day of **June 2009**.

ISAAC LENAOLA

JUDGE

In presence of: **Mr Sila h/b for Mr Ombati for Respondent**

N/A for Applicant

ISAAC LENAOLA

JUDGE