



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Misc. Appli. 20 of 1997

HEINZ ISBRECHT'..... PLAINTIFF

- Versus -

CHARLES OCHIENG NDIGA DEFENDANT

RULING

The application under consideration is the Notice of Motion dated 25.2.9.7 brought under Section 18(1) and (2) of the Civil Procedure Act seeking the main prayer

"That the Chief Magistrate's civil suit No. 5322 of 1996 currently pending for trial be transferred to the High Court of Kenya at Mombassa for hearing and final disposal".

On the face of it, it was a straight forward application but it generated strong objections and legal submissions.

There is no dispute that the High Court has the discretion under Section 18 of the Act to

"withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter - try or dispose of the same."

It is the manner of exercise of such discretion that was contentious.

The suit filed before the Chief Magistrate's Court in December

1996 claimed a sum of Shs. 500,000/= from the defendant on account

of breach of a building contract pleaded in the suit. The claim was within the jurisdiction of the

Chief Magistrate and was instituted by the plaintiff in person. Then in February 1997 the plaintiff in that suit instructed M/S Tindika & Co. Advocates to represent them. On perusal of the plaint and considering the instructions given to them by the plaintiff, those Advocates advised that the plaintiff was entitled to much more than he had pleaded and the plaint ought therefore to be amended. The catch was that the amendment could not be done before the Chief Magistrate because it would then oust his jurisdiction and if that happened then the suit could not be transferred to the High Court. The Transfer sought is therefore for the High Court to be able to handle the matter and for the plaintiff to be at liberty to apply to amend his pleading before the High Court. The claim when the plaint is eventually amended will be in excess of Shs. 1.2 million. A draft of the intended amendments is annexed to the Application.

For the Applicant it was submitted by Mr. Tindika that the principles under which the High Court would exercise its discretion have been discussed in various authorities which he cited and reviewed at length. These included Kaluba -Vs- Kajaya [1957] E.A.312, which held that the discretion should not be exercised without some reason stronger than the mere balance of convenience. He submitted that the transfer was not being sought for that reason.

Then there is Kagenyi -Vs- Musiramo & Another (1968) E.A. 43

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where it was held that an order for the transfer from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. On this Mr. Tindika pointed out that the Chief Magistrate has jurisdiction as the case before him currently stands. An application for transfer can therefore be entertained.

It is also stated in that case, on the principles applicable that

"There are also authorities for stating that the principal matters to be taken into consideration are balance of convenience, questions of expense, interests of justice and possibilities of undue hardship."

Mr. Tindika submitted that it was in the interests of justice that the transfer be allowed because, if the plaintiff's case is determined as it is before the Chief Magistrate, then the plaintiff will be shut out of the legal process of claiming any further amounts and will lose in excess of Shs. 700,000/=. No other suit can be filed. He referred to Ganatra -Vs- Uganda Electricity Board [1963] E.A. 26 where the transfer was being sought on the ground

that the combined amounts of the claim and counterclaim would exceed the jurisdiction of the trial court but it was held that so long as the two are within the jurisdiction of the trial court, the transfer of the suit was unnecessary. He posed the query begged by the decision, that is, whether the suit would have been transferred if the counterclaim exceeded the jurisdiction of the trial court.

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Finally he referred to passages in Halsbury's Laws of England and MULLA on the Code of Civil Procedure on the general powers of the court to transfer cases: thus in Halsburys:

"The courts power to transfer proceedings from one court to another is a useful corrective to ensure that proceedings wherever begun or whatever forum the plaintiff has initially chosen should be dealt with or heard or determined by the court most appropriate or suitable for these proceedings. When making or refusing an order of transfer the court will have regard to the nature and character of the proceedings the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case."

And from MULLA on the Indian Code of Civil Procedure Section 24

which is in pari materia with Section 18 of our Civil Procedure Act

save for the provision that a subordinate court has the same power of transfer as the High Court:-

"The plaintiff as arbiter litis or dominus litis has the right to choose any forum the law allows him. This right is subject to control under Section 22 & 24 (Section 17 & 18). The burden lies on the applicant to make out a strong case for a transfer. A mere balance of convenience in favour of 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

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whether the applicant has made out a case to justify it 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".

Relying on these authorities Mr. Tindika submitted that there was no intention on the plaintiff's part to cause injustice to the other party. His only wish is to have the quantum of damages payable to him determined by the proper court. There will be no question of expense or undue hardship as

both courts are still within Mombasa.

In response to these submissions Ms Munyari for the Respondent opposed the application on grounds filed on 5.3.97. These state that the application has no merits; is frivolous and abuse of legal process; no reasons for transfer has been shown; no explanation is given as to why the intended further claim was not pleaded initially; and finally that the intended proposed claim is totally different from the initial claim. She referred to the initial plaint filed before the Chief Magistrate's Court and compared it with the intended amended plaint and submitted that the claims were different and will prejudice the defendant's defence. The plaintiff should have decided once and for all what he wanted to claim and he did in fact do so when he filed the suit before the Chief Magistrate's Court. He should not be allowed to transfer the suit for the purpose of amending the plaint. If he wishes he should withdraw the suit and file it afresh in another court.

To this Mr. Tindika responded that the claim was not different

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since the cause of action was still the same. It is for breach of contract. The figures emanating from that cause of action are a matter of mathematics.

As for the plaintiff deciding once and for all what he wishes to claim, he submitted that the law allows any party to amend pleadings at any stage and that right cannot be taken away.

I have considered the application fully and the submissions of counsel. I accept the principles cited from various authorities as most appropriate in assisting the court to exercise its wide discretion that is granted under Section 18 of the Act. Those principles have been followed by eminent Judges in other jurisdictions and are persuasive enough for our purposes.

It is clear and is explained by the Applicant that this application was made at a stage when the Chief Magistrate's Court has jurisdiction to try the suit filed before it. If the amendments had been done there and the jurisdiction of that court had been ousted thereby, then it is clear that the application would have been a non-starter. The Applicant in the situation he finds himself had two options. Either to withdraw the suit before the lower court and file it in the High Court, or apply to the High Court to have it transferred and then apply for the desired amendments there. The first option would involve the loss of all filing fees and payment of costs of the withdrawal. It would also involve the payment of further fees for the entire claim made in the High Court.

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The other option would mean the payment of costs for the Application for transfer and also payment of further fees in the High Court for the extra sum claimed. Only the fees paid towards the original claim will be saved. As far as expense goes it would certainly be more prudent to take the second option and I do not blame the plaintiff/applicant for opting to do so.

The main objections taken are that the claim intended to be made in the High Court is entirely different. I have perused both the plaint before the lower court and the intended amendments and I am persuaded that the cause of action remains the same. Only the figures will change. At any rate the Respondent will have the opportunity once the application for amendment is made to oppose it on any grounds open to him. The court will also consider the question of costs. No objections are raised on convenience or other grounds stated in the authorities cited above. In considering the

totality of the entire matter I see no prejudice caused on the defendant/respondent which cannot be atoned for by an order for costs. It is in the interests of justice that the entire claim of the plaintiff is considered in one suit as he cannot in law file different suits on the same cause of action.

I grant the application for transfer as prayed.

The costs of the Transfer shall be paid to the defendant/respondent in any event.

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Dated at Mombasa this 11th day of July, 1997.

P.N. Waki JUDGE 11/7/97

Coram: Waki, J.

Tindika for applicant

Muriuki holding brief for Ms Munyari for respondent Court Clerk - Mutua Ruling delivered dated and finished in Chambers.

P. N. WAKI

JUDGE