



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION NO 42 OF 1992**

**HAMISI SAIDI KIZONDO .....APPLICANT**

**VERSUS**

**HASSAN SAIDI DELE .....RESPONDENT**

**MAJOR HENRY MWALUGHA.....RESPONDENT**

**RULING**

This application by way of a summons in chambers is brought to this Court under section 18 of the Civil Procedure Act. It seeks an order that

“this Honourable Court be pleased to transfer Kwale RMCC No 29 of 1991 from the Kwale Resident Magistrate to Mombasa”.

The suit in the Court of the Resident Magistrate was instituted by two people namely Hassan Saidi Dele and Major Henry Mwalugha who are the respondents to this application. They oppose the application for transfer. The applicant herein, Hamisi Saidi Kizondo, is the defendant in the action before the magistrate. I think the applicant was wrong to bring this application to Court by way of a summons in chambers. Section 18 of the Civil Procedure Act under which the application is brought does not provide for the manner in which applications are to be made. I am not aware of any other provisions in the Civil Procedure Rules which deal with the manner of bringing an application for transfer to the Court. That left the applicant only with order 50 rule 1 which provides:-

“All applications to the Court, save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open Court”.

This application should have been brought by way of notice of motion and not by a summons in chambers. The application was however not objected to on this score and I shall deal with it as though it was properly brought to Court.

As I have said, it is the respondents who sued the applicant in the Magistrate’s Court. There is no allegation that the respondents’ suit was wrongly filed in the Magistrate’s Court; in other words, it is not alleged that the magistrate has no jurisdiction to try the respondents’ case. The applicant had to file a defence to the action in the Magistrate’s Court and in his defence he raised a counterclaim. Under order VIII rule 2 the applicant was entitled to file his defence and to raise the counterclaim in the same defence. It would have been cumbersome for the applicant, to simply file his defence in the Magistrate’s Court and then file a separate suit in the High Court dealing with the matters raised in the counterclaim. It is agreed that the matters raised in the counterclaim are outside the jurisdiction of the Resident Magistrate at Kwale and it is on that basis that Mr Omwitsa for the respondents opposed the application, arguing that the counterclaim was “filed” in a Court without jurisdiction and accordingly this Court has no jurisdiction to transfer it. Mr Omwitsa relied on the Uganda High Court case of *Kagenyi v Musiramoo and another* [1968] EA 43, where the then Chief Justice of Uganda Sir Udo Udoma held 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 instance brought to a Court which has jurisdiction to try it” - see “Holding” No 2

at pg 43.

The decision in the Ugandan case is not binding on me but even if it is right, it cannot apply in the circumstances of this case. In the Ugandan case, it was the plaintiff who, knowing well that the magistrate had no jurisdiction, instituted the suit in the Magistrate's Court. In the present case, the applicant did not institute any suit in the Magistrate's Court at Kwale. He had to file his defence to the claim made against him in the Kwale Court and as I have pointed out he was entitled to raise a counterclaim in the defence. He did exactly that and it is the claim made in the counterclaim itself that is outside the jurisdiction of the magistrate. In these circumstances I am satisfied the applicant is entitled to a transfer as prayed. Accordingly I grant this application in terms of the prayer contained in paragraph one of the summons dated the 21st February, 1992 and filed in Court on the 10th March 1992. The costs of the application shall be costs in the transferred case. These shall be my orders.

**Dated and delivered at Mombasa this 22nd day of April , 1992.**

**R.S.C OMOLO**

**JUDGE**