



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL SUIT NO. 537 OF 2016

COUNTY GOVERNMENT OF KAKAMEGA.....APPLICANT

VERSUS

UFANISI FREIGHTERS (K) LTD.....1ST DEFENDANT

TRAWLERS LIMITED.....2ND DEFENDANT

R U L I N G

1. In this file, the applicant, County Government of Kakamega, seeks orders that Mombasa Civil No. 373 of 2016 and Ufanisi Freighters Ltd vs County Government of Kakamega and CMCC No. 374 of 2016 Trawlers Ltd vs County Government of Kakamega be withdrawn from the Chief Magistrate Court, Mombasa and transferred to the Chief Magistrates Court Kakamega.

2. The application is brought pursuant to the provisions of overriding objectives of the court, the inherent powers of the court and section 18 of the Act and grounded on the fact that the cause of action pleaded is an alleged breach of contract for provision of services whose performance was intended within the county of Kakamega where the defendant is situate and where all the defendants witness reside hence the magistrates court in Mombasa lack territorial jurisdiction to entertain the matter. The application was supported by the affidavit of Justus Daniel Sitati. Sifuna who essentially reiterated the grounds of the application.

3. The application was opposed by the Respondents who filed a Replying affidavit by JUSTUS KEWANY. Other than the contention that the court in Mombasa has the requisite jurisdiction in the matters the deponent raised the question that the matter had been dealt with by an application to strike out the statement of defence and that a ruling was awaited.

4. In order that the order I may issue here is effective and not Superfluous, I have called for the two files for perusal and to establish for myself the current status of both. My perusal of the two files reveal that the ruling in both was delivered on the 18/11/2016 and the statements of defence were indeed struck out and judgment entered for the plaintiffs, now respondents in this matter.

5. That development now begs the question on how desirable it is to make any order of transfer. This court appreciates the provision of section 18 of the Civil Procedure Act to grant to it power to transfer only matter pending determination before the lower court. To me there is no power to transfer a matter

that stands determined. The provision reads:-

Power of High Court to withdraw and transfer case instituted in subordinate Court

1. On the application of any of the parties and after notice to the parties and after hearing such of them as desire 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.

6. As today when I deliver this decision Mombasa CMCC No. 373 and 374 both of 2016 stand defamed and there is nothing to be transferred to the Chief Magistrate Court sitting at Kakamega for trial of or disposal. That being the position, the application dated 22/7/2016 has been over taken by event and is thus dismissed.

7. I however, hold the view that if not for the fact of the suit having been determined, the application was otherwise not baseless but was otherwise well founded. For that reasons and even though the applicant has failed, this is a matter that I hesitate to allow the costs follow the event. That each party shall meet its own costs.

It is so ordered.

Dated and signed at **Mombasa** this day **19th** day of **December 2016**.

HON. P.J.O. OTIENO

JUDGE



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