Case Number:	civ case 1454 of 03
Date Delivered:	16 Feb 2004
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	FRED A. OCHIENG
Citation:	ISMAIL ADAWA EDO & ANOTHER vs SAMEHA KASSIM SHEIKH & TWO OTHERS[2004] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Civil
History Magistrates:	-
County:	-
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGHC OURT OF KENYA AT NAIROBI
CIVIL CASE NO.1454 OF 2003

ISMAIL ADAWA EDO……1ST PLAINTIFF

MOHAMEDNUR ADAWA EDO……2ND PLAINTIFF

SUING ON BEHALF OF ABDIKADIR ADAWA EDO & OTHERS

VERSUS

SAMEHA KASSIM SHEIKH & TWO OTHERS……DEFENDANTS/RESPONDENTS

RULING

This is an application seeking to transfer RMCC NO. 9 of 2003 from the Resident Magistrate's court at Mandera, to the High Court of Kenya at Nairobi.

The application was filed by 2 applicants, Ismail Adawa Edo and Mohamednur Adawa Edo, who were suing on behalf of all the legal representatives of 12 other named persons.

The application had also incorporated a further prayer, for the stay of proceedings of the case at Mandera, as it was otherwise anticipated that the said case would proceed to trial on 8th December, 2003. This limb of the application was dealt with by Aluoch J on 25th November, 2003, when she ordered that the proceedings be stayed at Mandera. The order for www.kenyalaw.org stay was to remain in force until the interpartes hearing of this application, which was slated for 28th January, 2004.

The application was filed pursuant to the provisions of O.L. rule 1, Section 18 (1)(b)(i), 2 and Section 3A of the Civil Procedure Act (Cap 21).

Before analyzing the application further, I deem it necessary to recite in full the provisions of Section 18 of the Civil Procedure Act. The section provides as follows:

"(1) On the application of any of the parties and after notice to the parties and after hearing each 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."

The applicants have cited the reasons for their intention to have the case transferred from the Resident Magistrate's Court Mandera to the High Court, Nairobi. The 2 principal reasons are that the suit was wrongly filed at the Resident Magistrate's Court at Mandera; It is then pointed out by the applicants that the said Resident Magistrate's Court at Mandera does not have jurisdiction to try and dispose of the case.

In answer to the application the respondents filed "Grounds of Opposition", dated 19th January, 2004. It was the contention of the respondents that the application was incurably defective, misconceived and bad in law. The respondents also expressed the view that the application was merely vexatious incompetent and an abuse of the Court Process.

In the applicant's submissions, his advocate, Mr. Nyariki informed the court that the subject matter of the suit was land. The said land was situate at Mandera. He also informed the court that the suit was instituted by the applicants in person. I believe that this bit of information was given to the court with a view to achieving a two-pronged result, namely to exonerate the advocate from any blame for the initial choice of the court at which the proceedings were instituted; and secondly to earn some sympathy for the applicants, in respect of actions which they undertook as laymen. If that be the case, I would readily state that the intentions have been entirely successful: the advocates are exonerated from blame, and the applicants have earned themselves some sympathy of the court. However, that alone is not sufficient nor the right manner of obtaining the orders sought.

The applicants therefore went on the explain that the value for the suit property was in excess of Kshs.700,000/=. I believe that the value of the suit property was brought into play, so as to illustrate the fact that the Resident Magistrate's Court, Mandera, was probably lacking the pecuniary jurisdiction to entertain the suit. By this submission, the applicants were amplifying the fact that the magistrate's court did not have jurisdiction to try and dispose of this case.

In an endeavour to explain the choice of Nairobi as the intended venue for the case to be transferred to, the applications informed the court that the Defendants are carrying on business in Nairobi. If the suit was transferred to the High Court Nairobi, the Applicants would have brought themselves within the provisions of Section 15 of the Civil Procedure Act.

The applicants did submit that the High Court has unlimited powers under Section 18 of the Civil procedure Act to transfer the suit to the High Court. I was therefore asked to exercise the said powers by ordering that the case be transferred from the Resident Magistrate's Court Mandera to the High Court at Nairobi.

In answer to the application, the respondents' advocate, Mr. Aming'a, submitted that the application was bad in law and incurably defective. He said that once the applicants' advocates had conceded that the suit had been wrongly before a court that was lacking jurisdiction to try it, the whole suit was a nullity ab initio. Mr. Aming'a cited the case of **Kagenyi V. Musiramo & Another [1968]EA 43**, for the submission 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.

The respondents also submitted that the suit pending before the magistrate's court at Mandera was one which purports to be a representative suit. However, the said action is said to have failed to comply with the provisions of O.1 rule 12 of the Civil procedure Rules, which require the party instituting the proceedings to obtain written authority, which should then be filed in the case. The respondents informed

the court that no such authority had been filed in the magistrate's court at Mandera.

It is the view of this court that lack of written authority in the magistrate's court Mandera is not an issue that has a direct bearing on the present application for the transfer of the case. If the said authority is a mandatory pre-condition to the filing of a case by a few individuals who were doing so an behalf of many other persons, that would constitute a further ground upon which the respondents could attack the case which is before the Resident Magistrate's Court.

When the court asked the applicant's advocate to respond to the decision in **Kagenyi V. Musiramo**, he submitted that the said authority was not binding upon this court. He said that the decision was merely persuasive. I therefore invited the 2 advocates for the parties to provide me with legal authorities on Section 18. But although I allowed the advocates a period of 3 days to find authorities, none of them provided the court with any more authorities.

This court accepts the submissions of the applicant, to the effect that the decision of Sir Udo Udoma C.J. in the **Kagenyi V. Musiramo** case is not strictly binding on me. The decision is definitely persuasive, and this court has not been given any reason why the decision ought not to be followed by me. I have compared the wording of the provisions of S.18 as cited in the Kagenyi case, to the provisions of the equivalent section in the Kenya Civil Procedure Act, and found that they are the exact replica of each other. I must also say that I find the reasoning of Sir Udo Udoma to be wholly sound. I therefore see no reason to depart from it. If anything I wish to adopt the words of Sir Udo Udoma (at page 45) when he stated as follows:

"It seems to me that the suit having been instituted in a court without jurisdiction it would be incompetent for this court to have the suit withdrawn therefrom. When the attention of counsel for the Applicant was drawn to this aspect of the matter, he contended that regardless of the fact that the suit had originated in a court without jurisdiction, it was competent for this court to exercise the powers conferred upon it by S.18 of the Civil procedure Act. I do not agree with this contention.

While it may be argued that since the Provisions of S.18 of the Act do not restrict the powers of the High Court in this respect, it is difficult to see how a wrongly constituted suit could be transferred to another court for trial especially as the jurisdiction of the court of origin of the suit, which is a fundamental question is involved."

Having delivered himself thus, Sir Udo Udoma arrived at the following conclusion:

"In the result, this application is refused. It is dismissed because the subject matter of the application on the admission and showing of the applicant having been instituted in a court without jurisdiction, namely, the court of a magistrate grade II, Bukoto, Kabila is incompetent for this court to transfer the same to the High Court for hearing and determination."

In most respects the facts of the **Kagenyi Case** are reflected in the present case. The lack of jurisdiction is readily admitted by the applicants in paragraph 8 of the supporting Affidavit of Ismail Adawa Edo. Indeed the fact that the magistrate's court does not have jurisdiction is cited by the applicant as the main ground upon which the application is founded.

In the case of Gitasu **V. Waithaka & Another [2002] LLR 1708 (CCK),** Mwera J restated the legal position quite categorically. He held as follows:

“This court on 20th March 2002 found that in fact case number 1056 of 2001 ought not have been filed before the Chief Magistrate of Nakuru because she lacked jurisdiction right from the beginning.

The court was satisfied that this suit ought not have been filed at Nakuru right from the beginning. It was a nullity for want of jurisdiction and so this court would not transfer a nullity.

This court could not transfer a nullity at all. And because it was not asked to strike that suit out it left it there even as a nullity.”

By now it should have become clear that this application is without merit, and the same is therefore dismissed. The costs of the application are awarded to the respondents. Furthermore, as the respondents have expressly sought orders to strike out not only the application but also the suit, I hold that the most logical consequence of dismissing the application should be given effect. Accordingly, I make the consequential orders, dismissing **RMCC NO.9 of 2003, Mandera – Ismail Adawa Edo & Others V. Sameha Kassim Sheikh**. Costs of that suit are awarded to the Defendants.

DATED at Nairobi this 16th day of February 2004.

FRED A. OCHIENG

Ag. JUDGE