



- d) That all witnesses to the suit from both sides are residents within Tororo District Uganda.
- e) That the balance of convenience and ends of justice will best be served if the suit is transferred for disposal in the Chief Magistrate's Court Tororo.

The Application is supported by the affidavit of **Simeon Ochieng Awada**. In reply the Respondent **Wilson Naluhuba** deponed an affidavit in reply contesting the said application.

When this matter came for hearing, Counsel for the applicant argued the application under two major areas:

1. Requirements of the law.
2. Balance of convenience.

### **Requirement of the Law**

Under this area, grounds 1, 2, 3 were argued to cover the question of jurisdiction. In his arguments, Counsel stated that this Court has unlimited jurisdiction to grant the prayers sought in the plaint. Similarly the Chief Magistrate's Court of Tororo equally has the jurisdiction to try the subject matter save the granting of Consequential Orders. He referred to the Land (Amendment) Act, Act 1/2004 Section 31 amending Section 76 of the Principle Act. This law empowers the Chief Magistrate to determine land disputes as a Court of first instance. He also referred to Section 31 of the same Act which provides for the Land Tribunal to refer orders for cancellation to the High Court, which powers according to counsel are now vested in the Chief Magistrate. He therefore, prayed that this court refers this matter for determination by the Chief Magistrate under section 217 MCA. He

further relied on the affidavit in support sworn by the applicant. He also further relied on decided cases of “Juma Kasera vrs. Ouma Kasera CA.75/2009.”

He made further reference to Section 17 of Judicature Act as amended by Act 3 of 2002 which enjoins the High Court to make orders for speedy trials. It was his case that Tororo Chief Magistrate’s Court is the court of first instance in the matter. It is where the parties reside. It is where the suit land is situated, where the witnesses reside and therefore the trial will be expeditious. He made further reference to the case of Wilson Osuna Otwani vrs. Apollo Yeri Ofwono HCMA77/2012, Petronilla Omal Okoth vrs. Godfrey Obbo Ondhoro & Anor. HCT MA.174/2013, The Registered Trustees of Kabale Diocese vrs Commissioner for Land Registration [2000] (KLR) 780.

The cases above dealt with incidences where the High Court made orders to transfer depending on proof of matters as alluded to by Counsel. He contested matters in the affidavit in reply by the respondent paragraphs 9, 10, 11 and 15 on grounds that if the lower court determines the matter as court of first instance it would transfer the case to the High Court to make any consequence orders of the cancellation of the title as it was done in the case of The Registered Trustees of Kabale Diocese vrs Commissioner for Land Registration [2000] (KLR) 780.

**Mr. Mutembuli** for the respondent made an argument that this prayer was not necessary. His contention is that in paragraph 3 of the plaint, they are seeking an order of cancellation of Certificate of title. He argued that under Section 117 RTA the court of first instance is the High Court. His argument is that whereas the Chief Magistrate can make findings, he does not have jurisdiction to cancel titles. The Chief Magistrate has jurisdiction as a court of first instance in other land matters

which do not include the cancellation of title. That the matter is already fixed for hearing on the 20<sup>th</sup> January 2015 and transferring it will further delay the trial therefore causing injustice to the parties as they seek for a hearing date.

Respondent would be inconvenienced as he resides in Kabwangasi which is nearer Mbale than Tororo. He is sickly and it would be costly to transport himself and witnesses to Tororo. He distinguished all the quoted cases from the situation in the present case. Finally it was his case that transferring this matter had cost implications on the respondent and would lead to greater inconveniences to the respondent.

### **Decision of Court**

Counsel consolidated his grounds 1, 2, 3 into one issue; requirement of the law.

Having listened to all the arguments above it is my finding that under Section 18 of The Civil Procedure Act as expounded in the case of MATAYO K. KABOHA VRS. HABIB BIN ABDULLAH (1942) 6 ULR 121.

The factors that court considers before transferring are:

1. Balance of convenience.
2. Questions of expense.
3. Interest of justice.
4. Possibilities of undue hardship.
5. Strength of the case.

According to the affidavit in support of the Application, the Applicant **Awada** states in paragraph 11, 12, 13, 16 among others that he is sick, his principal witness is also sick and other witnesses are also elderly and sickly and that they will be inconvenienced at Mbale High Court and prefer the suit to be transferred to the

Chief Magistrate's Court Tororo. However in the respondents affidavit in reply **Wilson Naluhuba** (paragraph 6) he challenges this statement for lack of medical proof and depones in paragraph 7 of his own affidavit that he is sick and attaches a medical form annexed and marked 'A'. Under paragraph 13, 14 and 15 he prays that the matter be heard in Mbale and the application be dismissed.

In order to justify a transfer there must be a stronger reason than mere balance of convenience as held in, "Yolamu Kaluba vs. Clement Kajaya [1957] E.A. 312.

The facts surrounding this application in my view show that both parties have similar problems to wit they are all elderly, sickly and claim they live far from either of the two courts. It is therefore not enough for the applicant to come to seek a transfer of the case without proof of stronger reasons than those related to the balance of convenience. Those reasons would revolve around the questions of expense, interest of justice or undue hardship.

**Counsel Mutembuli** has shown in his submission that transferring this suit poses more hardship to the respondent than the applicant for reasons that the plaintiff seeks specific orders for cancellation of title. He argued further that transferring the suit would mean amendment of the plaintiff which is costly, and would require moving back to the High Court to seek the consequential order. I do agree. A party who comes to court is always guided by the question of jurisdiction.

Counsel has argued that the court of first instance in this matter would be the Chief Magistrate's Court. See paragraph 14 of the affidavit in support and paragraph 8, 9 and 10 of the affidavit in reply. Jurisdiction is a creation of statute. I agree with all the arguments raised by **Counsel Majanga** regarding the Chief Magistrate's Court and High Court on this matter. However, according to Section 177 of the

RTA the jurisdiction to cancel certificate of title arising from court proceedings is specifically vested in the High Court.

That being so places this case in a special category distinct from the cited cases. This is because as argued by **Counsel Mutembuli** for the Applicant, the plaint is specific that the Respondent is seeking a cancellation of title (paragraph 3 of the plaint).

In my view the arguments raised by the Respondent are stronger to convince this court that a transfer would not operate in the best interest of all the parties. This is because the case is already fixed for hearing and a transfer would mean that the Chief Magistrate's Court re-fixes the matter and after hearing sends the file back to the High Court to effect the orders sought for. Section 177 RTA, operates to sort out this scenario once and forever. I therefore agree with the Respondent that sufficient cause has not been shown to warrant moving this suit from the High Court to Magistrate's court.

### **Balance of Convenience**

This was covered under grounds 4, 5, 6 and the applicant's submissions. Applicant has tried to show that the balance of convenience in this case should be terminated in his favour. I have however discussed this at length in my earlier findings above. The case of *Matayo K. Kaboha v. Abibu Bin Abdulla [1942] 6 ULR 121* specifically guides that to justify a transfer there must be a stronger reason than mere balance of convenience. I have found that the reasons advanced including sickness, length of distance from court, lower court jurisdiction, and convenience of parties, are the same reasons pleaded in cross reply by the respondent. (See affidavits attached by both parties).

There was therefore need for the Applicant to show that there were stronger reasons warranting transfer than those pleaded. Applicant has failed to do so. Respondent on the other hand has shown the existence of such stronger grounds than mere balance of convenience in paragraph 4, 5, 6, 7, 8, 10, 11, 12 of his affidavit. He has also shown that the trial in the high Court is more justifiable, on the balance of convenience than, the transfer to the Chief Magistrate's Court.

Having found as above, it's the order of this court that the application fails on all grounds, for reasons stated above. The application is hereby dismissed. The matter should proceed in the high Court as fixed. Costs to respondent. I so order.

**Henry I. Kawesa**

**JUDGE**

**11.11.2014**