



Uaso Ngiro Contractors Ltd v Boleyn Magic Wall Pannel Ltd (Commercial Case E032 of 2022) [2023] KEHC 17269 (KLR) (28 April 2023) (Ruling)

Neutral citation: [2023] KEHC 17269 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL CASE E032 OF 2022
DO CHEPKWONY, J
APRIL 28, 2023**

BETWEEN

UASO NGIRO CONTRACTORS LTD PLAINTIFF

AND

BOLEYN MAGIC WALL PANNEL LTD DEFENDANT

RULING

1. The Application subject of this ruling is the Notice of Motion dated March 8, 2022 brought under Sections 1A, 1B, 3A, 15(a) and 18(1)(b)(i) all of the Civil Procedure Act in which the Applicant, Uaso Ngiro Contractors Limited, seeks:-
 - a. Spent;
 - b. That there be a stay of the proceedings in HCCOMM E032 of 2022 - Boleyn Magic Wall Panel Limited v Uaso Ngiro Contractors Limited [2022] pending hearing and determination of this application.
 - c. Transfer of the proceedings before this Court in HCCOMM E032 of 2022 - Boleyn Magic Wall Panel Limited v Uaso Ngiro Contractors Limited[2022] to the High Court of Kenya at Siaya, for hearing and determination.”
2. The Defendant/Applicant’s case is as laid down in the grounds on the face of the application, the Supporting Affidavit of William Oduol sworn on the March 8, 2022 and its written submissions dated the June 3, 2022.
3. The Plaintiff/Respondent, Boleyn Magic Wall Panel Limited, opposed the application via the Replying Affidavit of Jack Liu sworn on the March 14, 2022 and the written submissions dated June 22, 2022.



4. The facts of the matter are that on February 15, 2018, the parties entered into a contract whereby the Plaintiff/Respondent was subcontracted to put up one block of 12 Units of two-bedrooms and 48 Units of bedsitters at Bondo AP Line for the National Police Service for the Ministry of Transport, Infrastructure, Housing and Urban Development for the sum of Kenya Shillings One Hundred and Six Million, Five Hundred Forty Thousand, Eight Hundred and Thirty only (Kshs.106,548, 830/=). A dispute arose between the parties and as a result the Plaintiff /Respondent filed the suit within which the Application herein is made against the Defendant/Applicant alleging a breach of contract. The suit was filed in the High Court at Milimani Commercial Courts and is still pending at the Interlocutory stage. Vide a Supporting Affidavit sworn on March 8, 2022 by Mr. William Oduol, the advocate on record, the Defendant/Applicant states that the Contract was executed and performed in Bondo within the territorial jurisdiction of the High Court at Siaya which is of the lower competent jurisdiction. It is also deponed that the case is still at an interlocutory stage, hence no prejudice or undue hardship will be occasioned to the Plaintiff. It is contended that if the application is not granted, the Defendant/Applicant will be left without recourse as it is alleged that they have an outstanding debt owing to the Plaintiff.

Defendant/Applicant's Submissions

5. In its Replying Affidavit sworn on 4th March 2022 by Mr. Jack Liu, its Company Director, the Plaintiff/Respondent deponed that the contract entered into by the parties herein on 15th February, 2018 was executed in Nairobi, where they both have their head offices. It is also deponed that the Defendant was served with Summons to enter appearance at their Green House next to Adams Arcade, first Floor, Office No 14 Ngong Road which is where their website is. It is further deponed that the witnesses are all based in Nairobi, hence they would incur expenses in travelling to Siaya High Court. He goes on to aver that the High Court has no power to transfer a suit to another High Court as per Section 18 of the *Civil Procedure Act*. It has been contended that the application has not met the threshold of stay of proceedings and in the interest of justice and balance of convenience, the same should be dismissed with costs.
6. On May 23, 2022, by consent of both counsel for the parties, agreed to file and exchange written submissions to the application dated March 8, 2023. The record confirms the Appellant's submissions dated June 3, 2022, while the Respondent/Plaintiff's submissions are dated June 22, 2022.
7. To determine the application, I have read through the respective affidavits alongside the written submissions filed by the parties herein. I find the issue for determination being whether the suit herein should be transferred for hearing and determination at the High Court at Siaya.
8. The legal framework upon which the Defendant's/Applicant's application is premised is Sections 15(a), 18(i)(b)(i), 1A, 1B and 3A all of the *Civil Procedure Act*.
9. Section 15 of the *Civil Procedure Act* provides that:-

“ [15]. Other suits to be instituted where defendant resides or cause of action arises

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- a. the Defendant or each of the Defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or



- b. any of the Defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided
- c. the cause of action, wholly or part, arises.

10. Section 18(1)(b)(i) of the same Act provides:-

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

11. Section 1A then provides for:-

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

12. While Section 1B provides that:-

“(1) For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

- a. the just determination of the proceedings;
- b. the efficient disposal of the business of the Court;
- c. the efficient use of the available judicial and administrative resources;
- d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- e. the use of suitable technology.

13. Section 3A goes on to provide that:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

14. Section 15 provides for where suits should be commenced while Section 18 then clothes the court with jurisdiction to transfer any suit instituted in a specific subordinate court to another for purposes of adjudication and disposal.



15. It is the Defendant's/Applicant's case that the cause of action in this case arose in Bondo within the territorial jurisdiction of the High court in Siaya. The Applicant has relied on the provision under Section 15, 17 and 18, all of the *Civil Procedure Act* in support of this averment and further that the High Court has been clothed with jurisdiction to transfer any suit instituted in a specific sub-ordinate court to another for purposes of adjudication and disposal. That the High Court may exercise this power either suo moto or through an application by either party to a suit.
16. Further, the Defendant/applicant went on to submit that the contract clearly indicates that the contract was to be performed in Bondo, Siaya County and not Nairobi where the suit was instituted.
17. It also contends that its registered place of business is Siaya County where its principal office is situated and that the transfer will accord the witnesses easy access to court and a saving on time and expenses. Reliance has been placed on the case of *David Kabungu v Zikarenga & 4 Others* HCCC Case No 36 of 1995, where the Court stated that:-

“Section 18(1)(b) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party...”

18. In opposing the application, the Plaintiff/Respondent has submitted that the High Court has no power to transfer a suit from one High court to another under Section 18 of the *Civil Procedure Act*, which involves transfer of suit instituted in subordinate court by the High Court. According to the Plaintiff, the Defendants' application is misguided, an abuse of due process and brought in bad faith. This Court is exercising its power to transfer a suit to another High Court is guided by several factors as laid down in the case of *Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd* [2012]eKLR, where it was held:-

“..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.”

19. Clearly, Section 18 of the *Civil Procedure Act* does not donate power to this Court to transfer a suit to another High Court, as they are of equal status.
20. With regard to where the cause of action in the instant suit arose, the Plaintiff has opposed this claim on the ground that the contract dated February 15, 2015 adduced as “Exhibit WO-1” was executed in Nairobi contrary to the Defendant's/Applicant's averment that it was executed and performed in Bondo.
21. Having examined the said contract, at the preamble thereof, the court notes that the Defendant's place of business is described as:-

“.... And having its registered place of business in Siaya county and elsewhere within the Republic of Kenya....”.



22. The Defendant/applicant being a corporation, a suit against it should be instituted at the place where it carries out business which is its principal place of business, although the Plaintiffs' testimony indicates that both parties have their principal offices in Nairobi and or their environs, hence the suit should be heard in Nairobi. Section 15, Explanation 3(1) of the *Civil Procedure Act* states that:-

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

- (c) the cause of action, wholly or in part, arises.

“Explanation.(3)—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely—

- i. the place where the contract was made;
- ii. the place where the contract was to be performed or the performance thereof completed;
- iii. the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

23. In a case where a dispute relates to a contract, the cause of action is said to have arisen where the contract was made or where the contract was to be performed or where the money payable from the contract was to be paid.

Section 15, Explanation 3 states that:-

“Under Section 15 of the *Civil Procedure Act* it is provided

that:-

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

- (c) the cause of action, wholly or in part, arises;

“Explanation.(3)—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely—

- i. the place where the contract was made;
- ii. the place where the contract was to be performed or the performance thereof completed;

24. In this case, the cause of action arose in Siaya as the contract was to be carried out there.

25. It is however worth-noting that while the issues to be considered when transferring a suit are the convenience of parties, their witnesses' costs and interest of justice, the question of territorial jurisdiction is never usually a consideration. This is the position in the Ugandan case of *David Kabungu v Zikarenga* HCCC No 36 of 1995, where it was held that:-

“Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...”



26. This position is re-affirmed by the unlimited jurisdiction in civil matters as provided for under Article 165(3)(a) of the Constitution that:-

“Subject to clause (5), the High Court shall have—

a. Unlimited original jurisdiction in criminal and civil matters.

27. Having considered the arguments that have been put forth by the parties in support of their respective positions for this application, I find that n prejudice or inconvenience so great that will be occasioned upon the Respondent had been demonstrated. So that it will suffer an injustice if suit is heard in Nairobi.

28. However, more fundamentally, the application dated March 8, 2022 has no legal basis pursuant to Section 18 of the Civil Procedure Act and is therefore dismissed.

29. Each party to bear their own costs of the application.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 28TH DAY OF APRIL, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Ochieng counsel for Defendant/Applicant

M/S Mululu holding brief for Mrs. Karani counsel for Plaintiff

Court Assistant – Mwenda/Sakina

