



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC APPLICATION NO E030 OF 2021

EXECUTIVE SUPER RIDERS LIMITED.....APPLICANT

VERSUS

ALBERT JOACQUINNE OSUMBA.....RESPONDENT

RULING

INTRODUCTION

1. In its Notice of Motion application dated 12th February 2021 and filed on 15th February 2021, the Applicant sought the transfer of the matter herein to Milimani Commercial Court Nairobi. Its prayer for stay of proceedings pending the hearing and determination of the present application was spent.

2. The said application was supported by the Affidavit of its Advocate, Job Odhiambo Ochieng that was sworn on 12th February 2021. Through its advocate, the Applicant averred that it entered into an Agreement of Sale with the Respondent herein of Motor Vehicle Registration Number KCU 717L (hereinafter referred to as the “subject Motor Vehicle”) for the sum of Kshs 3,500,000/= at Nairobi as a result of which the court of the lowest competent jurisdiction was Milimani Commercial Court.

3. It was its contention that since **Kisumu CMCC No E028 of 2021** was still at an interlocutory stage, the Respondent would not suffer any prejudice or hardship if the suit was transferred as aforesaid.

4. It averred that the Respondent was forum shopping as he had also filed **Kisumu Misc No E117 of 2020** in which he had sought leave to appeal against the decision of Hon Shimenga, was still pending hearing and determination. It therefore urged this court to allow its application as prayed.

5. In opposition to the said application, on 20th April 2021, the Respondent swore a Replying Affidavit. The same was filed on 28th April 2021. He denied having been a party to the aforesaid Agreement for Sale and he could not therefore purport to know where the same was executed.

6. He contended that the said subject Motor Vehicle was registered under KISTAG SACCO which had principal offices in Kisumu and that he used it for commercial purposes to ferry fare paying passengers along the Kisumu- Sirare- Busia route. He pointed out that he filed **CMCC No E028 of 2021** in Kisumu because the Applicant repossessed the said subject Motor Vehicle at Ahero within Kisumu County.

7. He stated that he was granted stay orders on 4th February 2021 but the Applicant disobeyed the same prompting him to file contempt of court proceedings against it. He was emphatic that he performed his contractual obligations while in Kisumu County for the reason that the Applicant disobeyed court orders. He further averred that since the subject matter was movable, he had the option of filing the suit in Kisumu County.

8. He averred that **Kisumu Misc No E117 of 2020** was not pending hearing and determination as the same was dismissed and no appeal had been preferred against the decision of the said Hon Shimenga.

9. It was his contention that the Applicant had sought to frustrate him by causing unnecessary hardships, inconveniences and aggravated expenses and his weak financial muscle or lack of (**sic**) as he had no income, the subject Motor Vehicle having been repossessed, would hinder him from effectively ventilating his case.

10. He alluded to the challenges that he was likely to face due to the Presidential directives of 26th March 2021 that hindered movement due to Covid 19 as he was not an essential service provider.

11. He asserted that the Applicant was forum shopping and termed the present application fatally defective, frivolous, vexatious and without

any chance of success and thus urged this court to dismiss the same.

12. The Applicant's Written Submissions were dated and filed on 5th July 2021 while those of the Respondent were dated 26th May 2021 and filed on 4th June 2021. The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

LEGAL ANALYSIS

13. The Applicant placed reliance on Sections 17 and 18 of the Civil Procedure Act Cap 21 (Laws of Kenya) that provides that the High Court is clothed with jurisdiction to transfer a suit from one subordinate court to another. To support its argument that the court with the lowest competent jurisdiction to determine the dispute between it and the Respondent herein was Milimani Commercial Courts for the reason that the place of transaction was Nairobi and its registered offices were in Nairobi, it relied on the case of **Meeli Ole Naisewa vs Benson Gachuki Kinyanjui [2016] eKLR**. In the said case, the court therein held that suits shall be instituted in a court within the local limits of whose jurisdiction the defendant therein resided, carried on business or worked.

14. The Respondent agreed with the Applicant in that regard and placed reliance on Section 15 of the Civil Procedure Act which explains where and the circumstances under which a suit ought to be filed in a particular court.

15. He further concurred with the Applicant that a suit must be instituted in the court with the lowest competency to try it and that the High Court has power to direct the distribution of business where there is more than one subordinate court as provided in Section 11 of the Civil Procedure Act.

16. He also cited Section 18 of the Civil Procedure Act. He referred this court to the case of **Agrochemicals Ltd vs Panda Flowers Ltd [2012] eKLR** where it was held that an applicant had to make a strong case for the transfer of a suit. The court therein also considered several factors such as motive and character of proceedings, costs of transporting witnesses to testify, balance of convenience amongst others.

17. He urged this court to consider the overriding objectives of Section 1A of the Civil Procedure Act that mandates courts to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act and Section 1B of the Civil Procedure Act that imposes a duty on the court on how to handle matters for purposes of furthering the overriding objectives specified in Section 1A of the Civil Procedure Act.

18. It is trite law that the burden of proof lies on a party applying for a case to be transferred from one court to another to make out a strong case to the satisfaction of the court that the application ought to be granted.

19. The power bestowed upon the High Court to transfer suits of a civil nature is provided for in Section 18 of the Civil Procedure Act (Cap 21) Laws of Kenya that stipulates thus:-

“(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.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn”.

20. The transfer of suit is not automatic. It has to be premised on clear facts envisaged in Sections 11, 12, 13, 14, 15 and 17 of the Civil Procedure Act. In other words, a party may apply to transfer a suit from one court to the other if the suit is filed in courts that do not have territorial and pecuniary jurisdiction to determine the same. A suit is not transferred at the whim of an applicant or as a form of forum shopping. There are clear procedures that must be adhered to.

21. Section 15 of the Civil Procedure Act stipulates that:-

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 either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

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

Explanation.(1)—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

Explanation.(2)—A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place (emphasis court)

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 (emphasis court).

22. This court perused the Agreement for Sale that the Applicant had alluded to and noted that the same bore the Respondent's name in the execution page. This court could not make a pronouncement that he was the one who executed the said Agreement of Sale as he had denied knowledge of the same. That was a matter for the trial court to determine.

23. Be that as it may, as he had denied knowledge of the said Agreement of Sale and the Applicant had averred that its registered offices were in Nairobi, this court took the considered view that the court with the lowest competent jurisdiction was Milimani Commercial Courts, Nairobi as the subject matter of the suit was Kshs 3,500,000/=.

24. The Respondent could not be faulted for having filed suit in Chief Magistrate's Court Kisumu because his subject Motor Vehicle was repossessed at Ahero in Kisumu County and he needed to act fast to obtain stay orders. However, this did not mean that the suit could not be transferred to the proper court for determination at the appropriate time upon application.

25. The fact that the subject Motor Vehicle was registered with a Sacco in Kisumu or that it plied the Kisumu-Sirare- Busia route was not sufficient reason for the suit to be heard and determined in Kisumu. It was not where part of the cause of action arose wholly or in part. The Agreement of Sale was between a financier and a borrower and had no further execution in any other part of the country.

26. Further, the Presidential directives on restriction of movements from one County to another due to Covid- 19 had since been lifted allowing easy passage between Counties. This was therefore not a good reason for the matter to be heard and determined in Kisumu as it was clear the defendant's registered offices were in Nairobi and the contract was entered into in Nairobi.

27. In addition, there appeared to be two (2) witnesses to the disputed Agreement of Sale. While it was more convenient for a plaintiff to have the matter heard and determined where he or she resides, the place of suing is not dependent on the convenience of such a plaintiff. There are laid down procedures to be followed. If there were no such procedures, there would be chaos in hearing and determination of cases as the same would be done at the whim of any party who felt that the court hearing the matter was not persuaded and lead to forum shopping.

28. There was no evidence that the suit in the Chief Magistrate's Court at Kisumu had taken off. It appeared to be in the interlocutory stage as the Applicant had stated. The Respondent was not likely to suffer any prejudice or hardship if the case was transferred to Milimani Commercial Courts, Nairobi. If he had suffered prejudice and/or hardship, he had failed to demonstrate the same.

29. For the foregoing reasons, this court came to the firm conclusion that the Applicant had made out a case befitting of the grant of the orders that it sought as it had demonstrated that the Chief Magistrate's Court at Kisumu lacked territorial jurisdiction to hear and determine the case between it and the Respondent herein.

DISPOSITION

30. For the foregoing reasons, the upshot of this court's decision was that the Applicant's Notice of Motion application dated 12th February 2021 and filed on 15th February 2021 was merited and the same be and is allowed in terms of Prayer No (3) therein. Costs of the application will be in the cause.

31. It is hereby directed that **Kisumu CMCC No E028 of 2021** be and is hereby transferred to Milimani Commercial Courts and that the same be placed before the Chief Magistrate on 15th February 2022 for further orders and/or directions.

32. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY 2022

J. KAMAU

JUDGE