



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

MISCELLANEOUS APPLICATION NO. 154 OF 2021

MOLYN CREDIT LIMITED..... APPLICANT

VERSUS

JOSEPH LISIOLO LISHENGA

T/A LISHENGA & CO. ASSOCIATES.....RESPONDENT

RULING

1. This is a ruling on the Notice of Motion dated 15th September 2021 in which the applicant seeks the following orders;

- a) **An order for stay of proceedings in Eldoret CMCC 872 of 2019 Joseph Lisiolo t/a Lishenga & Co Associates vs Molyn Credit Limited**
- b) **An order to transfer Eldoret CMCC 872 of 2019 Joseph Lisiolo t/a Lishenga & Co Associates vs Molyn Credit Limited to the Chief Magistrates' court in Nairobi for hearing and determination.**
- c) **Costs of this application.**

2. The application is supported by an affidavit and submissions filed on 19th November 2021. The respondents filed a replying affidavit on 26th October 2021 and submissions on 30th November in response to the application.

3. The application is based on the grounds that the applicant entered into an agreement for audit and accountant services for the years 2015 to 2017 which was executed at Nairobi. The respondent filed **Eldoret CMCC 872 of 2019 Joseph Lisiolo t/a Lishenga & Co Associates vs Molyn Credit Limited** claiming breach of contract. The applicant's registered and head offices were in Nairobi from where the respondent operated during the performance of the agreement. Therefore the Chief Magistrates' Court at Eldoret lacks territorial jurisdiction to hear and determine the matter.

4. The respondent opposes the application based on the grounds that the instant application is defective for want of authority to swear affidavit on behalf of a limited company. The respondent deponed that the applicant has approached the court with unclean hands. Further, that the case in the Chief Magistrates' Court arises from a contractual relationship which was entered into in Eldoret in his Eldoret branch office; that the present application is a delay tactic on the part of the applicant.

5. Upon considering the applications, pleadings and submissions I have identified the following issues for determination;

- a) **Whether the Application is defective for want of authority to swear on behalf of a corporate body**
- b) **Whether the Chief Magistrates' Court in Eldoret has jurisdiction to hear Eldoret CMCC 872 of 2019 Joseph Lisiolo t/a Lishenga & Co Associates vs Molyn Credit Limited**

WHETHER THE APPLICATION IS DEFECTIVE FOR WANT OF AUTHORITY TO SWEAR ON BEHALF OF A CORPORATE BODY

6. Order 4 Rule 1(4) of the Civil Procedure Rules provides;

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so

As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same may be a ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint or with the Registrar of companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic vs. Registrar General and 13 Others Misc. Application No. 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed any time before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage”.

7. The application was filed on 15th September 2021 and the matter has yet to be set for hearing. In the premises I find that the failure to file the authority is not fatal.

WHETHER THE CHIEF MAGISTRATES' COURT IN ELDORET HAS JURISDICTION TO HEAR ELDORET CMCC 872 OF 2019 JOSEPH LISIOLO T/A LISHENGA & CO ASSOCIATES VS MOLYN CREDIT LIMITED

8. Section 18 (1) (b) of the Civil Procedure Act provides;

(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.

9. In **Hangzhou Agrochemicals Industries Ltd –Vs Panda Flowers Ltd (2012) eKLR** the court addressed conditions to be considered in determining whether or not to grant an order transferring a suit, thus:

“ ..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”.

10. The basis for the transfer herein is that the court has no jurisdiction as the applicant and the respondent are based in Nairobi. The Respondent's opposition is premised on the fact that the contract which is the subject of the suit was entered into in Eldoret.

11. Section 15 of the Civil Procedure Act provides;

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.

12. 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.

13. The Applicant has not provided a copy of the contract to prove that the contract was made and executed in Nairobi. The Respondent, who contends it was executed in Eldoret has also not produced a copy of the said contract. From the documents on record, the fee notes indicate that they originated from the respondents' Nairobi office. Both parties are situate and registered in Nairobi.

14. There has been no evidence tendered to show that the contract was executed in Eldoret or that a branch office of the respondents' exists in Eldoret. Applying the provisions of section 15, I find that the place where, in performance of the contract, any money to which the suit relates was expressly or impliedly payable is Nairobi.

15. In the upshot, the application succeeds and the file be and is hereby transferred to the Chief Magistrates' Court in Nairobi for hearing and determination.

16. No order as to costs.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF JANUARY 2022.

E. O. OGOLA

JUDGE