



**Continental Homes Ltd v Jiwajee Industrial Hardware Ltd (Miscellaneous Application E149 of 2021) [2022] KEHC 10721 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 10721 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS APPLICATION E149 OF 2021**

**MN MWANGI, J**

**APRIL 22, 2022**

**BETWEEN**

**CONTINENTAL HOMES LTD ..... APPLICANT**

**AND**

**JIWANJEE INDUSTRIAL HARDWARE LTD ..... RESPONDENT**

**RULING**

1. The application before me is a Notice of Motion dated 14<sup>th</sup> July, 2021 brought under the provisions of Sections 1A, 1B, 3A & 15 of the Civil Procedure Act, Order 18 and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The applicant seeks the following orders-
  - 1) Spent;
  - 2) That the Honourable Court be pleased to stay the proceedings in Mombasa CMCC Case No. 1085 of 2020, pending the hearing and determination of this application;
  - 3) That this Honourable Court be pleased to transfer this (sic) suit Mombasa CMCC Case No. 1085 of 2020 to the Chief Magistrate's Court at Malindi for hearing and determination; and
  - 4) That the costs of this application be provided for.
2. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 14<sup>th</sup> July, 2021 by Mohamed Tariq Khan, an Advocate of the High Court of Kenya.
3. In opposition to the application herein, the respondent filed a replying affidavit sworn on 14<sup>th</sup> August, 2021 by Monica Kavata Gideon, an Accountant of the respondent herein.
4. The application was canvassed by way of written submissions. The applicant's submissions were filed on 4<sup>th</sup> November, 2021 by the law firm of Tariq Khan & Associates, whereas the respondent's



submissions were filed by the law firm of Wachira King'ang'ai & Company Advocates on 16<sup>th</sup> November, 2021.

5. Mr. Khan learned Counsel for the appellant relied on the provisions of section 3A, 15 and 18 (1) of the Civil Procedure Act and submitted that the High Court is mandated to grant the reliefs sought in the application herein. he submitted that the standing of an applicant should be assessed proportionally to the nature and reasons advanced for the suit to be transferred and heard by another subordinate Court.
6. He cited the case of *Mukisa Patrick v Umeme Ltd* HC in Misc Cause No. 168 of 2014 as cited in *George Arab Muli Walabu v Festus Mbai Ndonye* [2021] eKLR, where the Court stated that the issues to be considered are questions of expense, the possibilities of undue hardship, convenience or the inconvenience of a particular place of trial, the issues raised by the parties, existence of reasonable apprehension in the mind of a litigant that he or she might not get justice in the Court in which the suit is pending, important questions of law are involved, or a consideration of the interest of justice.
7. It was submitted by Mr. Khan that the applicant's main ground is hinged on its fundamental right of access to justice under Article 48 of the Constitution. Therefore, the same should be upheld vis a vis the parameters outlined under Sections 11 to 18 of the Civil Procedure Act which provide for place of suing. In citing the case of *Sara Centofanti v Matumbawe Investment Limited* [2020] eKLR, Mr. Khan submitted that the scope of the dispute and subject matter of the contract is stated to have been performed in Kwale County and the applicant is domiciled in Malindi.
8. Mr. Wachira King'ang'ai, learned Counsel for the respondent submitted that the jurisdiction to determine an application to transfer the suit is vested in this Court by virtue of Section 18 of the Civil Procedure Act. He stated that a party instituting a suit can either file the suit where the defendant resides or where the cause of action arose. He submitted that the respondent's place of business is at Mombasa and that the respondent has no offices or operations in Malindi. He further submitted that after the orders are processed in Mombasa, it is immaterial where they are delivered to. He stated that Mombasa CMCC No. 1085 of 2020 was filed in Mombasa where the cause of action arose, thus the Trial Court has jurisdiction to hear and determine the suit to its logical conclusion.
9. He argued that the application herein is only meant to delay the hearing and determination of Mombasa CMCC No. 1085 of 2020 since the applicant already admitted being indebted to the respondent even before the filing of the said suit. He further argued that the applicant has no list of witnesses and documents but states that it shall avail its documents during the hearing of the suit, which offends the provisions of Order 3 of the Civil Procedure Rules.

#### **ANALYSIS AND DETERMINATION.**

10. This Court has considered the application filed herein and the affidavit filed in support thereof, the replying affidavit as well as the written submissions by Counsel for the parties. The issue for determination is if the instant application is merited.
11. In the affidavit filed by the applicant, it deposed that Mombasa CMCC No. 1085 of 2020 was instituted on 18<sup>th</sup> September, 2020 and that it is desirous to have the said suit transferred to Malindi Chief Magistrate's Court for hearing and determination on the basis of territorial jurisdiction.
12. It was stated by the applicant that it carries on its business in Malindi, Kilifi County and the alleged cause of action giving rise to this suit arose within Kilifi County as the respondent allegedly supplied construction materials to the applicant who carries on business in Malindi, in Kilifi County. The applicant averred that pursuant to the provisions of Section 15 of the Civil Procedure Act, 2010, suits



shall be instituted where the defendant resides or carries on business or where the cause of action wholly or partly arises.

13. The applicant contended that it continues to be prejudiced since its representatives will have to travel to Mombasa for Court proceedings thereby incurring expenses in respect of the same. He was of the view that it is in the interest of justice for the instant application be allowed since no prejudice will be suffered by the respondent if the same is allowed.
14. The respondent in its replying affidavit deposed that according to the rules on institution of suits, a suit can be instituted where the defendant resides or where the cause of action arose. It stated that in this case, the respondent's place of business is Haile Selassie Avenue, opposite Tuskys Supermarket in Mombasa, whereas the cause of action arose in Mombasa where the respondent's offices and warehouse are located as can be seen from the copies of the delivery note and invoice.
15. The respondent averred that the contract/order to purchase the items required by the applicant was done at its offices and that the location or place where the materials were to be delivered, is irrelevant when it comes to where a suit will be instituted.
16. It was contended by the respondent that the application herein lacks merit, it is vexatious and is an abuse of the Court process since before Mombasa CMCC No. 1085 of 2020 was filed, the applicant had issued cheques to the respondent that it later advised the respondent not to bank for lack of funds, which confirms the applicant's indebtedness to the respondent.
17. The respondent contended that other than the mere allegation that the applicant is situated at Malindi, there is no document produced to show that the applicant is based there.
18. It is undisputed that the High Court has the power to withdraw and transfer cases instituted in lower Courts as provided under Section 18 of the [Civil Procedure Act](#) which states as follows—
  - “(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.”
19. The applicant averred that it carries on its business in Malindi, Kilifi County and that the respondent allegedly supplied construction materials to it in Malindi thus the cause of action giving rise to Mombasa CMCC No. 1085 of 2020 arose within Kilifi County. It is noteworthy that when one looks at annexure MTK-3 of the applicant's supporting affidavit, a copy of the Summons to enter appearance in Mombasa CMCC No. 1085 of 2020 and a demand letter dated 1<sup>st</sup> September, 2020 both addressed



to the applicant herein, the applicant's address is shown as being in Malindi. It is therefore safe to conclude that the applicant ordinarily carries on its business in Malindi.

20. It is not in dispute that the respondent carries on its business in Mombasa and that the goods and/or items were ordered for, from the respondent's offices and/or warehouse in Mombasa and thereafter delivered in Malindi. The application before this Court has been brought under the provisions of Section 15 of the *Civil Procedure Act* which provides 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)—...

Explanation. (2)—...

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.”

21. In light of the foregoing provisions of the law, it is evident that Mombasa CMCC No. 1085 of 2020 should have been filed in Malindi since that is where the applicant carries on its business. Since the suit herein arises out of a contract, Malindi is also the place where the performance of the contract was completed as the goods were delivered to Malindi. The said suit could also have been filed in Mombasa since that is where the contract was made, but the respondent ought to have first sought leave of Court and/or the applicant ought to have acquiesced to the same. The respondent herein did not seek leave of the Court before it filed CMCC No. 1085 of 2020 in Mombasa and the applicant has objected to the continuance of the said suit in Mombasa through the filing of the application herein.

22. In the case of *David Kabunga v Zikarega & 4 others* (Kampala HCC No. 36 of 1995) which was cited with approval in the case of *GKK v ANK & another* [2021] eKLR, the Court stated as follows-

“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. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in



another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction... it is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and 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..." (emphasis added).

23. I wholly associate myself with the holding in the above case. Moreover, the applicant averred that it stands to be prejudiced since its representatives will have to travel to Mombasa for Court proceedings thereby incurring expenses. On the other hand, the respondent herein has not argued and/or alluded to the fact that it will be inconvenienced or suffer undue hardship or that the interest of justice will not be served by a transfer of the suit herein from Mombasa to Malindi Law Courts.
24. I am persuaded that the applicant has discharged its onus of proof that the application for transfer ought to be granted bearing in mind that the applicant ordinarily carries on its business in Malindi and the performance of the contract was completed in Malindi. The foregoing will cushion the applicant from incurring transport costs and incidental expenses for its witnesses, in defending Mombasa CMCCC No. 1085 of 2020. Having the suit heard in Malindi will ensure that the applicant is not prejudiced by having to defend the dispute in issue outside his territorial jurisdiction.
25. It is the finding of this Court that the application herein is meritorious and the same is allowed in the following terms-
  - a. That Mombasa CMCC Case No. 1085 of 2020 is hereby withdrawn from the Chief Magistrate's Court, Mombasa and transferred for hearing and final determination in the Chief Magistrate's Court in Malindi; and
  - b. The costs of this application shall be borne by the respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 22ND DAY OF APRIL, 2022.**

In view of the declaration of measures restricting Court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the then Chief Justice on the 17<sup>th</sup> April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Khadija Athman for the applicant

Mr. Muthuri holding brief for Mr. W. King'ang'ai for the respondent

Mr. Oliver Musundi – Court Assistant.

