



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

HCC/MISC CASE E034 OF 2020

1. UMI FAMAU MADI

2. MADI FAMAU MADI

3. MWANAISHA FAMAU MADI

4. MWANAHALIMA FAMAU.....PLAINTIFF

VERSUS

KASSIM FAMAU MADI.....DEFENDANT

Coram: Hon. R. Nyakundi

Mr. Gichana Advocate for the Applicants

Mr. Khalid Salim Advocate for the Respondent

RULING

The Applicants who also assert that they happen to be defendants in SPMCC No.E001 of 2020 at Lamu Court approached this Court by way of a notice of motion seeking transfer of the suit to the Chief Magistrate's Court at Mombasa for hearing and determination. The application is supported by the grounds on the face of the motion and an affidavit sworn by Madi Famau in which the main ground revolves on the distance together with the cost incurred to travel from Mombasa, their town of residence to Lamu. This is for the purpose to attend the Court proceedings.

In response, the respondent filed a replying affidavit where he vehemently opposed any application to transfer the primary suit from Lamu subordinate court to Mombasa or any other Court of concurrent jurisdiction. The reasons given by the respondent are that the law provides that a suit shall be instituted where the course of action arose and before the lowest grade of that particular district. He therefore averred that the application is bad in law and lacks merit to be considered by the court. The application was canvassed before me by way of brief oral submissions.

Determination

The question I ask myself is whether the applicants' notice of motion meets the legal criteria outlined under Section 11, 15 and 18 of the Civil Procedure Act and the course of action, the forum and guidelines in Section 18 of the Act on transfer of suits by the High Court from one subordinate Court to another for trial and disposal. The carrier provisions in Section 11 of the Act provides as follows:

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than on with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any of one of such subordinate courts:

Provided that-

(i) If a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is

no point of law involved or no other good and sufficient reason for instituting the suit in his court; and

(ii) Nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district”.

The judgement of the court in *David Kabungu Vs Zikarenga & 4 others, Kampala HCCS NO. 36 of 1995* expressly laid down the principles in regard to transfer of suits equivalent to our Section 18 of the Civil Procedure Act in which Okello J 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. 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 well established principle of law that the onus is upon the party applying the 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....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...”

Many of the factors in Section 18 have much in common with those which will be relevant in a *forum non convenient* enquiry and they are directed for the court to decide the question of which of two jurisdictions is appropriate. They are directed to enquire whether it will be appropriate which is the meaning of the word *convenience* in *forum convenient* for an order to be made by a court to transfer a suit already in another court to another concurrent court which as well an applicant thinks is a better forum than the earlier forum the plaintiff instituted the suit. That is why, in my view, I find the principles of comity will add something useful to the analysis on the very elastic content under Section 18 on Transfer of Suits in the Civil Procedure Act. That is why in the case of *Hangzhou Agrochemicals Industries Ltd- Vs Panda Flowers Ltd (2012) eKLR* , the Court states as follows:

“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:”.

The jurisdictional requirements here are not in dispute. What is clear the respondent is habitually domiciled in Lamu while on the other hand the applicants are domiciled or habitually residents of Mombasa. The conditions which are asserted by the applicants are regarded to be appropriate to deal with the so-called financial and costs incurred to travel from Mombasa to Lamu for hearing of the pending suit. First, the primary consideration for them is for the court to take into account the hardship and hindrance to meet the expenses involved in the many scheduled sessions set by the court during the ongoing proceedings and before the conclusion of the suit. It is not in dispute why it was appropriate for the suit to be initiated at Lamu as the cause of action apparently falls within that local county. It is not the purpose of Section 18 to exercise discretion purely for the purpose of convenience of the parties to a suit. It will amount to making an order which gives the applicant more advantage at the expense of the other in the proceedings taken within the jurisdiction of the court. On the other hand, the Court is expected to exercise its powers so as to place the parties in so far as it is reasonable and practical to do so as to have regard in giving effect to the overriding objective in the administration of justice. I have in mind here that the inadequacy of financial resources of a party can be a great impediment to the expeditious resolution of disputes. An obvious example is where a party has no financial muscle to transport himself or his witnesses to the forum where the suit was instituted. Certainly, that insufficiency will trigger flimsy applications of adjournment likely to occasion prejudice or injustice on the speed trial of the case.

In the present case, if the court gives in to the application, it will also inflict serious prejudice to the respondent who has to travel all the way to Mombasa which to the applicants is the appropriate forum by virtue of being residents. The symmetry between these two competing interests must be viewed with caution so as not to interfere with the primary jurisdiction on the cause of action. The second relevant sense in which the change of venue should be viewed is from the perspective of case docket and backlog interplay premised on classification of courts. I presume that the models on time standards for the court at Lamu would be necessarily one which experiences speed trial standards in comparison to Mombasa Chief Magistrate Courts. Overall, the sheer infrastructure capacity of the system in Mombasa such as the number of courtrooms, the capacity of those courts for certain types of cases, the availability of Magistrates and their effective deployment across the court structures may militates the whole purpose on the conditions precedent in the *Hangzhou Agrochemicals Industries Ltd- Vs Panda Flowers Ltd (2012) eKLR case*. That to hold otherwise would unjustly likewise lag and add to the old delay in resolving a simple dispute which Lamu Court is better placed in view of its case docket. If the parties adhere to the case management protocols under Order 11 of the Civil Procedure Rules, the perceptions, potential and pitfalls of an expensive litigation and inconvenience of the parties will be greatly minimized. While taking a broad approach to this application and coming from the perspective of an insider, both courts preferred by the parties are empowered to exercise jurisdiction on the type of case filed by the respondent. However, it is important to emphasize outside Lamu, there are various possible reasons that the trial is likely to be bogged down by the heavy case backlog in Mombasa. As aptly stated by *JB Jennings, “Evaluation of the Manhattan Criminal Courts Master Master Calendar Project” Phase 1 , Feb 1 June 30 , 1971 (New York Rand Corp 1972) p 111;*

“Congestion and delay in courts throughout the country threaten to strangle our system of justice, for as delays increase the innocent who cannot afford to make bail suffer longer in jail, the guilty who are released pose greater threats to society, and the deterrent value of speedy justice is lost. The resultant pressures to dispose of cases more and more quickly lead to still other

wrongs;less and less attention is given to each case, and greater reliance is placed on the disposition of case through 'Plea Bargaining' and the likelihood of injustice increases”.

The other factor which renders Mombasa Court as a *forum non conveniens* is the principle of case-flow stated by **Professor H.Zeisei of the University of Chicago in his text on “Delay in the Court”, Boston, Little Brown & Co., 1959, p. XXIII** where he observed *“Delay in the court is unqualifiedly bad. It is bad because it deprives its citizens of a basic public service, it is bad because the lapse of time frequently causes deterioration of evidence and makes it less likely that justice be done when the case is finally tried’ it is bad because delay may cause severe hardship to some parties and may in general affect litigants differentially; and it is bad because it brings to the entire court system a loss of public confidence, respect and pride.It invites in brief the wisecrack made a few years ago in a magazine editorial, ‘Okay, blind, but why so slow’”.*

By comparison to the facts of the instant case, it will seem to me that there is more than ample evidence not to displace the Lamu Court for Mombasa just for the mere reason of travel expenses. The court should bear in mind in construing and interpreting the provisions of Section 11, 12, 15 and 18 in circumstances that will promote the overriding objective and fair administration of justice.

What is important to note is that from Anno Domini to the time of Shakespeare and even in the 21st century, there have been complaints about the law's delay and it is a common perception that cases generally take too long to wind their way through the Kenyan Court System. At an advisory and decision level, I take the view that the motion must be denied with costs to the Respondent.

DATED, SIGNED AND DELIVERED AND SENT TO THE KNOWN EMAIL ADDRESS OF COUNSELS AT MALINDI THIS 29TH DAY OF APRIL, 2021

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R. NYAKUNDI

JUDGE

NB:

In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 by Her Ladyship, The Acting Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules. [gichanaem@yahoo.com info@kadvocates.co.ke]