



**REPUBLIC OF KENYA**

**IN THE HIGH OF KENYA AT MERU**

**MISC CIVIL APPL. NO.53 OF 2020**

**MOSES MURUNGI MUCHEKE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**CARITAS MICROFINANCE BANK LIMITED.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**JOSRICK MERCHANTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Here is an application by a Notice of Motion under certificate of urgency dated 3<sup>rd</sup> July 2020 by the applicant, brought by Caritas Microfinance Bank Limited, under section 5, 15 and 18(b) of the Civil Procedure Act and all other enabling provisions of the law and seeking, in the main transfer of Maua CMC Civil Case No.51 of 2018 from that court to Milimani Commercial courts at Nairobi for disposal and stay of proceedings pending the hearing and determination of this application.

2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Stephen K. Njoroge, the applicant's debt recovery manager, sworn on 26/06/2020. It is contended in that affidavit that the parties negotiated and concluded the contract in the applicant's/defendant's offices in Nairobi where the letter of offer was signed, disbarments made and the where the respondents account through which repayments were due is domiciled hence the cause of action arose in Nairobi and not Maua where the suit had been filed. It was additionally contended that even though the land charged is situate in meru, the balance of convenience dictated that the matter be heard in Nairobi because the main consideration in an application for transfer is where the cause of action arose.

3. The plaintiff/respondent, Moses Murungi Mucheke, has opposed the application through his replying affidavit sworn on 13/08/2020 in which he avers and contends that the cause of action having arisen in Maua Registry where the subject matter is charged, the proper court to hear and determine the matter is SPM court at Maua where the suit was properly filed. It is the respondent's position that the applicant's allegations on the issues of travelling and accommodation expenses are inapplicable in the circumstances. That it is only just and fair for the matter to be conducted within the local limits where the subject matter is situated, hence the balance of convenience favours the matter being heard and determined at Maua. The court is urged to dismiss the application as it is an afterthought and unmeritorious.

4. The 2<sup>nd</sup> defendant/respondent elected to neither file a response nor written submissions and did not participate in the matter at all.

5. Directions were taken on 15/07/2020 that the application be canvassed by way of written submissions, which were respectively filed on 21/07/2020 and 27/07/2020.

6. For the applicant, submissions were made to the effect that the transfer of the matter to Milimani Commercial courts in Nairobi for hearing and disposal is convenient to the applicant and the 2<sup>nd</sup> defendant as well as the plaintiff himself. That the travelling and accommodation expenses for the witnesses and the advocates for the applicant and the 2<sup>nd</sup> defendant are very high and they hinder justice contrary to the provisions of the Civil Procedure Act and article 159 of the constitution. It is contended that since the cause of action arose at Nairobi where the offices of the applicant and the 2<sup>nd</sup> defendant are located, the balance of convenience tilts in favour of the sought transfer and applicant who is owed money in arrears which continues to accrue interest.

7. It is concluded that the respondent will not suffer any prejudice if the orders sought herein are granted. The applicant relied on **Mutunga Mueni v Pastoer John Njenga & anor(2013) eKLR, George Mwongera Mwendameru v Loise Gakii(2016)eKLR and Kithita Ngeana v Mwaniki Kisume(2018) eKLR** in support of its position and stand that circumstances and fact revealed merit he grant of orders of transfer.

8. The respondent submitted that the subject matter that triggered the plaintiff to institute the suit in the subordinate court is a property known as Kangeta/Kangeta/6434 situate within the local limits of the Chief Magistrate court at Maua. It is contended that since the said suit is for recovery of immovable property as well as determination of a right of interest in immovable property, the court with proper territorial jurisdiction to hear and determine the same is the Chief Magistrates court at Maua in line with the express provisions of Section 12 of the

Civil Procedure Act. It is contended that section 15 of the Act is inapplicable in the matter considering the subject matter herein is property hence the relevant section is section 12 of the Act and further that the alleged travelling and accommodation expenses by the applicant and the fact that both defendants have offices in Nairobi cannot oust the statutory jurisdiction. It is further contended that it would be impractical for the Milimani commercial court at Nairobi to hear and determine the suit and proceed to issue orders on a subject matter that is not within its jurisdiction. Accordingly, to the respondent, the balance of convenience only favours the matter being heard and determined at the Chief Magistrates court at Maua which is clothed with proper territorial jurisdiction. The court is urged to dismiss the application and allow the matter to proceed at the Chief Magistrates court at Maua. The respondent relied on **David Karobia Kiiru v Charles Nderitu Gitoi & anor (2018)eKLR and Wilson Tsuma Ezekiel & 2 others v Joyce Lenga(2014) eKLR** where the courts held that where the suit involves real property or an interest thereof, the relevant section was section 12(a) and (b) of the Civil Procedure Act and therefore the suit ought to be filed at the court with territorial proximity to the suit property. Section 12 of the Civil Procedure Act provides that suits ought to be instituted where the subject matter is situated. Section 12, Civil Procedure Act provides that

**“subject to the pecuniary or other limitations prescribed by any law, suits—**

**(a) for the recovery of immovable property, with or without rent or profits;**

**(b) for the partition of immovable property;**

**(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property;**

**(d) for the determination of any other right to or interest in immovable property;**

**(e) for compensation for wrong to immovable property;**

**(f) for the recovery of movable property actually under distraint or attachment;**

**where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate:**-(emphasis added)

9. The current application is brought under section 5, 15 and 18(b) of the Civil Procedure Act and adverts not to section 12. That however does not prevent the court from addressing its mind to the broader justice needs a transfer is intended to serve.

10. Indeed, the High Court is empowered under Section 18 of the Act to order the withdrawal and transfer of any suit pending before a lower court to itself or to another court of competent jurisdiction to hear and determine it. Section 15 of the Act on the hand provides that other suits ought to be instituted where the defendant resides or cause of action arises. I do find that the suit being a dispute between a chargee and a chargor and concerning the right of the chargee to sell as contrasted with the chargor’s right to redeem the applicable provision is section 12. It is not disputed but conceded by both parties herein that the subject matter herein is immovable property that is Kangeta/Kangeta/6434, situate proximate to Maua Law Courts within Meru County as evidenced by the annexed certificate of official search dated 21/03/2018.

11. I have however noted that that the authorities cited by the applicant in its submissions support institution of the other suits anticipated under section 15 of the Act and therefore distinct from the specific circumstances and facts in the suit before the court. I find that the applicant has misapprehended the cause of action pleaded and being litigated before the lower court. Needless to say, convenience of a party cannot be allowed to outweigh the parameters set by law. I find no merit in the application and order that it be dismissed with costs.

12. I further find that the suit, Maua CMC Civil Suite No.51 of 2018 is properly before the Chief Magistrates court at Maua and that the court is competently clothed with the jurisdiction and the matter need to be given its chance in that court.

**DATED, SIGNED, AND DELIVERED AT MERU, VIRTUALLY, VIA MS TEAMS, ON THIS 21ST DAY OF MAY 2021.**

**Patrick J.O Otieno**

**Judge**