



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HIGH COURT CIVIL MISC APPL. NO. 281 OF 2019

RAGHBHIR SINGH CHATTHE.....APPLICANT

VERSUS

CLASSIC MOULDINGS LTD.....RESPONDENT

RULING

1. The application dated 25th March, 2019 principally seeks orders **that this Honourable Court be pleased to transfer Chief Magistrate's Suit No. 3510 of 2018 Milimani to the Chief Magistrate's Court at Kisumu for hearing and final determination.**
2. It is stated in the supporting affidavit that the cause of action herein arose in Kisumu and involves works allegedly carried out on a residential premises in Kisumu. That it is in the interest of justice that this matter be transferred to the Chief Magistrate's Court, Kisumu for hearing and determination and that the Respondent will not suffer any prejudice.
3. The application is opposed. It is stated in the replying affidavit that a similar application was made in the lower court and was then opposed but was withdrawn. It is further stated that the contract in question was entered into in Nairobi; that the contract was performed in Nairobi which is the Respondent's place of business; that both parties reside in Nairobi and that the cause of action giving rise to the suit is breach of contract in regard to payment of the consideration and not performance of the contract. That therefore the most convenient forum to institute the suit is in Nairobi.
4. I have considered the application, the response to the same and the written submissions filed by the counsel for the respective parties.
5. It is clear from the averment made in the replying affidavit that in the application dated 16th November, 2018 wherein the lower court was moved to transfer the suit to Kisumu was withdrawn. There is no evidence that the said application was heard and determined on merits. The issue of *res judicata* does not therefore come in.
6. The suit the subject of the application was filed in the lower court. Section 17 & 18 of the Civil Procedure Act gives this court the power to transfer such suits as provided therein.
7. The case at hand arises out of a contract. The Plaintiff (Respondent herein) specifically prays for judgment for **"Ksh.2,642,767.57 being the outstanding amount due for work done."** The Defendant has raised a counterclaim which raises issues regarding the quality of the work done *vis-a-vis* the quality of the works done, valuation and bills of quantities and payment.
8. Section 15 Civil Procedure Act as follows in respect of filing suits like the instant one;

"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; and

(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.

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.”

9. The affidavit evidence by the Respondent that the contract was made in Nairobi, that the consideration was payable in Nairobi at the Respondent's place of business and that the both parties reside in Nairobi remains unconverted by any other evidence. It is therefore apparent that the Respondent had the liberty to file the suit either in Nairobi or in Kisumu. However, the contract herein relates to works carried out on a premises that is situated in Kisumu. The territorial jurisdiction of the court was denied in the Statement of Defence. The issues concerning the valuation, Bills of quantities, quality and quantity of works done have been raised in the counterclaim. This gives rise to the possibility of experts visits for the making of reports and as submitted by the Applicant, possibly a site visit of the premises by the court. Consequently, it appears more expedient for the efficient disposal of the suit and in line with the overriding objectives of the Civil Procedure Act to have the case heard in Kisumu.

10. With the foregoing, this court is persuaded to allow the application. The application is hereby allowed with costs in cause.

Dated, signed and delivered at Nairobi this 23rd day of Jan, 2020

B.THURANIRA JADEN

JUDGE