



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISC. CIVIL APPLICATION NO. E029 OF 2020

SARA CENTOFANTI.....APPLICANT

VERSUS

MATUMBAWE INVESTMENT LIMITED.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Mwakireti & Asige advocates for the applicant

Tariq Khan advocates for the respondent

RULING

This is a notice of motion made under Section 1A, 1B, 3A and 15 of the Civil Procedure Act, Order 51 rule 1 of the **Civil Procedure Rules 2010**, seeking of transfer of **CMCC No. 25 of 2020** now pending before the Magistrate Court at Malindi to the Chief Magistrate Court at Mombasa.

In support of the application are grounds expressed in the body of the motion and an affidavit sworn by **Kelvin Asige** an advocate of the High Court representing the applicant. As part of the reasons stated in both instances are that:

- (a). The defendant is ordinarily resident in Kwale County and conducts business in Mombasa County.*
- (b). The contract which the plaintiff allegedly states was breached was meant to be wholly executed in Kwale County.*
- (c). The alleged cause of action giving rise to the suit arose within Kwale County.*
- (d). It is in the interests of justice that the application be alluded.*

On behalf of the respondents, Learned counsel Mr. Tariq opposed the application vide his preliminary objection filed in Court on 14.12.2020. In his contention, Learned counsel argued that the applicant has hitherto admitted to the jurisdiction of the Court. That following the admission, the applicant is estopped by dint of Order 2 Rule 11 of the Civil Procedure Rules. In this respect to seek for a transfer of CMCC No. 25 of 2020 to another Court.

- (e) That the Court lacks the jurisdiction to hear and entertain the applicant's application.*

Determination

For all intents and purposes applications of this nature ought not to take a dimension of such a serious controversy simply because the Law is very clear on this subject.

The Law

The applicable Section 15 of the Civil Procedure Act provides that interalia,

“Subject to the limitations aforesaid in Section 12 and 13 of the Act 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 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 looks 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 or carry on business or personally work for gain in aforesaid acquiesce, in such institution or

(c). The cause of action wholly or in part arises the Court notes that section 15 dictates a cause of action to be the facts pleaded in the claim necessary for the claimant to prove on a balance of probabilities as against the defendant to succeed in that suit.

Again, transfer of suits connotes jurisdiction being the authority in which a particular system of Court has to decide matters in issues that are set to be litigated before it or entertain the cause of action. Further, whenever disputes arise on the correct place for suing or the lowest competent Court to try the suit, it's the High Court vested with jurisdiction under Section 17 of the Civil Procedure Act to entertain any such motion to determine the forum of convenience and have the matter transferred appropriately.

Essentially, the Court has interest jurisdiction under Section 3A as read in confirmation with Section 18 (1) of the Act. Under this Section where the circumstances dictate, that certain proceedings ought to be transferred from one Court to another in this regard. The fundamental principles to be observed include the following:

(a). That the expenses and difficulties of the trial would be great as to lead to injustice.

(b). The case has been filed in a particular Court for the purpose of occasioning injustice.

(c). That it is necessary to transfer generally for the purpose of convenience.

(d). That there are pecuniary or other personal interests in the presiding judge.

(e). There is a reasonable apprehension by the litigant that he will not get a fair trial.

In view of the above, the High Court is mandated to grant the relief on transfer of suit at that stage to withdraw any suit or other proceedings pending in any Court subordinate to it and thereafter:

(1). Try or dispose of the same or transfer the same for trial or disposal to any subordinate Court to it and competent to try or dispose of the same.

In an application for transfer of suits, the standing of an applicant cannot be considered separately and without regard to the nature and reasons advanced for the suit to be withdrawn and heard by another subordinate Court.

I fully agree with the essential principles in the persuasive decision in **Mukisa Patrick v Umeme Ltd HC in Misc Cause No. 168 of 2014** in which the Court made the following observation:

“Questions of expense, the possibilities of undue hardship, convenience or inconvenience of a particular place of trial having regard to the nature of evidence on the parts involved in the suit, 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 considerations of the interest of justice.....”

It thus affords a stronger reason to say that a motion to transfer any suit to from one subordinate Court to another calls for prima facie assessment of the parameters outlined under Section 11 – 18 of the Civil Procedure Act. Thus, in decisions of a nature to transfer suits, the Court must bear in mind the fundamental right of access to justice under Article 48 of the Constitution.

It may safely be supposed that access to justice is not only an intentionally recognized human right but has also assumed Constitutional importance in Kenya as it provides abroad based remedy when it comes to fair administration of justice.

Therefore, while construing Section 11,12,13, 17 and 18 of the Civil Procedure Act on the place of suing and the requirement to transfer suit from one Court to another our approach should not be narrow and pedantic, but elastic enough to match with the fundamental right to a fair trial. In light of the above the Court has given a careful consideration to the preliminary objection raised by the respondent in rebuttal to the application seeking an order for transfer of suit from Malindi to Mombasa Court. The question that falls for determination as a preliminary objection is not a question of fact but a point of Law. The principles enunciated in **Shahida Abdul Hassanah Kasam v Mahed Mohamed Gulamah Civil Application No. 42 of 1999**, the Court expressed itself as follows:

“the aim of a preliminary objection is to save the time of the Court and of the parties by not going into the merits of an application because there is a point of Law that, will dispose of the matter summarily”

Reverting, to the respondent objection that the applicant had in the pleadings admitted and submitted itself to the jurisdiction of the Court in

which the transfer is being sought is not legally maintainable.

As regards the argument that the Court lacks jurisdiction as vested by the Constitution and statute Law to determine the application, helpfully Section 17 of the Act serves as a useful reminder to the respondent.

Nothing in this preliminary objection is capable of being an issue of Law which can determine the substantial disputes of facts and dispose of the whole claim or at least one aspect of the case. In particular, the fact that the applicant admitted jurisdiction in its defence would not be a determinative of the claim filed by the respondent as a whole.

Indeed, as to the merits of the application, the scope of the dispute and subject matter of the contract is stated to have been performed in Kwale County. It is especially important to note that the applicant is domiciled in Mombasa.

In the context of entirely reasons given by the applicant in the notice of motion, I am satisfied that the respondent choice of forum should be disturbed by withdrawing **CMCC No. 25 of 2020** registered at Malindi and have it transferred to **Mombasa Chief Magistrate Court** for hearing and determination with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 16TH DAY OF DECEMBER 2020

.....

R. NYAKUNDI

JUDGE

In the presence of:

1. Mr. Asige advocate for the appellant
2. Mr. Tama advocate for the respondent