



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

CIVIL SUIT NO. 22 OF 2018

MAPANA ENTERPRISES LTD.....PLAINTIFF

VERSUS

XPLICO INSURANCE CO. LTD.....1ST DEFENDANT

PATRICK MBUVI MBITHI.....2ND DEFENDANT

RULING

1. The only prayers that remain for the determination by this court in the Notice of Motion dated 30.11.2018 is the request by the applicant to transfer the instant suit to the ***Chief Magistrate's Court in Nairobi for hearing and final disposition.***

2. The Application is supported by an annexed affidavit of Bernard Nzusa Mangatu, indicated as the director of the Applicant sworn on even date and further on the following grounds:-

(a) What remains of the suit is a cause of action in contract between the 1st defendant and the plaintiff.

(b) The said contract was entered into in Nairobi.

(c) Both the plaintiff and the defendant have their registered offices in Nairobi.

(d) The defendant will suffer no prejudice if the application is allowed.

3. The Application was not opposed by the defendants who have not filed any response. Earlier on the 16th October 2018 the suit against the 2nd defendant was struck out leaving the plaintiff and the 1st defendant to continue with the suit.

4. Learned counsel for the plaintiff prayed that the application be allowed and indicated that the application was served on counsel for the 1st defendant who has failed to file any response thereto. I have considered the Application and note that the plaintiff seeks that the court finds that the issues raised are uncontroverted and should thus be entitled to the prayers sought. The issue for determination is whether Milimani CM's Court has jurisdiction to hear and determine **High Court Civil Suit 22 of 2018** and if not whether this court can order for the transfer of the said suit from Machakos High Court to Nairobi CM's Court for hearing and final determination.

5. The application is brought under Section 11, 14, 15 and 17 of the Civil Procedure Act. The High court is empowered under Section 18 of the Civil Procedure Act Cap 21 laws of Kenya to withdraw and transfer any suit pending before a lower court to itself or to another court of competent jurisdiction to try and determine it. Section 17 of the Civil Procedure Act provides that "Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed." Section 14 of the Civil Procedure Act provides that "Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts"

6. Section 14 provides for the place of institution of a suit and not the transfer. Transfer is covered under Section 17 and 18 of the Act. However the court can only transfer a matter which was in the first instance filed before a court that was competent to hear and determine the suit. (see **Omwoyo =Vs= African Highlands And Produce Limited [2002] KLR 698**).

7. The Applicant herein maintains that the remaining part of the cause of action arose within Nairobi where the Defendant and plaintiff carries on business. Section 15 of the civil Procedure Act provides that every suit shall be instituted in a court within the local limits of whose jurisdiction the Defendant or each of the Defendants actually or voluntarily resides or carries on business or personally works for gain or have acquiesced in such institution of suit of the cause of action wholly or in part arises. Again Section 12 of the said Act provides that subject pecuniary jurisdiction or other limitation prescribed by law suits shall be instituted where subject matter is situate.

8. On the other hand the Magistrate's Court Act Cap 10 Laws of Kenya vide Section 3(2) gives a Magistrate's Court countrywide jurisdiction to hear and determine any suit notwithstanding where the Defendant resides or where the cause of action arose. This seems to appear to be in conflict with the Civil Procedure Act in that the Magistrate's Court Act is the substantive Law establishing the Magistrate's Courts and conferring it with geographical as well as pecuniary jurisdiction to hear and determine disputes. It is noted that the Civil Procedure Act was enacted much earlier than the Magistrate's Court Act and that in the event of a conflict between the two statutes the Provision in the latter statute would be deemed to have amended the earlier provision (see Mohamed Sitabani =Vs= George Mwangi Karoki Hcca 13 Of 2002). Even though this may be the position, the guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of Owners Of Motor Vessel "Lilian S" Vs Caltex Oil (K) Ltd [1989] KLR 1 that:-

"Jurisdiction is everything without which a court of law has no power to make one more step where a court of law has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter the moment it holds the opinion that it is without jurisdiction."

9. The Applicant seems to base its Application on the convenience grounds and wants it transferred to Milimani CM's Court for trial and final determination. The Defendant seems to admit that the convenience of the Applicant that the suit should be heard in Milimani CM's Court because of their failure to respond the application. A perusal of the pleadings indicates that the plaintiff seeks for an order that the 1st defendant settles the decretal amount in Kithimani PMCC 160 of 2016 and failure to do so will be in breach of the contract between the plaintiff and the 1st defendant imputing that the magistrates Court had jurisdiction to try the instant suit in the first place in order to enable this Court vide Section 18 of the Civil Procedure Act to order for the transfer to Milimani CM's Court. I am curious why the applicant opted to file the instant suit at the Machakos High Court instead of filing it at Kithimani Magistrates court and this does not resonate with Section 11 of the Civil Procedure Act that provides that a suit be filed in a court of the lowest grade competent to try it. In as much as this suit is properly filed before this court since the cause of action is said to be based on a contract entered between the Plaintiff and the Defendant and which contract was said to have been executed at Nairobi; the analysis of the pleadings indicate that the performance stems from a Civil suit that was filed and judgement entered. Under the Provisions of Section 15 of the Civil Procedure Act a suit arising out of a contract ought to be filed before the court where the contract was to be performed or where in performance of contract any money was expressly or impliedly payable. It is clearly apparent that the amount is less than Kshs 20m/- hence by dint of section 3(2) of the Magistrate's Court Act and Section 15 of the Civil Procedure Act the Magistrates Court at Milimani or Kithimani has the territorial jurisdiction.

10. The overriding objective of the Civil Procedure Act and Rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. In the furtherance of this overriding objective, the courts are mandated to ensure the just determination of proceedings, efficient disposal of business of the court, the efficient use of available judicial and administrative resources and the timely disposal of proceedings at a cost affordable by the respective parties. I find it would be just, convenient and fair to let the case now pending at Machakos High Court be determined at Kithimani Magistrates courts. A transfer of the suit to Milimani would not be in the best interest of both parties. I find the suit was improperly filed before the High Court and yet it ought to have been filed at the Magistrate's Court and that the present Application by the defendant in my view amounts to delaying tactics and akin to forum shopping. There is absolutely no justification why this case cannot be heard and determined by the Kithimani Magistrates Court. Suffice to add that already the 2nd defendant has since been compensated leading to the striking out of the suit against the 2nd defendant. Any issues involving the plaintiff and the 1st defendant ought to be resolved within the Kithimani case as taking it to another court will cause prejudice to the parties.

11. In the result I find the Plaintiff/Applicant's Application dated 30.11.2018 lacks merit. The same is dismissed with no order as to costs.

It is so ordered.

Dated and delivered at Machakos this 24th day of September, 2019.

D. K. Kemei

Judge