



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLENOUS CIVIL APPLICATION NO. 62 OF 2016

ERIC SIMIYU MAFURA.....APPLICANT

VERSUS

1. CROWN PAINTS (K) LIMITED

2. METAL CANS & CLOSURE KENYA LIMITED.....RESPONDENTS

RULING OF THE COURT

1. The applicant by a notice of motion dated 3rd March, 2016 sought orders that Mavoko PMCC No. 829 of 2013, Eric Simiyu Mafura v. Crown Paints (K) Limited and Metal Cans & Closure Kenya Limited be transferred to Milimani Commercial Chief Magistrates Court at Nairobi for trial and final determination. The motion is supported by the affidavit of Ben Musundi who is the advocate in conduct of this matter for the applicant. The reasons he advanced are that; at the time of filing of the suit, he knew that the cause of action occurred near airport road within the jurisdiction of Mavoko Law Courts but that after reviewing the case and after Honourable E. Too's directions of 29th February, 2016, it is his opinion that the suit ought to be tried at Milimani Commercial Chief Magistrate's Court at Nairobi to save on costs and time.

2. In support of his case, the applicant relied on Article 159 (2) (d) of the Constitution which provides that justice should be done without undue regard to procedural technicalities. He cited **Bungoma High Court Civil Appeal No. 50 of 2001, John Maraka Wakesa v. Patrick Wafula Otunga** where it was stated that section 15 of the Civil Procedure Act being relied upon is purely administrative. That the resident magistrate's courts have countrywide jurisdiction in matters wherein it has competent pecuniary jurisdiction to hear and determine. He further cited **Justus Kyalo Mutunga v. Labh Singh Harnam (2012) eKLR** where Judge Odunga quoted Judge Mwera's (*as he then was*) decision in **Nairobi HCC No. 627 of 2001 Doshi Enterprises Ltd v. Oriental Steel Fabrications & Builders** that filing of a case outside the territorial jurisdiction of both parties contrary to the mandatory provisions of section 15 of the Civil Procedure Act does not make it a nullity because section 15 (b) thereof adds that a court may give leave for the filing away from the local limits if the defendant may acquiesce in such institution.

3. Betty Kageni who is the advocate in conduct of this matter on behalf of the respondent swore a replying affidavit filed on 14th June, 2016. She stated that the suit was first filed against the first respondent whose offices are within Nairobi and that the cause of action occurred in the said respondent's premises situate within Nairobi. That according to the Civil Procedure Act a matter can either be filed where the cause of action took place or where the defendant resides or carries out business in this case, Nairobi. She however contended that since Mavoko Law Courts did not in the first instance have the territorial jurisdiction to hear and determine the matter, an order for transfer of the suit cannot be made herein.

4. In its submissions, the respondent cited **Charles Ndungu Kirobi v. Esther Muthoni Mungai (2012) eKLR**, **Charles Omwata Omwoyo v. African Highlands & Produce Co. Ltd (2002) eKLR**, **Victoria Katuku v. Jessinkay Enterprises & 2 Others (2017) eKLR** and **Bishop Christopher Ndungu v. Andrew Abungu (2006) eKLR** all which held that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is in the first place filed in a court which does not have jurisdiction, pecuniary or territorial to try it.

5. I have considered the plaintiffs application and the rival affidavits as well as the submissions of the learned counsels. The issue for determination is whether Mavoko Principal Magistrate's court had the requisite jurisdiction in the first place to hear and determine on suit No. 829 of 2013 and if not whether this court can order for the transfer of the said suit from Mavoko Law Court to Milimani Chief Magistrates Courts for hearing and final determination.

6. The High Court is empowered under Section 18 of the Civil Procedure Act 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. 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 PRODUCT LTD [2003] KLR 698**). There is good reasons or rationale behind this provision in that it would present persons from filing suits in any places which suits their convenience which might later on be found to cause undue hardship to the persons sued. Indeed by dint of Section 15 of the Civil Procedure Act 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 reside 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.

Even though Section 3(2) of the Magistrate's Court Act (Cap 10 L.O.K) gives a Magistrate's Court countrywide jurisdiction to hear and determine any suit notwithstanding where the Defendants resides or where the cause of action arose, 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 will be deemed a nullity. (See **OWNERS OF MOTOR VESSEL "LILIAN S" Vs CALTES OIL (K) LTD [1989] KLR**)

The Plaintiff/Applicant herein states that at the time of filing the suit he knew that the cause of action arose near North Airport Road within the Jurisdiction of the newly established Mavoko Law Courts but that he has now learnt that the suit ought to be tried at Milimani Commercial Chief Magistrate's Court at Nairobi to save on costs and time. Indeed it has been revealed that the Respondents offices are located in Nairobi where they carry on their business and further that the cause of action arose within the jurisdiction of the Nairobi Milimani Chief Magistrate's Commercial Court. This therefore leaves no doubt that Mavoko Law Court did not have the territorial jurisdiction to hear and determine the suit in the first place.

The Applicant has sought refuge under the provisions of Article 159 (2) of the Constitution and overriding objective of Section 1A of the Civil Procedure Act. I am not persuaded by the Applicant's conduct in seeking refuge under those provisions because parties to suits are expected to conduct due diligence before embarking on the exercise of filing cases. The said provisions should not be used as a panacea for all ills and if it is encouraged, there will be situations hereby parties or litigants will have a field day to file cases in courts that suit their convenience to the disadvantage of the would be defendants. This must be discouraged.

Once the Applicant learnt that the Mavoko Law Courts lacked the requisite jurisdiction to hear and determine the suit he was at liberty to withdraw the suit and file it in the appropriate court. The Applicant should not worry about an expected challenge by Respondents who would often oppose the new suit on the ground of Res judicata since the matter would not have been conclusive by and substantially decided by the court. The issue then left for the Applicant to grapple with will be aspect of costs as the governed under Section 27 of the Civil Procedure Act.

In the result I find the Plaintiff's application dated 3/3/2016 lacks merit. The same is ordered dismissed with costs to the Respondents.

Dated and delivered at Machakos this **19th** day of **January, 2018**.

D. K. KEMEI

JUDGE

In the presence of :-

N/A for Musundi - for the Plaintiff

N/A for Kairu - for the Respondents

Kituva - Court Assistant