



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**MISCELLANEOUS APPLICATION NO. 326 OF 2016**  
**SUSTAINABLE MANAGEMENT SERVICES.....PLAINTIFF/RESPONDENT**  
**VERSUS**  
**NEW MITABONI F.C. S.....DEFENDANT/APPLICANT**

**RULING OF THE COURT**

1. The Defendant/Applicant filed a Notice of Motion dated 6/12/2016 brought pursuant to the Provisions of Section 18 of the Civil Procedure Act and seeks for the following prayers:-

***(a) That the Honourable court be pleased to order the transfer of Milimani CMCC No.6047 of 2016 – Sustainable Management Services =Vs= New Mitaboni F.C.S. from Chief Magistrate’s Court at Milimani (Milimani Commercial Law Courts) to the Chief Magistrate’s for hearing and final determination.***

***(b) That the costs of the Application be in the cause.***

2. The Application is supported by an annexed affidavit of Philip M. Mulwa learned Counsel for the Applicant sworn on even date and further on the following grounds:-

***(a) The cause of action in this matter arose in Mitaboni within Machakos County within the jurisdiction of the Machakos Chief Magistrate’s Court and not Milimani Law Courts.***

***(b) The Defendant operates business in Mitaboni within Machakos County and not within the territorial jurisdiction of Milimani law courts.***

***(c) All the Defendant’s witnesses are based in Mitaboni area within Machakos County.***

***(d) It is only fair and just that the orders sought herein be granted for the expeditious disposal of the matter.***

3. The Application was opposed by the Plaintiffs/Respondent on the following grounds of objection:-

***(a) The matter sought to be transferred is currently the subject of ongoing proceedings at the Milimani Law courts which should be left to continue to conclusion.***

***(b) The suit is properly filed within the jurisdiction of the Chief Magistrate’s court at Milimani since the contract was executed in Nairobi and was to be performed in Nairobi as indicated by***

*repayments of loan by the Defendant at the Plaintiff's offices in Nairobi.*

*(c) That the Application should be rejected on the grounds that the cause of action arose out of a contract which is dependent on where the same was to be performed and where monies were expressly or implied to be payable. As all these were done in Nairobi and hence the CM's Court at Milimani is seized of the matter and there is no need to warrant a transfer.*

4. Learned counsels for the parties made oral submissions. Miss Mutua for the Defendant/Applicant submitted that the Defendant carries on business in Machakos and further that the cause of action arose at Mitaboni, where most of the Defendants witnesses reside. The Defendant's Counsel further submitted that the alleged contract does not indicate the place it was signed or where it was to be performed. It was finally submitted that the Plaintiff would not suffer any prejudice if the transfer of suit is allowed.

5. Mr. Olando for the Respondent submitted that the suit is pending determination before the CM's Court at Milimani. He further submitted that the suit is based on a contract between the Plaintiff and Defendant which was executed in Nairobi and payments made in Nairobi. It was further submitted for the Respondent that the Applicant is intent on delaying the finalization of the suit and is engaging in forum shopping. It was finally submitted for the Respondent that the Plaintiff stands to be prejudiced and that it would be fair and convenient to have the matter finalized at Milimani Law courts.

6. I have considered the Defendants Application and the rival affidavits as well as the submissions of both learned counsels. The issue for determination is whether Milimani CM's Court has jurisdiction to hear and determine **CMCC No. 6047 of 2016** and if not whether this court can order for the transfer of the said suit from Milimani CM's Court to Machakos CM's Court for hearing and final determination.

7. 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. 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**).

8. The Applicant herein maintains that the cause of action arose within Mitaboni area of Machakos where the Defendant resides and carries on business and further its witnesses reside there and therefore Milimani Law Courts do not have the requisite territorial jurisdiction.

9. Indeed 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.

10. 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 Civil Procedural law whereas the Magistrate's Court 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.”***

The Defendant/Applicant seems to base its Application on the above ground of lack of territorial jurisdiction by the Milimani CM's Court to handle the suit and wants it transferred to Machakos CM's Court for trial and final determination. In essence the Defendant/Applicant appears to acquiesce or admit that the Milimani Law Courts had jurisdiction but that in order for the convenience of the Applicant and its witnesses and also due to the fact that the cause of action arose at Mitaboni area of Machakos the suit should be heard in Machakos CM's Court. The Defendant's contention further implies that the Milimani CM's Court had jurisdiction to try the 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 Machakos CM's Court. This then resonates with the Respondent's contention that the Milimani CM's Court has jurisdiction and that the suit is properly filed before it since the cause of action is based on a contract entered between the Plaintiff's and the Defendant and which contract was executed at Nairobi and further that the said contract was to be performed in Nairobi and that so far the Defendant has performed partly as it has made part payment in Nairobi leaving the outstanding sums which is now the subject of the suit at Milimani CM's Court. The Respondent has maintained that the cause of action is based on a contract whereby the Applicant was advanced some loan which was to be repaid at some interest. The Respondent further maintains that the loan contract was entered into in Nairobi whereby the parties executed the loan agreement in the presence of one Eunice Njeri Ndiritu Advocate of P.O. Box 20314 – 00200 Nairobi. Further minutes taken of a meeting between the Respondent and Applicant on 7/1/2016 at the Respondents offices in Nairobi had been done in Nairobi. Under the Provisions of Section 15 of the Civil Procedure Act a suit arising out of a contract ought to be filed 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 loan contract was executed in Nairobi and was to be performed in Nairobi and that part payment of Kshs.4 million had been paid by the Applicant in Nairobi. Hence by dint of section 3(2) of the Magistrate's Court and Section 15 of the Civil Procedure Act the Milimani CM's Court has the territorial jurisdiction in the suit since the cause of action arose within Nairobi and performance of the contract was to be done in Nairobi.

11. The overriding objective of the Civil Procedure Act and Rules made thereunder is to facilitate the just, expeditious, proportionate and or 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 Milimani CM's Court be determined at Milimani law courts. A transfer of the suit would not be in the best interest of both parties, I find the suit properly filed before the Milimani CM'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 Milimani CM's Court.

12. In the result I find the Defendant/Applicant's Application dated 6/12/2016 lacks merit. The same is dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered at **MACHAKOS** this **26<sup>TH</sup>** day of **JULY** 2017.

**D. K. KEMEI**

**JUDGE**

**In the presence of:**

C/A: Kituva