



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MISCELLANEOUS CIVIL APPLICATION NO. 173 OF 2015**

**AIR CONNECTION LIMITED.....PLAINTIFF**

**VERSUS**

**TRANSAFRICA FISHERIES LTD.....DEFENDANT**

**RULING**

1. The subject matter of this ruling is the motion dated 15<sup>th</sup> May 2015 in which **Transafrica Fisheries Ltd**, the defendant/ Applicant sought for inter alia an order directing the transfer of **Nairobi C.M.C.C No. 165 of 2012, Transafrica Fisheries Ltd =vs= Air Connection Ltd** from Nairobi Chief Magistrate's court to the Chief Magistrate's court, Mombasa for hearing and disposal. When served with the aforesaid motion, **Air Connection Ltd**, the plaintiff/respondent, filed the replying affidavit of Rehan Fazal to oppose the motion.

2. When the motion came up for inter partes hearing, learned counsels tendered oral submissions. The brief facts which gave rise to this motion can be ascertained from the pleadings filed by the parties. The plaintiff's claim against the defendant appears to be the sum of USD 13,119.21 in respect of export and import cargo services offered to the defendant by the plaintiff at the defendant's request made in Nairobi between the year 2005 and 2010. The plaintiff avers that this action was filed against the defendant when it failed to meet the plaintiff's demands. The defendant denied the plaintiff's claim by filing a defence. The defendant also denied the territorial jurisdiction of the chief magistrate's court, Nairobi. The defence further filed a counter-claim in which it sought for damages against the plaintiff for the loss it suffered due to the plaintiff's breach of unwritten contract with the defendant leading to the perishing of live crabs worth USD.10,500/=.

3. Having set out in brief the case that was before the trial court, let me now consider the merits or otherwise of the motion. The defendant/applicant is of the view that the suit should be withdrawn from Nairobi Chief Magistrate's court and transferred to Mombasa Chief Magistrate Court for hearing and determination because the cause of action arose in Mombasa where the contract was allegedly entered. The defendant/applicant further stated that the defendant has a registered office in Mombasa and has no branch in Nairobi. It is also the defendant's submission that unless the applicant is granted the orders sought, the defendant will be disadvantaged because it will incur expenses in transporting and maintaining its witnesses in Nairobi. Miss Michira, learned advocate for the defendant informed this court that the agreement between the parties was partly performed in Nairobi and partly done in Mombasa.

4. The plaintiff /respondent, on the other hand strenuously opposed the motion claiming that the same was filed in abuse of the process of court. The plaintiff/respondent further argued the filing of the motion

meant to forestall the hearing of the substantive suit. The respondent also complained that the defendant did not issue a notice of intention to the institution of the applicant. The plaintiff/respondent argued that it has offices both in Nairobi and Mombasa. It further submitted that transactions involving the processing of export documents were carried out in Mombasa.

5. The plaintiff also argued before this court that all other transactions including payments were carried out at its Nairobi offices. In summary, the plaintiff stated that the contract was performed and completed in Nairobi hence the Chief Magistrate's Court, Nairobi is best suited to hear and determine this suit.

6. I have carefully considered the rival submissions and the question which this court has to grapple with, is whether or not the suit before the Chief Magistrate's, Nairobi should be transferred to Mombasa. The considerations to be taken into account in determining the proper place for a suit to be tried are clearly stated under Sections 14, 15 and 17 of the Civil Procedure Act. Learned counsels who appeared before this court for interpartes hearing of the motion did not present to this court the kind of evidence in their possession which they would rely at the hearing of the suit. The learned advocates basically relied on their pleadings. I expected the parties to present to this court copies of their witness statements they filed before the trial court, yet there is clear averment in paragraph 11 of the replying affidavit of Rehan Fazal that parties had exchanged witness statements.

7. It would appear to me that questions touching on which court should hear a matter should be dealt with under Order 11 rule 7(3)b of the Civil Procedure Rules that is during the pre-trial conference. It is at this juncture that, parties explore ways in which they can even have the suit transferred by consent to the most appropriate court. In the absence of that parties will fall back to Section 18 of the Civil Procedure Act which is the case here.

8. I have already pointed out that this court was given scanty information by way of evidence to show where the cause of action arose. This court will therefore heavily rely on the pleadings presented to it. The plaint clearly shows that the cause of action arose in Nairobi. The defendant has disputed that assertion by claiming that it has registered offices in Mombasa and that the transaction was partly performed in Mombasa.

9. In paragraph 10 of the replying affidavit of Rehan Fazal, the plaintiff avers that the defendant has admitted the jurisdiction of the Chief Magistrate's court, Nairobi in paragraph 13 of its defence and counter-claim. This averment has not been controverted by the defendant. I have also looked at paragraph 13 of the defendant's defence and counter-claim dated 24<sup>th</sup> February 2012 and it is true that the defendant actually admitted jurisdiction. Parties are bound by their pleadings. They are not allowed to turn around what they pleaded which the defendant now purports to do.

10. A critical examination of paragraphs 4, 5, 6 and 7 of the replying affidavit of Rehan Fazal will reveal that the transaction that gave rise to this dispute appears to have been partly performed or transacted in Mombasa and partly in Nairobi. The oral submissions of Miss Michira also confirms this view. Under section 15 of the Civil Procedure Act, the plaintiff therefore had the option of choosing either court to file its action.

11. In the end and for the above reasons, I find no merit in the motion dated 15<sup>th</sup> May 2015. The same is dismissed with costs.

Dated, Signed and Delivered in open court this 11<sup>th</sup> day of March, 2016

**J. K. SERGON**

**JUDGE**

In the presence of:

Miss Mirigu for the Applicant

N/A. for the Respondent