



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA

MISC APPLICATION NO. 97 OF 2014

FRAGRASSO COMPANY LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

MALINDI MANAGEMENT STRATEGY LTD

T/A CASINO MALINDI.....DEFENDANT/APPLICANT

R U L I N G

1. The miscellaneous application, hereof, is for an order that Mombasa civil suit No 252 of 1995 be transferred to Malindi court for hearing and determination.
2. The application is premised on two grounds. Firstly that the cause of action arose in Malindi, and secondly that the applicant is ordinarily resident in Malindi.
3. The application was opposed by the respondent, who is the plaintiff in magistrate's court case. In the replying affidavit sworn by the respondent on 15th August 2014 it was deponed that the magistrate's court case was filed in 1995, 19 years ago. That the case was fully heard before Hon. Maloba Senior Resident Magistrate but before the final submissions were made before that magistrate he was transferred out of the Mombasa law court station. That the applicant, when directions were being given by another magistrate, stated that the record of the proceedings of Maloba Senior Resident Magistrate had a lot of information missing. It is as a result of that, that the case was ordered to start denovo. Before it started denovo the applicant made the present application.
4. The respondent also deponed, which was not controverted by the applicant, that when the magistrate's court case was filed the respondent resided in Mombasa and only relocated to Malindi subsequently.

ANALYSIS

Section 15 of the Civil Procedure Act is the section which.

5. That section provides that a suit shall be filed where the defendant resides or carry on business at the commencement of the suit. I emphasize 'at the commencement ' of the suit. The question in that regard to be determined is where was the applicant/defendant residing in 1995. It is not controverted that the defendant was a resident of Mombasa at the commencement this suit. Because it is central to the present application. I will reproduce section 15 thus:

15. Subject to the limitations aforesaid, 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 the 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 works 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 for gain, as aforesaid acquiesce in such institution; or

c) the cause of action, wholly or in part, arises.

6. The applicant's application is defeated on two front bearing the provisions of that section into account firstly is that the applicant was a resident of Mombasa at commencement of this suit. The respondent therefore was right to have filed the case in Mombasa.

7. The Section further defeats respondent's application because it provides that a suit may be filed where the defendant acquiesces. The respondent in his defence filed in the magistrate's court stated:

“ The jurisdiction of the honourable court is admitted”.

He admitted to the jurisdiction of the magistrate's court in Mombasa. Having so acquiesced the respondent cannot be heard to say that he is prejudice by the case continuing to be heard before the magistrate's court at Mombasa.

8. The respondent does not also deserve the exercise of this court's discretion in his favour in view of the delay in bringing the present application. Respondent waited for 19 years to bring the present application. Here the delay certainly does defeat the respondent's application.

CONCLUSION

The Notice of Motion dated 4th April 2015 for the reasons stated above is dismissed with costs to the respondent.

Dated and delivered at Mombasa this 25th day of June 2015.

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Mary Kasango

C/Assistant- Kavuku

For the Applicant

For the Respondent

Court

Ruling delivered in their presence/Absence in open court.

MARY KASANGO

JUDGE