



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 34 OF 2014

ALY JAMAL.....PLAINTIFF

-versus-

ERASTUS GEORGE MOMANYI.....1ST DEFENDANT

JULIUS MARS OUMA.....2ND DEFENDANT

AUTOMATED LOGISTICS COMPANY LIMITED.....3RD DEFENDANT

RULING

ON NOTICE OF MOTION DATED 17TH APRIL 2014

1. By that Notice of Motion Defendant seeks the dismissal of this suit for want of jurisdiction. The application is brought under Section 15 and 3A of the Civil Procedure Act Cap. 21. The application is based on the following grounds-
 - a. **That the Defendants reside and carry on business in Nairobi.**
 - b. **That the cause of action giving rise to this suit arose in Nairobi.**
 - c. **That this suit ought to have been filed in Nairobi, the Defendants being residents of Nairobi and cause of action having arisen in Nairobi.**
 - d. **It is very expensive for the Defendants to attend trial of the suit in Mombasa and it is fair and just that this suit be terminated at this stage.**

BACKGROUND

2. The Plaintiff filed this case on 17th March 2014. The suit is based on an agreement the Plaintiff claims was entered into on or about the 24th December 2013 between the Plaintiff, ARIFF LALANI, KARIM PIRBHAI, SALIM MADHANI and ALIKHAN SHAJANI on the one hand and the Defendants on the other hand (hereinafter "**the Agreement**"). The Plaintiff claims that the terms of the Agreement were, *inter alia*, that:
 - i. The Defendants would refund the sum of USD 232,750.00 to the Plaintiff and the same would be paid in the following manner:

a. The sum of USD. 45,000.00 to be paid immediately upon signing the Agreement;

b. The balance of USD. 187,750.00 to be paid by seven (7)

equal consecutive monthly installment of USD.

26,821.50 being due within sixty days of the date of the

Agreement.

ii. All payments were to be made in United State Dollars by direct

funds transfer to the Plaintiff's account at Imperial Bank

Limited, Mombasa Branch.

3. The Plaintiff alleges that the Defendants defaulted in making payments as agreed hence the Plaintiff filed this suit in which he claims USD. 232,750.00 together with interest thereon at the rate of 9% per annum from 24th December 2013 until payment in full.

4. The Defendants filed their Statement of Defence on 2nd April 2014 in which they denied the Plaintiff's claim.

DEFENDANT'S SUBMISSIONS

5. Referring to Section 15 of Cap 21 the Defendants submitted that they reside and work in Nairobi and that the 3rd Defendant has its registered office, also in Nairobi. That according to Section 15(a) and (b) this suit should have been filed in Nairobi.

6. That the negotiation leading to the agreement, the subject of this suit also took place in Nairobi and consequently the cause of action as contemplated by Section 15(c) was in Nairobi, where suit should have been filed.

7. That although the Plaintiff sought to rely on the place of payment, that is Mombasa, for determination where the cause occurred Defendant submitted that the agreement provided for payment to be made to Plaintiff's bank account which could be transmitted through any bank in Kenya.

8. Defendants relied on the following three authorities-

ELKANAH ORARE OTUNDO –Vs- RAEL OTUNDO NAIROBI HCCC NO. 936 OF 2004 delivered by Justice Osiemo on 19th June 2006. The Court's holding in that case was as follows-

“From the wording of the said order it is clear that although the High Court has jurisdiction to entertain suits all over the country, having established High Courts regionally, a suit should be filed within the jurisdiction of the local High Court where that cause of action occurred unless otherwise ordered.”

MARIGAT GROUP RANCH & OTHERS –Vs- WESLEY CHEPKOIMET

& 19 OTHERS NAKURU HCCC NO. 172 OF 2012 where the learned Judge struck out a suit after finding that it had been filed in the wrong Court. The Learned Judge held as follows-

“Though the High Court has unlimited jurisdiction to hear matters from all over the country, Section 12 of the Civil Procedure Act and the above Gazette Notice exist for

purposes of good management and administration of the various Courts in the country.”

SAMUEL M. W’NJUGUNA –Vs- BENJAMIN ACHODE & OTHERS

NAIROBI HCCC NO. 711 OF 2012 (2013)eKLR they held as follows-

“As a result of the foregoing authorities, I have little or no doubt that this Court can, in an appropriate case, invoke its inherent jurisdiction or the power as donated to it by Order 47 rule 6(2) to transfer a case from one High Court Registry to another.”

They ordered that suit to be transferred to Mombasa High Court.

PLAINTIFF’S SUBMISSIONS

9. Plaintiff submitted that striking out a suit is drastic and that it is a

power the Court should use sparingly. That striking out the suit on such a technicality would not serve the end of justice and would be contrary to the present Constitutional dispensation.

10. On provisions of Section 15 Plaintiff submitted that the cause of

action arose in Mombasa because Mombasa was where the contract would be **“completed.”** That is the money payable by Defendants to Plaintiff was to be made in Mombasa. And even though Defendants could transmit that money from elsewhere the pay was to the Plaintiff’s account at Imperial Bank Mombasa Branch.

11. Further that the Defendants had a Subordinate office in Mombasa and in accordance with Section 15 Plaintiff was entitled to file the suit in Mombasa.

12. Plaintiff relied on the case **ATTA (KENYA) LIMITED –Vs- NESFOOD INDUSTRIES LIMITED (2012)eKLR** viz-

“A party seeking to oust the jurisdiction of one station of the High Court in favour of another, must, in my view go beyond the face value of the tenets of convenience stipulated in Section 15 of the Civil Procedure Act. At the minimum, the applying party must demonstrate that the right of access to justice under Article 48 of the Constitution is at threat. This should be advanced by placing before the Court material showing that beyond the pillars of convenience stipulated in Section 15 of the Civil Procedure Act, there is a verifiable motive on the part of the Plaintiff to use geographical inconvenience to defeat the substantive ends of justice. A mere apprehension of such a possibility may not suffice. Further, the Applicant should demonstrate that it has come to Court at the earliest opportunity with its request.”

ANALYSIS

13. There are two issues for determination-

- i. **Does the Mombasa High Court have territorial jurisdiction to entertain this matter?**
- ii. **If not should this suit be dismissed?**

14. On the first issue I will begin by referring to the decision of Justice

Odunga in the case of **JANE WAMBUI WERU –Vs- OVERSEAS PRIVATE INV. CORP & 3 OTHERS, NAIROBI HIGH COURT CIVIL SUIT NO. 83 OF 2012, [2012]eKLR**. The holding of the Judge is very persuasive. He held-

“However, it is my view that the jurisdiction of the High Court can only be limited as provided by the Constitution itself and any purported limitation not founded on the Constitution is null and void. If, therefore the provisions of Section 12 and 15 of the Civil Procedure Act purported to limit the jurisdiction I would not hesitate to exercise the powers bestowed upon the High Court under *Article 2(4)* of the Constitution and declare it void to that extent. The Civil Procedure Act, however, is not the instrument that confers jurisdiction upon the High Court. In Riddlesbarger and Another vs. Robson and Others [1958] EA 375, the East African Court of Appeal held as follows:

“As the Supreme Court has jurisdiction throughout, ‘court’ in sections 13, 14 and 15 of the Civil Procedure Ordinance can only refer to a subordinate court. Since the Ordinance applies only to courts in the territory, and ‘suit’ by definition in section 2 means civil proceedings commenced in any manner prescribed by rules made by the rules committee under section 81 of the Ordinance, the word ‘court’ in these sections can only refer to a subordinate court. In Kenya there is only one Supreme Court with jurisdiction throughout and there is no need for express exclusion since the sections cannot apply to the Supreme Court in Kenya”.

Similarly, I hold that in light of the clear provisions of the Constitution section 15 of the Civil Procedure Act does not apply to the High Court.” (emphasis mine).

15. Although as I said before that this decision is persuasive there is

need to take care that the Plaintiff in attempting to frustrate a Defendant, perhaps one who is impecunious, could file a suit in a far flung place. There is, in my view need to limit the liberality of the interpretation of the Constitution in that regard. After all Article 159(1) (a) provides that justice shall be done to all. There may therefore be instances that the justice of the case requires that the territorial jurisdiction be given its due regard.

16. The applicable law on territorial jurisdiction is Section 15 which

provides-

“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.”**

17. The 1st and 2nd Defendants reside and work in Nairobi. The 3rd

Defendant has its registered office in Nairobi and has its Subordinate office in Mombasa. It follows that in respect of the 1st and 2nd Defendants territorial jurisdiction is in Nairobi but in respect of the 3rd Defendant Plaintiff had the option of either filing the suit in Nairobi or Mombasa – see explanation No. 2 of Section 15. I do reject 3rd Defendant’s argument that since its

Directors did not sit in Mombasa that it does not qualify as a Subordinate office. In my view, since it carries out the business of the 3rd Defendant's business the Mombasa office would qualify as a Subordinate office.

18. In respect of provision of Section 15(c) I find that the cause of action arose in Nairobi where the subject agreement was executed.

I reject the Plaintiff's submission that the cause of action arose in Mombasa because that is where Plaintiff's bank account is. Even by the terms of the agreement it seems clear that it contemplated that such payment was by "direct funds transfer" from any location. It is therefore incorrect to submit that the final destination of that payment would determine the territorial jurisdiction.

19. I do therefore find that the territorial jurisdiction lay in the High Court at Nairobi.

20. On the second issue I find that to strike out this suit, which would

necessitate the Plaintiff filing another suit in the High Court at Nairobi would go contrary to provisions of Section 1A and 1B of Cap 21, that is the overriding provision. The Courts are required by that provision to facilitate the just, expeditious, proportionate and affordable resolution of Civil dispute.

21. Perhaps more importantly is that Order 47 of the Civil Procedure

Rules makes adequate provision for a suit filed in one District Registry of the High Court to be transferred to another. The different District Registries are set out in Appendix G. of those Rules. They are 15 in total. Nairobi is the Central office. The District Registries are, amongst others, Mombasa, Malindi, Kericho, just to mention a few. Order 47 Rule 6(1) and (2) provides as follows-

"6.(1) Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such place as the Court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.

(2) The Court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the Court.

Provided always that in appointing such particular place for trial the Court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case."

22. The Court can on its own motion, under that Rule appoint the place for trial bearing in mind the convenience of parties.

23. To order for this case to be tried in Nairobi rather than order the

same to be struck out would be in keeping with the Court of Appeal decision in the case **NICHOLAS KIPTOO ARAP KORIR SALAT v INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 6 OTHERS [2013]eKLR** where the Court considering an application to strike out a Notice of Appeal which it was alleged was not served within the provided period on the Respondent. The Court of Appeal had this to say-

“Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice t the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the Court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.

The general trend, following the enactment of Sections 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate Jurisdiction Act and Article 159 of the Constitution, is that courts today strive to sustain rather than to strike out pleadings on purely technical grounds as will shortly be demonstrated.”

24.This Court in view of what is stated above, will not strike out the Plaintiff’s suit.

25.In conclusion I grant the following orders-

- a. **The Notice of Motion dated 17th April 2014 is dismissed but the costs thereof shall be paid by Plaintiff to Defendants.**
- b. **I hereby transfer this suit to High Court at Nairobi Commercial and Admiralty Division for its determination.**

DATED and DELIVERED at MOMBASA this 27TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE