



IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPL. NO. 198 OF 2014

KENYA ORIENT INSURANCE LIMITED APPLICANT

-VERSUS-

KADENGE KARISA SALI 1ST RESPONDENT

SADIKI KAZUNGU CHIPAWA 2ND RESPONDENT

DEOGRATIAS MICHAEL KATANA 3RD RESPONDENT

ERICK KETU NDOVOI 4TH RESPONDENT

MUYE CHARLES MUYE 5TH RESPONDENT

RULING

1. **KENYA ORIENT INSURANCE LIMITED (the Applicant)** has filed this Miscellaneous Cause seeking the following prayers-

a. **THAT this Honourable Court do order the transfer of the following cases-**

- i. **Kadenge Karisa Sali Vs Kenya Orient Insurance Limited PMCC No. 9 of 2014, Garsen.**
- ii. **Sadiki Kazungu Chipawa Vs Kenya Orient Insurance Limited PMCC No. 10 of 2014, Garsen.**
- iii. **Deogratias Michael Katana Vs Kenya Orient Insurance Limited PMCC No. 11 of 2014, Garsen**
- iv. **Erick Ketu Ndovoi Vs Kenya Orient Insurance Limited PMCC NO. 12 of 2014, Garsen**
- v. **Muye Charles Muye Vs Kenya Orient Insurance Limited PMCC No. 13 of 2014, Garsen.**

from the Garsen Magistrate Court Registry to the Mombasa Resident Magistrate Court for trial and determination.

GENESIS OF THE APPLICATION

2. The Plaintiffs in all the above listed suits sued the owner of vehicle KAB 017B for general damages for injuries suffered when that vehicle was involved in accident in which they were passengers. Judgment was entered in their favour. The suits this Miscellaneous Cause seeks to transfer from Garsen Magistrate's Court to the Resident Magistrate's Court Mombasa are the

declaratory suits filed by those Plaintiffs in respect of the aforesaid judgments.

APPLICANT'S SUBMISSION

3. That the Applicants, which is a Corporation has registered office in Nairobi and has an office in Mombasa. That being so, as per Section 15 of the Civil Procedure Act, the suits filed in Garsen Magistrate's Court were not in the correct forum. It was deponed by Stephen Kisevu in his affidavit of 11th July 2014 as follows-

“THAT in a tort case one of the considerations to be taken into account is the residence of the defendant and secondly the geographical location of the place where the cause of action arose while in a declaratory suit like the current one the place of suing has to be a place where the defendant i.e the applicant herein has its registered office or carries on business.”

RESPONDENTS' SUBMISSIONS

4. Respondent submitted that the accident to which the declaratory suits relate occurred in Garsen and were reported in Garsen Police Station. That the declaratory suits because they relate to unsettled decrees of Garsen Magistrate's Court that Court was the correct forum.

ANALYSIS

5. Section 15 of Cap. 21 provides-

“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. In my consideration of the Applicant in the light of Section 15 there are two issues to interrogate-

- i. **Where is Defendant's principal office in Kenya?**
- ii. **Are there any other considerations when determining place of instituting a suit?**

7. In respect of the first issue Applicant had a burden of proof to show

either its registered office – that is Principal Office, or its Subordinate office are situated. Applicant did not attach any document to prove the same. It is therefore idle argument for Applicant to say that the suits in Garsen Magistrate's Court should have been filed in the Resident Magistrate's Court Mombasa because it runs an office in Mombasa. Applicant failed, in this regard, to satisfy the burden upon it as per Section 107 of the Evidence Act Cap 80. That Section provides-

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

8. In the light of the above failure this Court is unable to determine

where the Applicant's Principal or Subordinate Office is.

9. Even if Applicant had satisfied that burden, is the Defendant's

residence the only consideration? On the above second issue I answer in the negative. As can be seen from the above reproduced Section 15 there are three considerations when one contemplates instituting a suit. One is residence or place of business of the Defendant. Second is where the leave of the Court to institute a suit in a particular Court is sought or where the Defendant acquiescence. The third is that a suit may be instituted where the cause of action wholly or in part arose.

10. It is the third consideration, above, that I find favours the

Respondent. The cause of action is the Applicant's failure to settle the judgment amount on behalf of its insured which judgment and decree were in respect of suits in Garsen Magistrate's Court. The cause of action, that is the failure to satisfy those decrees, occurred in Garsen.

11. The two issues identified above go against the Applicant.

Accordingly this action is hereby dismissed with costs to the Respondents. The previous stay of the suits in Garsen Magistrate's Court is hereby vacated.

DATED and DELIVERED at MOMBASA this 20TH day of NOVEMBER, 2014.

MARY KASANGO

JUDGE