



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUSIA
MISC.CIVIL APPLICATION NO.96 OF 2014

FRANCIS KASALA KACHORO.....APPLICANT

VERSUS

MAGDERLYNE ACHIENG OMONDIRESPONDENT

RULING

1. This Court is asked to consider and determine the Notice of Motion dated 12th August 2014 seeking the following substantive order,
 1. **THAT Mumias S.P.M C.CC 118 of 2014 be transferred to Busia C.M.S court to be heard and determined.**
 2. **THAT costs be provided for.**
2. Mumias SPM No.118 of 2014 **MAGDERLYNE ACHIENG OMONDI –VS FRANCIS KASALA KACHORO** (the suit) was commenced by the Respondent against the Applicant at the Senior Principal Magistrates Court at Mumias. It is said that vide an agreement made on 27th February 2013 the Applicant agreed to sell to the Respondent one acre of sugarcane at a consideration of ksh.40,000/= which sum was paid in full. According to paragraph 3 of the Plaint, the Applicant was forced to make the sale to enable him pay school and examination fees for his son schooling at St Joseph’s High School situated in Mumias. The Respondent complains that the Applicant breached the agreement and therefore sued him for ksh.59,000/= which includes ksh.19,000/= being expenses allegedly incurred by the Respondent in tending the sugarcane crop.
3. In seeking to transfer the suit the Applicant states that he is a resident of Nasewa village in Busia County, where the cause of action arose.
4. In a Replying Affidavit sworn on 26th August 2014, the Respondent opposes the Application for transfer. The Respondent states that the agreement giving rise to the cause of action was done at Mumias and further that,

“...the applicant’s son whose fees was paid by me and forms the subject of the dispute was a student at St. Joseph’s High School at Mumias and in the premises the Mumias Court is best placed to hear and determine the dispute between me and the applicant.”

The Respondent sees the present application as a ploy to merely delay the determination of the Dispute.

5. The provisions of Section 11 through to 18 of The Civil procedure Act is on place of suing. From the Plaint, the Plaintiffs cause of action arises out of contract. For that reason the provisions of Section 15 governs the place of institution of the suit under discussion. Section 15 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, of the defendants who do not reside or carry on business, as aforesaid acquiesce in such institution; or**
 - c. **the cause of action, wholly or in part, arises.”**
6. The Respondent had the option instituting the suit either in a Court within the local limits of whose jurisdiction the Defendant resides or where the cause of action, wholly or in part, arose. Explanation (3) of Section 15 expounds the meaning of “arise” for purposes of that Section. It explains;

“In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely-

- I. **the place where the contract was made;**
 - II. **the place where the contract was to be performed or the performance thereof completed;**
 - III. **the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable. “**
7. It is common ground that the Applicant resides within Busia County (see paragraph 2 of the Plaintiff and paragraph 2 of the Applicants Supporting Affidavit.) The Chief Magistrates Court at Busia is within the local limits of the residence of The Applicant. So the Respondent could have chosen, by virtue of residency, to file suit at Busia. But the Respondent would also have an option of filing suit where the cause of action arose.
8. In paragraph 3 of the Supporting Affidavit the Applicant avers that the cause of action arose at Nasewa within the jurisdiction of the Busia Court. He simply states so without more. It is a mere averment. On the other hand, the Respondent avers that the agreement (and therefore the contract) was made at Mumias and consideration was paid at Mumias. If what the Respondent is saying is true then in terms of Explanation 3(i) and 3(iii) of Section 15 the cause of action arose at Mumias within the local limits of the Mumias Court. But just like the Applicant no evidence was placed before me on where the agreement or payment of the consideration was made.
9. This Court is dealing with two rival positions made by mere averments. Yet the Applicant who seeks to have the suit transferred to Busia bears the onus of proving that the cause of action arose at Nasewa. He who asserts must prove. Given that the Applicant has failed to provide some proof that the cause of action arose at Nasewa, this Court is not persuaded that the Respondent wrongly exercised her option of instituting the suit in a Court within whose limits she alleges the agreement was made and consideration in respect thereof paid.
10. The Application of 12th August 2014 is therefore for dismissal. It is hereby dismissed with costs.

F. TUIYOTT

J U D G E

DATED, SIGNED AND DELIVERED AT BUSIA THIS 10TH DAY OF DECEMBER 2014.

IN THE PRESENCE OF:

KADENYI.....COURT CLERK

APPLICANT IN PERSON

BOGONKO H/BRIEF FOR AKWALA.....FOR RESPONDENT