REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 351 of 2006

THE CO-OPERATIVE BANK OF KENYA LTD. …….…. PLAINTIFF

VERSUS

GIKANDI NGIBUINI T/A GIKANDI NGIBUINI & CO. ADVOCATES …..… DEFENDANT

R U L I N G

1. The Defendant has brought this Notice of Motion dated 16 November 2012, before court seeking to transfer this suit to the High Court at Mombasa for hearing and disposal. The Application is brought under **sections 1A, 1B, and 3A** as well as **sections 15, 18 and 63(E)** of the *Civil Procedure Act*. The Application is based on the following grounds:

"1. The Defendant works for gain and resides in Mombasa and as there is a High Court in Mombasa, in particular a Commercial Court in Mombasa, the suit is best suited to be heard and determined in Mombasa.

2. All the witnesses in the matter reside in Mombasa and the Plaintiff by filing this suit in Nairobi did so against the law with the sole intention of forum shopping.

3. The Plaintiff's bank that dealt with the matter in dispute is based in Mombasa and all the alleged transactions in the matter were purportedly carried out in Mombasa town.

4. The Defendant will suffer great prejudice if the matter proceeds for hearing and determination here in Nairobi where he will; be forced to incur heavy costs and may not be in a position to prepare well for the hearing as a result of the extensive travelling that is involved.

5. This Honourable Court must not allow the Plaintiff to forum shop and ought to allow this dispute to be heard and determined within the Mombasa County where both parties reside and the subject matter of the suit occurred".

2. The Application is supported by the Defendant's Affidavit sworn on 19 November 2012. The deponent detailed that he is an advocate of this court practising in Mombasa. He stated that he used to maintain two current accounts with the Plaintiff Bank's branch in Nkrumah Road, Mombasa. Such accounts were being operated from Mombasa. The deponent then referred to **section 15** of the *Civil Procedure Act* which he maintained was couched in mandatory terms to the extent that the suit should be heard and determined where the alleged cause of action arose, in this case, in Mombasa. He noted that there was a Commercial Court in Mombasa with competent jurisdiction to deal with this matter. He made two further comments. Firstly that he would suffer great prejudice if this matter was to proceed to hearing in Nairobi AS HE would be incurring heavy costs in travelling to Nairobi both for himself and his

witnesses. Secondly, he urged the court to safeguard his integrity to follow the rule of law by not allowing the Plaintiff herein to forum shop.

3. The Application is opposed and the Plaintiff filed Grounds of Opposition on 27 November 2012. The following were the grounds thereof:

"1. The application is a grave abuse of the process of this Honourable Court.

2. The application offends the provisions of Sections 1A and 1B of the Civil Procedure Act, Cap. 21 Laws of Kenya and Article 159 2 (b) and (d) of the Constitution of Kenya, 2010.

3. This suit which was filed in Court way back in 2006 has come for hearing on a number of occasions only to be adjourned at the behest of the defence but at no one time has the Defendant raised an issue on the place of suing.

4. The Affidavit of the Defendant sworn in support of his application does not make out a case to warrant the orders sought.

5. The application is intended to vex the Plaintiff and more so after the Defendant's application dated and filed in Court on 10th July 2009 to have the suit dismissed for want of prosecution was dismissed way back on 16th October 2009.

6. The application is an afterthought and purely intended to delay and/or frustrate the hearing of the suit which is scheduled for 6th December 2012".

4. On the 18 December 2012 counsel for both parties appeared before this court to make oral submissions as regards the Application. Counsel for the Defendant noted that all the transactions as between the Plaintiff and the Defendant herein had taken place in Mombasa. The Defendant resides and has his business in Mombasa. The bank accounts, the subject of the suit, were held at the Plaintiff Bank's Branch in Nkrumah Road, Mombasa. In counsel's view the Plaintiff was obliged to file its suit at the place where the Defendant resides or carries on his business. The reasons why the suit should be transferred to Mombasa are detailed under **section 1A** of the *Civil Procedure Act* so as to allow a just and affordable resolution of the case. In counsel's further opinion, the Defendant will have to incur exorbitant expenses to have to come to Nairobi to defend the case. Section 1B of the Civil Procedure Act also implores the court to consider a more efficient method of determination of the suit – all the witnesses are resident in Mombasa and it will be efficient and expeditious for the matter to be heard there. Finally, the learned counsel for the Defendant noted that the Plaintiff had raised the issue that there had been delay in the filing of this Application but it had not shown that it would suffer any prejudice by having the case heard in Mombasa.

5. Miss. Karanja, learned counsel for the Plaintiff, noted that it opposed the Application and relied upon the filed Grounds of Opposition. In her view, the Defendant was guilty of undue delay in making the Application. She noted that the Defence had been filed in September 2006 and such an application as this, should have been made much earlier. It was now too late in the day. Further, the suit had come for hearing on a number of occasions but had always been adjourned at the request of the Defendant. In counsel's view the Application was an afterthought aimed at frustrating the further prosecution of the suit. Under section 18 of the Civil Procedure Act, the Plaintiff had a right to institute a suit in any forum of law as provided for and the court should not interfere with the choice of forum unless the expenses of trial would lead to undue injustice to the Defendant. Further, counsel noted that the Plaintiff had complied with Order 11 but the Defendant had not filed either his witness statements or his documents in relation to the suit. Miss Karanja felt that it was not proper for the Defendant to allege that his witnesses would incur undue expense, where the Defendant had not even filed their witness statements in court. As regards the law, counsel made the point that this court had no jurisdiction to transfer the matter to another High Court and the Application had been wrongly brought under **section 18** of the *Civil Procedure Act*. Under that section, there is no power given to the High Court to transfer one case from the High Court sitting in one place to another. **Section 18** only gave the court power to transfer matters to subordinate courts.

6. In a short response, Mr. Agwara for the Defendant stated that this court has jurisdiction to transfer the suit to Mombasa for determination and disposal, which was provided for under **sections 3A** and **63 (a)** of the *Civil Procedure Act* allowing the court to make such orders as it considered convenient. It was part of the court's inherent jurisdiction. He maintained that the Defendant had not filed his list of witnesses or witness statements as he had always been concerned as to the costs for him to produce his witnesses in Nairobi. Counsel commented upon the authority submitted to this court by counsel for the Plaintiff being **Heinz Isbrecht versus Charles Ochieng Ndiga (1997) eKLR**. He distinguished that case on the fact that the transfer of the suit of therein was from the lower courts to the High Court as the plaintiff therein had wrongly claimed jurisdiction of the lower court. Counsel reiterated that as regards the provisions of **section 15** of the *Civil Procedure Act*, the Plaintiff was obligated to file its suit in Mombasa. He maintained that it was in the interests of justice so to do and would create no prejudice to the Plaintiff. He commented that the costs of transporting the Defendant's 5 witnesses that he intended to call, would be exorbitant.

7. The substantive sections under which the Defendant has brought his Application before court are **sections 15, 18 and 63 (e)** of the *Civil Procedure Act*. With respect, I do not consider any of those sections help the Defendant as far as the Application is concerned. **Section 15** provides that every suit shall be instituted in a court within the local limits of whose jurisdiction the defendant, at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain. This suit has been instituted in the High Court which has unlimited jurisdiction throughout Kenya. It does not have local limits of jurisdiction. To my mind, the provisions of **section 15** of the *Civil Procedure Act* apply to subordinate courts situated in various areas in Kenya. In any event, section 15 does not provide for the transfer of suits on such an application before the High Court. **Section 18** of the *Civil Procedure Act* gives power to the High Court to withdraw and transfer cases instituted in subordinate courts. It does not give power to the High Court to transfer cases as between the various High Court stations throughout Kenya. **Section 63 (e)** of the *Civil Procedure Act* allows the court to make such other interlocutory orders as may appear to be just and convenient in order to prevent the ends of justice from being defeated. That section appears under Part VII – Supplemental Proceedings and is one of general application. However as it appears under such heading, I do not think or consider it to be of any assistance to the Defendant in pursuing his Application before court.

8. This then leaves the Defendant relying upon the sections of general application and the inherent jurisdiction of this court being **sections 1A, 1B and 3A** of the *Civil Procedure Act*. I consider the provisions of **section 3A** to be particularly pertinent to this Application in that it reads:

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

I would tend to agree with counsel for the Defendant that this section gives this court considerable leeway to make such orders as it thinks fit including ordering for a file which has been opened in one High Court station to another where it appears to the court to be necessary for the aims as expressed in **section 1B (1)** of the *Civil Procedure Act*. Such aims would include the necessity for:

"the just determination of the proceedings, efficient disposal of the business of the court, the efficient use of available judicial and administrative resources, the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties and the use of suitable technology".

9. The Plaintiff herein chose to file this suit in Nairobi just under 6 years ago. The delay in the Defendant bringing this Application leaves this court with wondering just why it has taken so long? It may be that the learned counsel for the Plaintiff is correct in that the Application is merely another way or device put forward by the Defendant in order to frustrate the hearing of the suit. From the record of this court, there is a history of non-appearance by the Defendant in respect of various applications and twice with regard to the hearing of the suit. Although I take the point that the **Heinz Isbrecht** case (supra) is not on point so far as it involved a transfer of a suit from the Chief Magistrate's court in Mombasa to the High Court there, I do take cognizance of the quotation adopted by the honourable Judge who heard the

transfer application. He quoted from **Mulla** on the **Indian Code of Civil Procedure** as follows:

"The plaintiff as *arbites litis* or *dominus litis* has the right to choose any forum the law allows him. This right is subject to control under Section 22 & 24 (Section 17 & 80). The burden lies on the applicant to make out a strong case for a transfer. The balance of convenience in favour of proceedings in another court is not a sufficient ground, though it is a relevant consideration. As a general rule, the court should not interfere unless the expenses and difficulties of the trial would be so great as to lead to an injustice or the suit has been filed in a particular court for the purpose of working injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leading him to seek his remedy in another jurisdiction."

10. Counsel for the Defendant has claimed that the Defendant intends to call some 5 witnesses and the cost of transporting these witnesses from Mombasa to Nairobi will be exorbitant. That was a statement from the bar and is not backed up by the Affidavit in support of the Application sworn by the Defendant. **Order 7 rule 5** of the *Civil Procedure Rule* reads as follows:

"5. The defence and counterclaim filed under rule 1 and 2 shall be accompanied by –

(a) An affidavit under Order 4 rule 1 (2) where there is a counterclaim;

(b) A list of witnesses to be called at the trial;

(c) Written statements signed by the witnesses except expert witnesses; and

(d) Copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11".

11. As I read **rule 5** above, it is mandatory for the Defendant to file his list of witnesses to be called at the trial as well as the written statements signed by those witnesses. It is also mandatory for the Defendant to have provided copies of documents to be relied on at the trial. The Defendant has not provided any of the documentary requirements and has not complied with **Order 11**. As a result, this court is in the dark as to how the Defendant intends to conduct his defence and what witnesses he intends to call. The court is not in a position to adjudge whether the expenses and difficulties of holding the trial in Nairobi would be so great as to lead to injustice. Further, the almost 6 years which it has taken the Defendant to bring the Application before court amounts, in my opinion, to inordinate delay. Over and above that, the matter has come before this court in Nairobi on not less than 11 occasions, the Defendant being present and/or represented on more than half of the same. He has already submitted to the jurisdiction of this court in Nairobi and to now come with this Application will, in my opinion, be prejudicial to the Plaintiff.

12. The general rule is that the court should not interfere unless an injustice is caused. I don't see any injustice here. Accordingly, I dismiss the Defendant's Notice of Motion dated 16 November 2012 with costs to the Plaintiff. The parties may now take an early hearing date for this suit at the Registry here in Nairobi, upon a priority basis.

DATED and delivered at Nairobi this 11th day of February 2013.

J. B. HAVELOCK
JUDGE