



REPUBLIC OF KENYA

High Court at Mombasa

Civil Case 34 of 2011

JOSIAH NJENGA T/A JOSIAH NJENGA & ASSOCIATES.....PLAINTIFF

VERSUS

CONCORD INSURANCE COMPANY LTD.....DEFENDANT

RULING

1. The application before the court is the Defendant's Notice of Motion dated 22nd May, 2012 seeking a court order for the transfer of this case from this court to the High Court at Nairobi, Commercial and Tax Division, Milimani Commercial Court.

2. The Defendant's grounds are as follows:

“1. The Defendant's registered office is in Nairobi.

2. The Defendant's principal place of business is also in Nairobi and as a result whereof the purported contract would have been made and wholly performed in Nairobi.

3. That in the circumstances, the High Court of Kenya in Nairobi is the Court of suitable jurisdiction to try this matter as the purported cause of action arose in Nairobi.

4. That no prejudice will be occasioned on the Plaintiff as both he and his Advocates have offices in Nairobi whereas prejudice will be occasioned on the Defendant through unnecessary travel and sustenance costs in defending the suit in Mombasa.”

3. The Defendant's application is supported by Affidavit of Njoroge Mbuchucha, the Defendant's Chief Executive Officer who says the Defendants registered office is in Nairobi at L.R. NO. 209/10670 4th Floor Yaya Centre Building. That its principal place of business is also in Nairobi where the purported contract would have been performed. That these facts are confirmed in the Plaintiffs list of Documents 1-6 and 8. That the Plaintiff at all times communicated with the Defendant's Nairobi office. Further, that the Plaintiff's advocate's letters annexed as documents 9 and 11 of the Plaintiff's List of documents bear

details of the Plaintiff's and his advocate's Nairobi offices.

4. The application is opposed by the Plaintiff's grounds of opposition which are as follows:

“1. That the Plaintiff had entered into a contract for service with the Defendant to conduct forensic audit of the Defendant's accounts and prepare both due diligence report and five year financial projections.

2. That the allegation that the High Court in Mombasa is not the suitable forum for the determination of the instant case is misleading because;

a) The Defendants carry on business in Mombasa and has offices in Mombasa located at Oriental Building, 1st floor Nkrumah road.

b) The Plaintiff's main office is in Mombasa Trade Centre, phase 2, 2nd floor, Nkrumah Road Mombasa. The Defendant's letter dated 10/6/10 addressed to the Plaintiff confirms the awareness of the Plaintiff's offices in Mombasa. The same letter is produced as document Number 5 in the Defendant's List of Documents.

c) The Plaintiff had been contracted by the Defendant to conduct a forensic audit of its accounts prepare a due diligence report and a five year financial projection.”

5. As parties correctly submitted, Section 15 of the Civil Procedure Act is the governing provision on this matter. The principal relevant consideration in determining where the suit is filed is circumscribed by the place where the **“defendant carries on business”** in terms of Section 15 (a) and (b), and on where **“the cause of action, wholly or in part, arises”** in terms of Section 15 (c).

6. In connection to the residence of a Defendant, Explanation (1) under Section 15 relates to a person who has a **“dwelling”** at one place and **“temporary residence”** at another. In my interpretation, this implies individuals rather than corporations. In my view, residence of a corporation does not arise as the locale of a corporation is not referred to in legal nomenclature in terms of **“residence”**, but rather in terms of juridical domicile – as, for example, a company incorporated in Kenya.

7. Explanation 2 is relevant to corporations, such as the Defendant. It provides:

“(2) – A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or in respect of any cause of action arising at any place where it has a subordinate office, at such place.”
(underlining mine)

Thus, critical to the determination of the place where a suit should be filed against a Defendant corporation, are the twin indicators:

- firstly, where its sole or principal office in Kenya is, and
- secondly, if the cause of action has arisen at a place where the Defendant corporation has a subordinate office, then that office.

8. I do not see from the parties' submissions any dispute that the principal office of the Defendant is also its registered corporate office as indicated in the various minutes and audited financial statement of the Defendant. This is at 4th Floor Yaya Centre Building, Nairobi. The Plaintiff could have been sued there.

9. The Plaintiffs, however, point out in their grounds and written submissions that the Defendant also has offices in Mombasa, and that the entire contract was performed in Mombasa where the Plaintiff's main office is. In coming to this position, the Plaintiff has relied on Explanation 2 of Section 15 of the Civil Procedure Act.

I do not understand Explanation 2 in the same light. My understanding is that that explanation provides firstly, that a corporation may be sued either at its sole or at its principal office. The Defendant has a principal office but not a sole office. So, it can be sued at its principal office. But secondly, in respect of a cause of action arising at any place where it, the corporation, has a subordinate office, it can be sued at that office. From the documentation availed, however, there is no evidence that the cause of action herein arose at any of the corporations subordinate offices. Consequently, in respect of explanation 2, the Defendant can only be sued at its principal office.

10. The Plaintiffs have also invoked Section 15 (c) which permits a suit to be filed where the cause of action wholly or in part arises. In this regard, the Plaintiff has referred to Explanation 3, which provides as follows:

“(3) – in suits arising out of contact, 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 the place where, in performance of the contract any money to which the suit relates was expressly or impliedly payable.”

11. Although the Defendant disputes the existence of a contract, the suit is nevertheless based on the existence of one, and therefore arises out of it in terms of Section 15 (c) of Civil Procedure Act.

12. With regard to Explanation 3(i) none of the parties have provided evidence as to the place where the contract was made, and therefore that provision cannot be invoked. Again, on performance under Explanations 3(ii) and (iii), there was no evidence availed to demonstrate where it was to be done, completed or payment made.

13. I have also carefully perused the alleged contract pointed out in the Affidavit of Njoroge Mbuchucha, for the Defendant, as contained in the Plaintiff's List of Documents as Number 1. I do not see in it any indication of where it was signed or when and where payment was to be made. It is titled **“Terms of Reference for Investigations/Forensic Audit at Concord Insurance Company Limited.”**

14. Given all I have said above, I determine that the place of suing the Defendant in this matter should have been at the Defendant's principal office in terms of Explanation 2 of Section 15 (b). The Application therefore succeeds.

Accordingly, I direct that the file be transferred to Nairobi, Milimani Commercial Court.

Costs will be in the cause.

Orders accordingly.

Dated, signed and delivered this 11th day of February, 2013

R.M. MWONGO
JUDGE

Read in open court

Coram:

Judge: R.M. Mwongo

Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....