



REPUBLIC OF KENYA

High Court at Eldoret

Miscellaneous Application 43 of 2012

ZACHARIAH SAMBAY.....APPLICANT

VERSUS

NATIONAL BANK OF KENYA LIMITED.....RESPONDENT

RULING

The applicant **Zachariah Sambay**, is the defendant in Narok CMCC No. 170 of 2011 in which he has been sued by **National Bank of Kenya Limited**. He seeks, by his application dated 12th June, 2012, the transfer of that suit from Narok to Eldoret Chief Magistrates Court for disposal. The application has been brought under the provisions of sections 3A, 17 and 18 of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The application is predicated upon the grounds that the applicant resides in Eldoret and he cannot afford the costs of travelling to Narok to conduct the case.

The application is supported by an affidavit of the applicant sworn on 12th June, 2012 which affidavit elaborates the above grounds. The application is opposed and in that regard there is a replying affidavit of **Grace Sukantet**, the respondent's Operations Manager. She has deponed that the applicant applied for and obtained a loan facility from the respondent at its Narok Branch which facility was to be paid through the applicant's account at Narok. In the premises, she has further deponed, the respondent had the option to file the suit in Narok.

When the application came up before me for hearing on 3rd July, 2012, Counsel agreed to file written submissions which were duly in place by 31st July, 2012. Those submissions reiterated the stand-points taken by the parties in their respective affidavits.

I have considered the application the affidavits and the submissions of counsel. Having done so, I take the following view of the matter. Section 15 of the Civil Procedure Act reads as follows:-

“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.

(b) any of the 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 aforesaid acquiesce in such institution or

(c) the cause of action wholly or in part arises”

There is no dispute that at the time of commencement of the suit, the applicant actually and voluntarily resided and carried on business in Uasin Gishu County. That fact expressly emerges from the affidavit of service exhibited by the deponent of the replying affidavit. The respondent's objection to the application is that the cause of action arose in Narok where the loan advanced to the applicant was to be repaid and it therefore had the option to commence the suit, as it did, in Narok. The respondent has however not disputed the applicant's averment that he now resides and works for gain in Uasin Gishu County.

Section 18 [1] [b] [ii] of the Civil Procedure Act provides as follows:-

“18 (1) On the application of any of the parties and after due notice to the parties and after hearing such of them as desire to be heard or of its own motion without such notice, the High Court may at any stage.

(a)

(b) Withdraw any suit or other proceedings pending in any court subordinate to it and thereafter.

(i)

(ii) Transfer the same for trial or disposed to any court subordinate to it and competent to try or dispose of the same.”

It would appear from the above provisions that the jurisdiction of the High Court to withdraw and transfer cases instituted in subordinate courts is unfettered, the only limitation being the competence of the subordinate courts. In the matter at hand, both the Narok and Eldoret chief Magistrate's courts have jurisdiction to try the subject suit and it cannot be gainsaid that the respondent indeed had the option, to file the Narok suit. It can equally be said that the applicant had the right to make this application given that at the time the suit was instituted in Narok he was residing and working for gain in Uasin Gishu County.

Having considered the respective merits of the parties' positions, I have come to the conclusion that the suit filed by the respondent in Narok be transferred. The respondent has not in any event demonstrated that it would suffer any prejudice which cannot be compensated in costs if the order sought in this application is granted. Having come to that conclusion, I will allow the application. Narok CMCC No. 170 of 2011 is hereby withdrawn from that court and is transferred, to Eldoret Chief Magistrate's Court for disposal.

The applicant shall pay the costs of the application.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET
THIS 18TH DAY OF SEPTEMBER, 2012.**

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Ngetich H/B for Mr. Barasa for the Applicant.

**F. AZANGALALA
JUDGE**

18TH SEPTEMBER, 2012