



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO. 233 OF 2011

SUPERIOR PRINTERS LTD.....APPLICANT

VERSUS

KENTRO SYSTEMS LTD.....RESPONDENT

R U L I N G

1. By a notice of motion dated 18th March, 2011 filed as Miscellaneous Civil Application No. 233 of 2011 the applicant Superior Printers Limited, who is the defendant in HCCC No. 849 of 2010, seeks to have the suit which was filed at the High Court in Milimani Commercial Court transferred to the High Court Mombasa for hearing and determination.

2. The application is based on the following grounds:

a) That the cause of action herein arose in Mombasa and as such High Court Commercial court Milimani, Nairobi has no territorial jurisdiction to determine the same.

b) That the High court Commercial Court at Milimani, Nairobi lacks the requisite territorial jurisdiction to hear and determine the said suit.

c) That it is much more convenient for the Applicant and its witnesses if the case was transferred to Mombasa as it is much nearer and the Applicant's headquarters is actually at Mombasa.

d) That there is no clear and fairly good arguable point as to why this matter was filed in Nairobi by the plaintiff here.

e) That the costs of conducting this matter in Nairobi is unnecessary for all the parties involved.

The application is also supported by an affidavit sworn by Seifudin A. Bhaijee a director of the applicant.

3. The application is opposed through a replying affidavit sworn by Vineet Kanwar, a senior manager of the respondent. He depones that the respondent's suit is primarily premised on the infringement of the respondent's registered trade mark, and passing off by the applicant. The infringement and passing off has allegedly taken place in numerous places. In particular the applicant widely distributed, marketed and sold the disputed products in Nairobi. The respondent therefore maintains that the cause of action having wholly or partially arose in Nairobi, it is within the respondent's right to elect to file the suit in Nairobi. The respondent denies that the High Court at Milimani Commercial Court lacks territorial jurisdiction to hear and determine the suit.

4. Counsel for the applicant pointed out that the cause of action arose in Mombasa. He relied on section 15 of the Civil Procedure Act which provides for the place of suing. He also relied on the case of **Abdi Ali Hasham vs. Antony Kihonge [2008] e KLR**. Counsel for the respondent on his part maintained that the passing off giving rise to the cause of action, arose in Nairobi. He submitted that the power provided under section 18 of the Civil Procedure Act to withdraw and transfer a case from one court to another only applies in matter filed in the lower court. He pointed out that the Chief Justice has given out practice instruction note relating to the place of suing.

5. I have given due consideration to this application.

I note that the application has been brought under Section 17 and 18 of the Civil Procedure Act. Section 17 which deals with power to transfer suits which may be instituted in more than one court states as follows:

“17. Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determined in which of the several courts having jurisdiction the suit shall proceed.

6. Section 18 gives power to the High Court to withdraw and transfer a case instituted in a subordinate court. That section states as follows:

18. (1) On the application of any of the parties and after 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

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(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter –

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

7. It is evident from the above that these sections are concerned with transfer of suits instituted in the subordinate courts and not suits instituted in the High Court. With regard to suits instituted in the High Court the relevant provision is Order 47 of the Civil Procedure Rules 2010 (formerly Order XLVI). Rule 1 Order 47 states that every suit in the High Court may be instituted at the central office of that court situated in Nairobi, or in a district registry. Rule 2(1) provides for a schedule setting out district registries. That schedule identifies the High Court registry in Mombasa as one of the district registries of the High Court. Therefore the position is that unlike the subordinate courts, there is only one High Court of Kenya with one central registry and several district registries. The issue of territorial jurisdiction is not applicable in the High Court.

8. Order 47 Rule 6 of the Civil Procedure Rules which provides for place of trials, states as follows:

“(1) Every suit whether instituted in the central office or in a district registry of the High court shall be tried in such place as the court may direct; and in the absence of any such direction a suit instituted in the central office shall be tried by the High Court sitting in the area of such central office and a suit instituted in a district registry shall be tried by the High Court sitting in the area of such district registry.

(2) The court may of its own motion or on the application of the party to a suit and for a cause shown order that a case be tried in a particular place to be appointed by the court – Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date of which such trial is to take place and all other circumstances of the case.”

9. The above provisions make it clear that the issue of transferring a suit from one High Court to another High court does not arise. Rather the suit having being filed in the High Court whether in the central registry or district registry, the issue is where the trial is to be held. That issue is to be determined by a Judge in the same suit and not by way of a miscellaneous application. Nor can section 3A of the Civil Procedure Act apply as there is a specific provision dealing with the situation.

10. For the above reasons I find that the application before me is incompetent. It is accordingly struck out.

Dated, signed and delivered this 2nd day of November, 2011.

H. M. OKWENGU

JUDGE

In the presence of:

Ms. Omondi for the Applicant

Oluande H/B for the Respondent

Kiponda Court Clerk