



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI
Miscellaneous Civil Appeal 43 of 2009

CHRISTINE KAHINDI KARISA &
DAMA FONDO KIWE & OTHERS.....APPLICANTS
VERSUS
MAHA INTERNATIONAL LTD
MACKSON M. MWANGO & ANO.....DEFENDANTS

RULING

The application made by way of Notice of Motion dated 2nd October 2009 is brought under section 18(b) of the Civil Procedure Act and section 3A of the same Act. It seeks for orders of transfer of the following suits from Malindi Chief Magistrate's Court to the Resident Magistrate's Court at Garsen, for hearing and determination.

The suits listed are:-

- (a) SPMCC No. 153 of 2009 (Malindi) Christine Kahindi Karisa V Maha International Ltd and 2 others
- (b) SPMCC No. 157 of 2009 (Malindi) Mary Nasambu Mrega v Maha International Ltd and 2 others
- (c) SPMCC No. 158 of 2009 (Malindi) Dama Fondo Kiwe v Maha International Ltd. & 2 others
- (d) SPMCC No. 159 of 2009 (Malindi) Faith Nema Gambo v Maha International Ltd & 2 others
- (e) SPMCCC No. 151 of 2009 (Malindi) Kadzo Mutengo v Maha International Ltd & 2 others
- (f) SPMCC 152 of 2009 (Malindi) Kai Tembo Mwangombe v Maha International Ltd & 2 others
- (g) SPMCC No. 190 of 2009 (Malindi) Dzedere Kaingu v Maha International Ltd & 2 others
- (h) SPMCC 189 of 2009 (Malindi) Haluwa Mutengo (minor suing through mother and next friend Kadzo Katana Fondo v Maha International Ltd & 2 others

The application is based on grounds that:

- (1) The cause of action is a road traffic accident which occurred on 16-2-09 along the Garsen Lamu road at Nyongoro area.
- (2) The applicants were treated at Mpeketoni sub-district Hospital
- (3) The accident was reported at Witu Police Station which is served by the resident magistrate court at Garsen.
- (4) The applicants and their witnesses are residents of the new Tana Delta District which is served by the resident magistrate's court at Garsen
- (5) It is extremely expensive and inconvenient for the applicants to keep on traveling to Malindi for hearing of the case.
- (6) The respondents carry on business of matatu along the Malindi – Garsen Kipini – Lamu Road.

In affidavit in support of the application Christine Kahindi Karisa, one of the applicants, depones that the accident occurred along the Garsen – Lamu road at Nyongoro area and was reported to Witu Police Station. That the nearest court with jurisdiction, as at the time of filing suit, was the Malindi Chief Magistrate's Court, but since then, a new court has been established at Garsen, being a Resident Magistrate's Court which has both pecuniary and geographical jurisdiction to hear and determine the suits.

The application is opposed and the respondents in a replying affidavit, sworn by Mackson Mwango, is that the 2nd respondent resides in Mombasa, and the witnesses he intends to call reside in Mombasa.

He has drawn this court's attention to a Gazette Notice by the Chief Justice being Gazette Notice No. 1756 dated 19th February 2009 "Practice Direction Relating to the Filing of Suits, Applications and References in Proper Courts, wherein the Hon. The Chief Justice directed that the place of suing is determined in accordance with the provisions of section 11 tot 18 of the Civil Procedure Act and not according to the preference or convenience of the plaintiff.

It is his contention that the application is intended to suit the applicant's preference and convenience.

Further, that it will be very expensive for the 2nd respondent and his witnesses to be moving all the way from Mombasa to Garsen for purposes of hearing each and every one of the suits, and so it is in the interest of justice that the matters be heard and concluded in Malindi.

In arguing the application, Mr. Kilonzo submitted on behalf of the applicants, that section 19 of the Civil Procedure Act gives this court jurisdiction to transfer matters pending in the lower court and section 11 gives the court with the lowest jurisdiction competent to try a suit. Further, that section 14 gives the plaintiff a choice of where to file suit especially where the respondent carries on business in one place and resides elsewhere.

He argues that since the respondent's motor vehicle plies Lamu – Garsen road, then it means that the place of business is within Garsen Court's jurisdiction and that section 115 of the Civil Procedure Act should not be looked at in a narrow manner.

His contention is that transferring the matter to Garsen will ensure faster disposal of the matter.

Mr. Kilonzo acknowledges that Malindi Chief Magistrate's court does have jurisdiction over the matter but argues that the Malindi court is overloaded and whilst the Garsen one, being a newly created court, does not have much work.

He disputes the 2nd respondent's claim that he resides in Mombasa, saying that 2nd respondent in fact swore the replying affidavit in Nairobi.

In response, Mr. Matini, on behalf of the respondent, submits that in ordering for transfer of suits, the convenience of the defendant/respondent is of significance.

Section 11- 15 of the Civil Procedure Act addresses the issue of place of filing suit. Section 11 provides that:

"Every suit shall be instituted in the court of the lowest grade competent to try it..."

Section 14 and 15 seem to bend over backwards in favour of the defendant, when it comes to determining where to file suit – section 14 reads as follows:

"Where a suit is for the compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction and defendant resides or carries on business, or personally works for gain within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts."

I suppose this is the option that Mr. Kilonzo is seeking to exercise in presenting his arguments for the transfer of the matters. Yet the considerations will be incomplete unless we take into account the provisions of section 15 which states:

"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 "commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain ..."*
- (c) the cause of action wholly or in part, arises.*

From the annexed police abstract forms the cause of action arose at Nyangoro – is that in Tana Delta District or in Malindi? Some of the police abstract forms reference to the place of accident as Mwa Junction along Malindi – Lamu Road.

The address of 2nd and 3rd respondent is given as 94053 Mombasa – both in the police abstract and the plaint and to my mind the applicant cannot blow hot and cold in the face of those pleadings.

Paragraph 5 of the plaint refers to the place where the cause of action arose as Nyangoro area along Malindi – Lamu road, not along Lamu-Garsen road as the applicants now purport to state in their application.

Nyangoro area is at the border of Tana delta District but within the jurisdiction of Lamu. Witu Police Station is in Lamu District, the 2nd and 3rd respondents have their address as Mombasa – which would make the nearest court with competent jurisdiction to be the Chief Magistrate's court, Malindi.

The matter is adequately catered for by the provisions of section 15 Civil Procedure Act, and there is no reason whatsoever to warrant transferring the matter to Garsen – the application is not with any merit and is dismissed with costs to respondent.

Delivered and dated this 4th day of March 2010 at Malindi.

H. A. Omondi
JUDGE