

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET**

Miscellaneous Civil Appeal 133 of 2010

**MASINDE MULIRO UNIVERSITY OF
SCIENCE AND TECHNOLOGY:.....APPLICANT
VERSUS
FRACA SERVCOM LTD:.....RESPONDENT
RULING**

This is an application by Notice of Motion stated to be brought under Order L Rule 1 of the Civil Procedure Rules and Section 18(1) of the Civil Procedure Act cap 21 of the Laws of Kenya praying that this honourable court do stay the proceedings in Eldoret CM.CC.No.1019 of 2009 and the said case be withdrawn and be transferred to the Chief Magistrate's Court at Kakamega for hearing and final disposal. It is brought on the grounds that the cause of action arose in Kakamega within the jurisdiction of the Chief Magistrate Kakamega, the Defendant/Applicant has its offices in Kakamega, the subject matter is in Kakamega, the Respondent is forum shopping by filing the case in Eldoret and that all the Applicant's witnesses are based in Kakamega and it is unnecessary expense defending the suit in Eldoret. Professor Sibilike K. Makhanu the deputy Vice Chancellor of the Applicant has sworn the supporting Affidavit. In it he states that once suit was filed the Plaintiff's counsel was advised by the Defendant's counsel to have the same transferred to Kakamega as that was the right court. That the Applicant's offices are in Kakamega and all witnesses are similarly in Kakamega and that the transactions the subject matter of the suit occurred in Kakamega and it is only fair that the suit be heard at Kakamega as the Applicant has not acquiesced to the jurisdiction of the Eldoret Court.

In opposing the application one Benjamin Shitsukane and described as the Managing Director of the Plaintiff/Respondent swore a Replying Affidavit stating that his advice from his counsel was that the application is incurably defective, incompetent, bad in law and smacks of an abuse of the court process. He adds that the cause of action arose at Eldoret and hence the Chief Magistrate's Court at Eldoret has jurisdiction to hear the case. He depones that the application was brought for the sole purpose of delaying a fair trial of the case. He adds that no good reasons have been given for the transfer of the suit.

It is now an opportune time to consider this application. From the proceedings and submissions by both counsel it is clear that the Plaintiff ordinarily carries on business in Eldoret while the Defendant does its business at Kakamega. Goods were ordered for from Eldoret to be delivered to Kakamega. Whether the LPO's were issued at Kakamega and delivered to Eldoret or were issued by the Defendant at Eldoret will be a matter of evidence but what cannot be contested is that the Defendant/Applicant's business is in Kakamega and the delivery of the goods was made thereat thereby concluding the performance of the contract. The general principal as to where to file suit is set out in section 15(a) of the Civil Procedure Act and it is that suit shall be instituted in a court within the local limits of whose jurisdiction the Defendant or each of the Defendants, if 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. In suits where the cause of action arises out of contract, as in this case, the cause of action arises at any of the three places, that is to say, the place where the contract was made, the place where the contract was to be performed or the performance thereof completed and the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable. It follows therefore that the suit could either have been filed in Eldoret or Kakamega. In this case suit was filed in Eldoret. The Defendant who is non-resident in Eldoret has objected by way of this application to continuance of the case in Eldoret. Consequently the provisions of section 15 (c) illustration (b) of the Civil Procedure Act come into operation and hence the suit shall not

proceed save with the leave of the court. Case law to the effect that the principal matters to be considered for transfer of a suit are the balance of convenience, questions of expense, interests of justice and possibilities of undue hardship see **MATAYO K. KABOHA –VS- ABIBU BIN ABDULLA AND OTHERS (1936-51) 6 U.L.R 121.**

The Respondent in this application has not argued that it will be inconvenienced or suffer undue hardship or that the interest of justice will not be served by a transfer. All it has said is that the court in Eldoret has jurisdiction. On the other hand the Applicant has argued that it will go into great and unnecessary expense if the case is not transferred to Kakamega, the place of business of the Applicant and where all its witnesses are. I am persuaded that the Applicant has discharged its onus that the transfer ought to be granted. The point taken that the court at Eldoret has no jurisdiction and therefore this court cannot transfer the suit from such court is in my view misplaced. The court in Eldoret has the pecuniary as well as territorial jurisdiction to hear and determine the case. The overriding principle is that the more correct court of suing is Kakamega where the Defendant's business is situated and so as not to make the Defendant incur unnecessary expense. For these reasons I grant the application and order that Eldoret CM.CC.NO.1019 of 2009 be and is hereby transferred for hearing and final determination by the Chief Magistrate's court Kakamega. Costs shall be payable to the Plaintiff/Applicant.

It is so ordered.

DAED SIGNED AND DELIVERED AT ELDORE THIS 29HTH DAY OF APRIL 2010

**P.M.MWILU
JUDGE**