



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Civil Miscellaneous Application 482 of 2008

JOHN DUFFY PLAINTIFF

VERSUS

1. NEW OCEAN TRANSPORT
2. WILSON MUTOKO WAMULWA.....DEFENDANTS

RULING

This is the Notice of Motion dated 23rd October 2008 by which the Defendant/Applicant seeks the transfer of the suit from Nairobi to the Chief Magistrate’s Court in Mombasa. Ms Kairaria for the Defendant/Applicant submits that since the first defendant carries on business in Mombasa and the 2nd defendant ordinarily resides in Mombasa the suit ought to be heard and determined in Mombasa. However the Plaintiff by their Grounds of Opposition dated 13th November 2008 opposes the present application and relies on S. 14 Civil Procedure Act in arguing that the Plaintiff has the right to institute the suit in Nairobi where they allege the cause of action arose.

Ms Kairaria for the Applicant cited S.15(a) of the Civil Procedure Act which provides that 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 ...”

However a clear reading of the Civil Procedure Act reveals that S.15(a) is subject to S.14 which provides that:-

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

This is a suit for damages where the Plaintiffs claim that the accident occurred along Uhuru Highway in Nairobi. Therefore under S. 14 of the Civil Procedure Act the Plaintiff had the choice to institute the suit either in Nairobi where the cause of action arose or in Mombasa where the Defendants reside and carry on business. The Plaintiff in exercising this choice opted to institute the suit in Nairobi. S. 15 of the Civil Procedure Act does not bar the Plaintiff from doing so and uses the words **“subject to the limitations aforesaid”** thus making S.15 **subject** to the provisions of S. 14 of the Act. In **MULLA** on the Code of Civil Procedure at page 162 at (2) talks about **“Transfer where plaintiff has a choice of courts”** and goes on to provide that

“Prima facie plaintiff as arbiter litis has the right to select his own forum”

The Plaintiff here did have the choice of two courts either Nairobi or Mombasa and the Plaintiff has the exclusive right to select his own forum. It is my considered opinion that such a substantive legal right ought not to be interfered with except for just cause. The Applicant submits that it would be inconvenient for him and his witnesses to travel to Nairobi for the hearing of the case thus the balance of convenience favours a transfer. However as a court I do not agree that to show a mere balance of convenience amounts to enough just cause to deny the Plaintiff their legal right of forum. In **MULLA** (cited above) at page 165 it is stated that:-

“The burden lies on the applicant to make out a strong case for transfer. A mere balance of convenience in favour of proceedings in another court is not sufficient ground”.

Likewise in the case of Yolamu Kaluba –vs- Kerementi Kajaya Civil Case No. 20 of 1957 it was held that at page 312 that:-

“(ii) This discretion [to transfer a suit] should not be exercised without some reason stronger than the mere balance of convenience ...”

In the present application I find that no strong enough grounds have been advanced for a transfer of the suit from Nairobi to Mombasa. A mere balance of convenience will not suffice. Therefore based on the foregoing I am not convinced by the reasons advanced by the Applicant for a transfer and I therefore dismiss this present application in its entirety. Costs to be met by the Applicant.

Dated and delivered at Mombasa this 28th day of July 2009.

M. ODERO

JUDGE

Read in open court in the presence of:

Mr. Mbuya holding brief for Kasmani for Defendant/Applicant

No appearance for Plaintiff/Respondent

M. ODERO

JUDGE

28.7.2009