



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

Miscellaneous Civil Application 182 of 2009

FREIGHT FORWARDERS (K) LTD.....APPLICANT

VERSUS

UNGA LIMITED.....RESPONDENT

RULING

The application before me is by Freight Forwarders (K) Limited (hereinafter “the applicant”). The applicant is the defendant in Kericho Principal Magistrate’s Court Civil Case Number 249 of 2008 a suit instituted by Unga Limited (hereinafter “the respondent”). The applicant seeks the withdrawal of the said case from Kericho Principal Magistrate’s Court and transfer of the same to the Senior Resident Magistrate’s Court at Mombasa for hearing and disposal. The application is expressed to be brought under the provisions of sections 3A, 15 and 18 of the Civil Procedure Act and Order L Rules 1 and 2 of the Civil Procedure Rules. In my view section 3A has inappropriately been invoked as there are relevant provisions covering the applicant’s application.

The applicant has given six (6) grounds for its application expressed as follows:-

- (a) That the said suit is for breach of a carriage contract allegedly entered into between the applicant and the respondent;**
- (b) That the applicant who is the defendant in the said suit carried on business in Mombasa;**
- (c) That the cause of action referred to in the plaint arose in Mombasa;**
- (d) That the principal office of the applicant is in Mombasa;**
- (e) That the contract of carriage referred to in the plaint was made at Mombasa;**
- (f) That all amounts due to the applicant under the contract of carriage referred to in the plaint were payable in Mombasa.**

There is an affidavit in support of the application sworn by one Franklyn Pereira, an Executive Director of the applicant which in essence elaborates the above grounds. To the said affidavit are annexed copies of the pleadings in the Kericho case and contract documents. The application is opposed and there is a replying affidavit sworn by one L. Murithi, the Deputy Manager Legal Affairs and Recovery, of Insurance Company of East Africa Limited who are the respondent’s insurers. It is deponed in the said affidavit, *inter alia*, that the said insurance company indemnified the respondent for damage of a consignment of goods in a road accident which occurred within Kericho District and the respondent had

the option to institute the suit at either Kericho or Mombasa. It is further deponed that the respondent's witnesses are based in Nairobi which is nearer Kericho than Mombasa. It is further deponed that the application has been lodged too late in the day.

When the application came up before me for hearing on 2nd July 2009, counsel agreed to file written submissions. However, by 29th July 2009, only counsel for the applicant had filed his written submissions. I have considered the application, the affidavits filed and the said submissions. Having done so, I take the following view of the matter. Section 15 of the Civil Procedure Act provides that suits be instituted where the defendant resides or cause of action arises. Explanation 2 reads as follows:-

“(2) A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or in respect of any cause of action arising at any place where it has also a subordinate office, at such a place.

AND explanation 3 reads as follows:-

“(3) In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely:

- (i) the place where the contract was made;**
- (ii) the place where the contract was to be performed or the performance thereof completed;**
- (iii) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.**

The applicant's executive director has deposed, among other things, that the contract giving rise to the suit was entered into in Mombasa and was to be performed partly thereat and further that, the applicant carries on business in Mombasa. The said executive director has supported that averment by documents which clearly show that the contract was made in Mombasa where acceptance of the respondent's quotation took place.

The respondent has not denied that the contract giving rise to the suit was indeed made in Mombasa and further that it was to be partially performed in Mombasa. The respondent does not also dispute the fact that payment under the contract was to be made in Mombasa. Although the respondent alleges that the applicant carries on business all over Kenya, it did not identify the various places where the applicant has main or subordinate offices. Indeed in its plaint filed at Kericho, service was to be effected at Mombasa.

In the premises, the respondent contravened the provisions of section 15 of the Civil Procedure Act in filing its suit in Kericho. This court has the power under section 18 of the same Act to control the filing and hearing of suits in subordinate courts and may, *inter alia*, transfer any suit for trial or disposal to any other court subordinate to it.

I will accordingly allow the applicant's application dated 1st April 2009 in terms of prayer 3 thereof.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THISDAY OF SEPTEMBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

The parties have filed a consent letter before this ruling is delivered. In the premises the consent order is hereby endorsed as an order of this court.

F. AZANGALALA

JUDGE

22ND SEPTEMBER 2009