



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

Miscellaneous Civil Application 29 of 2009

DAHABO ABDI ALI.....APPLICANT

VERSUS

ALBERT GITARI LUKA.....RESPONDENT

CIVIL PROCEDURE ACT

v Place of institution of suit s. 15 of the Civil Procedure Act.

v Power of High Court to transfer suit S.18 of the Civil Procedure Act (Cap 21, Laws of Kenya).

R U L I N G

By an application by way of Notice of Motion under Section 3A and 18 of the Civil Procedure Act, Order L; rule 1 of the Civil Procedure Rules, the Defendant herein prays for an order to withdraw Chuka Senior Resident magistrate's Court Case No. 76 of 2008 pending before the Resident Magistrates Court at Chuka to itself and thereafter transfer the same to the Garissa Senior Principal Magistrate's Court for trial and final disposal.

The Motion is grounded upon the grounds set out on the face thereof and the Applicant's Supporting Affidavit sworn on 18th September 2009. The applicant/defendant's case is that the cause of action arose in Garissa and he lives and works for gain in Garissa Town and that the suit should be transferred to Garissa for trial and final disposal.

The Plaintiff/Respondent will not hear of such argument. In a Replying Affidavit sworn and filed on 21st July 2009, he categorically states that the cause of action arose in Chuka and that his witnesses live in Chuka, and he would incur expense if the case were withdrawn from Chuka Senior Resident Magistrates Court and transferred to Garissa Court.

I have considered those rival arguments. The law governing the place of suing and the transfer of cases from one court to another is to be found in Section 15 and 18 of the Civil Procedure Act, (Cap 21, Laws of Kenya) Section 15 of the Act provides:-

15. Subject to the limitation 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;

(b).....

(c) the cause of action, wholly or in part, arises

Explanation (1).....

Explanation (2).....

Explanation (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 performed or the performance thereof was completed;

(iii) the place where in the performance of the contract any money to which the suit relates was expressly or impliedly payable.

The Section gives two illustrations. Illustration (a) a tradesman in Nairobi who delivers goods to a tradesman B who carries on business in Mombasa, may sue either in Mombasa (for the price of goods), or in Nairobi where the cause of action arose. In illustration (b) where A&B&C meet in Nakuru and B&C a proviso note to "A" A may sue B&C where the cause of action arose, or Nairobi where B resides, or Mombasa, where C resides, and in either case if the nonresident defendant objects, the suit cannot proceed without leave of the court.

In the case in point, the plaintiff one Albert Gitari Luka has sued one DAHABO ABDI ALI (the applicant) for payment of the balance of some Ksh.370,000/- allegedly advanced by the Plaintiff to the Defendant and out of which the Defendant has repaid Kshs.70,000/-

In his Affidavit in support of the Application for transfer of the suit to Garissa, the Defendant/Applicant states on oath that throughout his life as a business person he has never been to Chuka for any purpose whatsoever (para b). The Applicant (Defendant) also states on oath that the Plaintiff/Respondent was a complete stranger to him, and he met him barely for a fleeting minute, when they exchanged telephone numbers after being introduced to him by Police Constable (P.C.) Murithi as a Manager with the National Cereals and Produce Board (NCPB) in Embu, which he later discovered is a lie (para 6, & 9).

The Defendant/Applicant further states on oath that as he had known P.C. Murithi who was then based at Garissa Police Station, he gave him (P.C. Murithi) Ksh.360,000/- and shs.6.000/- in cash to buy and transport rice to Garissa (Paras 6 &7) P.C. Murithi has since he received the money from him disappeared from Garissa Police Station, and that even his superiors were looking for him for desertion. The Applicant/defendant states categorically he never could have borrowed Ksh.370,000/- from a stranger almost the exact sum which he gave to P.C. Murithi to buy rice for him. He is still under shock since receiving summons in Chuka SRM Court Civil Case No.76 of 2008 (Paras 13 &14).

In his Replying Affidavit, the Plaintiff/Respondent apart from stating "**Categorically that the cause of action in relation to Principal Magistrates Chuka Civil Case No. 76 of 2008, took place in Chuka and all my witnesses live in Chuka, (para 3) and that the Applicants Affidavit contains all falsehoods and irrelevance** (Para 4) and that P.C. Murithi referred to by the Applicant is not his business, partner, (para.5); the Plaintiff/Respondent does not attempt at all, either to describe the circumstances under which the Defendant/Applicant borrowed Sh.370,000/- from him, or when he paid sh.70,000/- or even attach the alleged agreement of 28th June 2008.

In my view, the plaintiff/respondent was obliged to say what falsehoods were in the Defendant/Applicant's Affidavit, how he met the Defendant/Applicant who states on oath he has never been to Chuka, during his entire business life. The Plaintiff/Respondent needed to answer specifically all of the Applicants averments where the Agreement was made, where and how the repayments were to be made.

In the absence of any answer to such issues, one is inclined to believe the applicant that he met the respondent in the company of P.C. Murithi in Garissa and that the only transaction that took place between them was the exchange of cell phone numbers and no more. The applicant being resident in Garissa, where he also carries on business, the proper place of instituting suit is, in accordance with Section 15 (a) and explanation (b) thereof is Garissa.

The Defendant Applicant has applied for the transfer of the Chuka S.R.M. Cause Case No. 76 of 2008 to Garissa where he is the Defendant resides and works for gain or carries on business.

Section 18 of the Civil Procedure Act empowers the High Court to withdraw and transfer any case instituted in the subordinate court. It provides:-

18. (1) On the application of any of the parties and after notice, to the parties and after hearing such each of them as desire to be heard, or of his own motion without such notice, the High Court may at any stage:-

- (a)
- (b) withdraw any suit or other proceedings pending in any court subordinate to it, and therefore
 - (i) try or dispose of the same;
 - (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;

In light of the discussion above, I am satisfied that the ends of justice would be better served by an order withdrawing the case from the Chuka Court, and directing that the same be transferred to Senior Principal Magistrate's Court Garissa forthwith for trial and final disposal. The costs herein shall be in the cause.

These shall be orders accordingly.

Dated, delivered and signed this 16th day of October of 2009

ANYARA EMUKULE

JUDGE