

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

Miscellaneous Application 67 of 2009

KENYA POWER & LIGHTING CO.....APPLICANT

Versus

ANN WAMBUI WANJIRURESPONDENT

RULING

Pursuant to the provisions of sections 3A and 18(1)(b)(ii) of the Civil Procedure Act, order L rule 1 and order XLVI rule 2 of the Civil Procedure Rules, Kenya Power and Lighting co. Ltd, the applicant herein, took out the notice of motion dated 20th February 2009 in which it applied to this court to withdraw Nyeri C.M.C.C.C. No. 226 of 2008 from Nyeri C.M.'s court and transfer it to the C.M.'s court, Thika for hearing and disposal. The motion is supported by affidavit of Charles Wahome Gikonyo sworn on 20th February 2009. When served with the aforesaid motion, Ana Wambui Wanjiru, the Respondent herein, filed a notice of preliminary objection dated 23rd April 2009 to oppose the same. The preliminary objection had to be disposed of first before entertaining the merits of the motion and hence this ruling.

It is important to set out the background of the facts leading to the filing of this motion before considering the issues raised in the preliminary objection. The substantive suit is expressed in the plaint dated 26th March 2008 in which Kenya Power & Lighting Co. Ltd (Plaintiff) sued Anah Wambui Wanjiru (defendant) for payment of Kshs. 33,978/50 in respect of outstanding electricity bill. The plaintiff claimed it had supplied electricity to the defendant against account No. 204055-01 within the Mount Kenya Region, Nyeri. The annexures attached to the affidavit of support of Charles Wahome Gikonyo, indicates that the defendant filed a defence denying the plaintiff's claim. She stated that she was not in arrears. She raised the defence of limitation. She further averred that the cause of action arose in Thika, hence the Nyeri court lacked jurisdiction to hear and determine the dispute. This later objection appears to have provoked the plaintiff to apply for the suit to be transferred to Thika, chief Magistrate's court for hearing and determination.

Having given in brief, the history behind the filing of the motion dated 20th February 2009, let me now determine the issues raised in the preliminary objection, the subject matter of this ruling. It is the argument of Miss Gicheha, learned advocate for the Respondent that this court lacks jurisdiction to grant the orders sought. It is said that since the suit was filed in a court which did not have jurisdiction to hear and determine it, then there is no competent suit for this court to transfer. The Respondent also raised an issue touching on the competency of the motion. It is Miss Gicheha's view that the motion is premised on the provisions of S. 18(i) D(ii) of the Civil Procedure Rules which provision does not exist. Mr. Wahome Gikonyo, learned advocate for the Applicant conceded to the later submission of Miss Gicheha. Mr. Wahome implored upon this court to excuse the error and treat the defect as a typographical error. The learned advocate stated that his motion was meant to be premised on S. 18(i)(b)(ii) of the Civil Procedure Act. I have carefully considered the submissions presented by learned counsels over the later issue. I am in agreement with the submissions of Mr. Wahome that the defect pointed out by Miss Gicheha should be treated as typographical errors which occur daily in drafting legal documents hence curable by amendment. I proceed to amend the motion in terms of the request by the applicant's advocate; so that the motion is treated as having been brought under S. 18(1)(b)(ii), of the Civil Procedure Act.

The remaining issue is whether this court has jurisdiction to order for the transfer of the suit from Nyeri

to Thika. It is stated that since the Nyeri, C.M.'s court does not have jurisdiction to hear and determine the suit, then there is no competent suit which can be transferred. It is apparent from the submissions of Miss Gicheha, that the Respondent is challenging the territorial jurisdiction of the Chief Magistrate's Court, Nyeri. Under Section 3(1) of the Magistrates' Court Act, a resident Magistrate's court is established. The aforesaid provision states that a Resident Magistrate's court shall be duly constituted when held by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate. The territorial jurisdiction of a Resident Magistrate's court is said to be throughout Kenya under S. 3(2) of the Magistrates Courts' Act. The pecuniary jurisdiction of a Chief Magistrate is set at Kshs. 3 million under s. 5(1)(a) of the same Act. It is obvious that the Chief Magistrate's court, Nyeri has the pecuniary jurisdiction to hear and determine the suit mentioned in this matter. It is also obvious that since the Chief Magistrate's court had territorial jurisdiction throughout Kenya, then it has jurisdiction to hear and determine the substantive suit in these proceedings. I am of course, alive to the existence of the provisions of section 15 of the Civil Procedure Act which states inter alia that suits should be filed where cause of action arose or where the defendant resides. It would appear there is a conflict between section 15 of the Civil Procedure Act and Section 3(2) of the Magistrate courts Act. The Civil Procedure Act was enacted way before the magistrate's courts Act which came into being in 1967. The rules of interpretation of statutes are very clear that where two statutes are in conflict in certain provisions the later statute shall be deemed to have amended the former. This view was clearly expounded in the text of Maxwell on the interpretation of statutes 12th Edition at page 69 as follows:

“Where it is expressly provided that two Acts be read together, every part of each must be construed as if contained in one Act unless there is some manifest discrepancy which makes it necessary to hold that the later Act has to some extent modified the earlier.”

In this case, when parliament passed the magistrates courts Act, it is presumed it knew of the existence of section 15 of the Civil Procedure Act. The later Act has created an ambiguity which will force courts to look at the later Act to see the measuring which Parliament puts on the later Act. It must also be remembered that it took time for Chief Magistrates courts to be established in the provinces. At the beginning there was only one Chief Magistrate based in Nairobi. Perhaps that is the more reason why parliament deemed it fit to make the Chief Magistrate have country-wide territorial jurisdiction. It would appear parliament anticipated that parties were likely to file suits in places outside where the cause of action arose or outside where the defendant resides. That anticipation can be inferred by a critical examination of the provision of S. 18 which gave this court the unfettered discretion to determine the place of trial. For the above reasons, it is right to hold that a suit filed outside the territorial jurisdiction in breach of section 15 of the Civil Procedure Act cannot be said to be incompetent. I find that Nyeri C.M.C.C. No. 226 of 2008 was filed in the competent court. However this court still retains the power under S. 18 of the Civil Procedure Act to have it withdrawn and transferred to itself or to any other subordinate court of competent jurisdiction for good reasons like the convenience of the parties or to cut costs etc. I must point out that where a suit is filed in a court which has no jurisdiction to try it, this court will not have any jurisdiction to entertain any application which seeks to have it transferred to another court. This view was stated by Sir Udo Udoma C.J. in Kagenyi =VS= Musiramo and Another [1968]E.A. 43 as follows:

“An order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it.”

In the final analysis I am convinced the preliminary objection has no merit. The same is ordered dismissed with costs to the plaintiff.

Dated and delivered this 13th day of November 2009.

J.K. SERGON

JUDGE

In open court in the presence of Mr. Ombongi h/b Wahome for Respondent. N/A. Wairegi for applicant.

J.K. SERGON

JUDGE