



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**MISCELLANEOUS APPLICATION 446 OF 2004**

**BUREAU VERITAS KENYA LTD.....APPLICANT**

**VERSUS**

**MOGAKA OBIERO.....RESPONDENT**

**RULING**

Before me is the Notice of Motion dated 10<sup>th</sup> May 2004 and filed on 12<sup>th</sup> May 2004 seeking the transfer of Nairobi (Milimani) Chief Magistrate's Civil Case No. 3673 of 2004 to the Chief Magistrate's Court at Mombasa. That case is between Mogaka Obiero (plaintiff) and Bureau Veritas Kenya Limited (defendant). The application is by the defendant and is made on the grounds that:-

- (a) The cause of action arose in Mombasa.
- (b) The contract of employment referred to in the said suit was made in Nairobi on 16<sup>th</sup> May 2002.
- (c) The respondent was transferred under the provisions of the said contract of employment to Mombasa with effect from 1<sup>st</sup> January 2003.
- (d) The performance of the said contract of employment took place in Mombasa and the respondent resided in Mombasa for this purpose until he was dismissed on 16<sup>th</sup> February 2004.
- (e) All amounts paid to the Respondent under the said contract of employment were paid to him in Mombasa.
- (f) The majority of the witnesses intended to be called by the applicant in the said suit are either based in Mombasa or travel to Mombasa in the course of their employment and there would be a consequent saving of costs and avoidance of inconvenience to these witnesses.
- (g) There is no reason other than the Respondent's own convenience for this case to be tried in Nairobi.

The application is supported by an affidavit sworn by Ravi Mysore a director of the applicant. The affidavit elaborates the above grounds.

The application is opposed on the basis of Grounds of Opposition filed by the respondent's advocates. Of significance are the following grounds:

- 1) That the applicant has already submitted to the jurisdiction of the Chief Magistrate's court at Nairobi not only by entering appearance therein but also filing a defence and counter claim.
- 2) That pursuant to the provisions of Section 15 of the Civil Procedure Act the suit had to be filed in Nairobi.
- 3) That the applicant's supporting documents show that the respondent was transferred to Nairobi by the applicant's Chief Executive and the respondent's termination emanated from Nairobi where his dues were prepared and subsequently stopped.

I have considered the application, the affidavit in support, the Grounds of Opposition and the submissions of counsel. I have also given due consideration to the authorities cited to me. Having done so, I take the following view of this matter.

Section 15 of the Civil Procedure Act reads as follows:

**"15. Subject to the limitations 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 or**
- (b) any 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, provided either the leave of the court is given, or the defendants who do not reside or carry on business or personally work for gain, as aforesaid acquiesce in such institution; or**
- (c) the cause of action, wholly or in part arises.**

The documents supporting this application in my view show that the respondent had the option to file his suit in either Nairobi or Mombasa. In Nairobi because the contract of employment was made in Nairobi and was to be performed in both Nairobi and Mombasa and in Mombasa because it was substantially performed in Mombasa. A further reason for opting to file the suit in Nairobi is that the applicant's principle or registered office is in Nairobi.

It can therefore not be correct as the applicant contends that the respondent had no reason other than his own convenience in filing this suit in Nairobi. In my view the provisions of Section 15 explanation 3 were satisfied and the respondent was entitled to choose where to sue and his decision to sue in Nairobi was not on whim.

It is further significant that in the defence filed in the said suit, the applicant has admitted its address as being P. O. Box 34378 Nairobi and although it denies that the cause of action arose in Nairobi it has set up a counterclaim in the same suit.

It is not in dispute that this court has the power under sections 17 and 18 of the Civil Procedure Act to withdraw and transfer cases instituted in subordinate courts. Nairobi (Milimani) Chief Magistrate's Court has jurisdiction to try the suit instituted by the Respondent. The Respondent has objected to the transfer of the suit from Nairobi to Mombasa and has given as one of his grounds of objection the reason that he has been rendered impecunious by the applicant's action and cannot afford to litigate in Mombasa.

That objection may very well not be without foundation as the Respondent's suit is for damages for wrongful dismissal. As already observed above, the applicant has its own cross claim in the Nairobi suit and has thereby submitted to that court's jurisdiction.

I have carefully considered all the cases cited to me by both counsel. Those cases in my view correctly

applied the law to the facts and circumstances obtaining therein. The cases are clearly distinguishable from the present case where I have found that the Respondent had a legitimate option as to the place of suing the applicant.

The upshot is therefore that this application is dismissed with no order as to costs.

Order accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF APRIL 2008.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:

ANITA SHAH for the applicant.

**JUDGE**

**17<sup>TH</sup> APRIL 2008**