



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION 108 OF 2006

MOI UNIVERSITY.....PLAINTIFF

VERSUS

MARIAKANI AUTO PARTS LTD.....DEFENDANT

RULING

The applicant Mariakani Auto Parts Limited which is the defendant in Eldoret CMCC No. 1268 of 2004 seeks withdrawal of the suit from the Eldoret Chief Magistrate's Court and transfer of the same to the Chief Magistrate's Court Mombasa for hearing and final disposal. The application is expressed to be brought under the provisions of Order XLVI Rules 4 and 5 (2) Order L Rules 1 and 3 of the Civil Procedure Rules and Sections 3A, 17 and 18 (1) (a) of the Civil Procedure Act. Section 3A, in my view, has inappropriately been invoked as there are relevant provisions covering the defendant's application.

The defendant has given five grounds for its application expressed as follows:-

- 1) That the alleged cause of action arose at Mombasa.
- 2) That the defendant's registered office and businesses are based in Mombasa.
- 3) That the alleged subject matter of the suit was purchased at the defendant's shop at Mombasa.
- 4) That all the defendant's witnesses are based at Mombasa and one crucial witness is half paralyzed and sickly.
- 5) That it is convenient for the court to verify the facts of the defendant's case by visiting the defendant's shop at Mombasa.

There is an affidavit in support sworn by one Maria Gulamabbas Abdulhussein a partner in the defendant's business. The affidavit essentially elaborates the above grounds.

The applicant is opposed and there is a replying affidavit sworn by one Dr. J. K. Sang the plaintiff's Chief Administrator. It is deponed in the affidavit that the Eldoret Court has jurisdiction to try the case and that jurisdiction has been admitted by the defendant in its written statement of defence. It is also deponed that as the Eldoret Court has jurisdiction the issue of convenience of the parties should be considered. In that regard all the plaintiff's witnesses are based at Eldoret and the plaintiff will be greatly inconvenienced

should the trial be held in Mombasa. It is further deponed that the application has been lodged too late in the day.

In this case there is an admission by the plaintiff at paragraph 2 of its plaint filed at Eldoret that the defendant carries on business in Mombasa and its physical address is also in Mombasa. I have also noted that the plaintiffs replying affidavit does not deny the averments by the defendant that the transaction between them wholly took place at the defendant's shop in Mombasa.

Section 15 of the Civil Procedure Act provides for the place of suing to be where the defendant resides or where the cause of action arose. Explanation 2 reads as follows:

“2 – A corporation shall be deemed to carry on business at its sole or principal office in Kenya.....”

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 defendant says that the transaction between the parties wholly took place at the defendant's shop in Mombasa. The plaintiff has not controverted that contention. The plaintiff has expressly admitted that the defendant's principal place of business is in Mombasa and further that its registered and physical address is in Mombasa.

In view of those facts, it is clear to me that the plaintiff contravened the provisions of Section 15 of the Civil Procedure Act in filing its suit in Eldoret. 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. Where there is an option to institute the suit before any one subordinate court or another, Section 17 grants power to the High Court to order a transfer.

The upshot is that the defendant's application dated 1st February 2006 is allowed as prayed.

Costs shall be in the cause.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF APRIL 2008.

F. AZANGALALA

JUDGE

Read in the presence of:

Otieno H/B for Sifuna for the applicant.

JUDGE

17TH APRIL 2008