



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc. Civil Suit 58 of 2007

SHAHID PERVEZ BUTT.....PLAINTIFF/RESPONDENT

VERSUS

IFTIKAR A. MALIK.....DEFENDANT/APPLICANT

R U L I N G

1. The defendant herein is the applicant in the chamber summons dated April 3, 2007, which application is brought under Order 6 Rule 13(1) (d) of the Civil Procedure Rules and Section 14 of the Civil Procedure Act. By the said application the applicant prays for orders:

- (i) ***That this suit be struck out as it is filed in abuse of the court process.***
- (ii) ***That the costs of this application and the suit be provided for;***

which application is premised on grounds that:-

- 1. ***Both parties are resident in Mombasa***
- 2. ***The cause of action arose in Mombasa.***
- 3. ***There is a High Court in Mombasa which has jurisdiction to handle this case.***
- 4. ***The Defendant will be exposed to great expenses to proceed with the hearing in Nairobi as all witnesses will have to come from Mombasa.***
- 5. ***The only court with jurisdiction to try the suit is the High Court at Mombasa.***

2. The application is also supported by the sworn affidavit of the applicant, **Iftikar A. Malik** who says that the cause of action arose in Mombasa where both parties also reside and that it is only the plaintiff's advocates who reside in Nairobi. He also says that because of the fact that the cause of action arose in Mombasa and that both parties live in Mombasa, it is imperative that the suit should have been filed in Mombasa, otherwise he would be forced to incur a lot of expenses to defend the suit in Nairobi.

3. This matter was fixed for hearing by the consent of both parties, when the parties' representatives appeared in the Civil Registry on February 2008, but on the day of hearing on June 16, 2008, neither the plaintiff/respondent nor his counsel, M/s Lumumba Mumma & Kaluma Advocates were present to canvass the application on behalf of the respondent nor had the plaintiff/respondent filed any replying papers by the hearing date.

4. The above position means that this application is to be determined on the basis of the averments both of the application and the plaint and defence. The plaintiff filed suit on January 23, 2007 and at paragraph 2 of the plaint, he averred that he resides and works for gain in Mombasa. Although the plaintiff did not expressly say that the cause of action arose in Mombasa, paragraphs 3, 4 and 5 of the plaint refer to a meeting of the Muslim Association of Mombasa which was held at the Association's registered offices in Mombasa and which meeting the defendant is said to have attended and at which he is alleged to have uttered some words defamatory of the plaintiff as stated at paragraph 6 of the plaint. So it would appear from the plaint itself that by the plaintiff's own averments, the cause of action arose in Mombasa and that both the plaintiff and the defendant reside and work in Mombasa.

5. In his defence filed in court on March 21, 2007, the defendant denied the jurisdiction of this honourable court to hear and determine this suit on the grounds that the cause of action arose in Mombasa where both parties reside and carry on business and secondly that the suit was filed as an abuse of the court process.

6. It is that denial by the defendant in his defence that this court has jurisdiction to hear and determine this case that he brought the instant application. Under Order 6 Rule 13(1)(d) of the Civil Procedure Rules, the court may strike out a pleading on the ground that:-

“(d) it is otherwise an abuse of the process of the court.”

7. In Volume 1: A – C of **WORDS AND PHRASES LEGALLY DEFINED**, Second Edition, the following words are found at pages 10 and 11 defining what amounts to abuse of process of the court:-

“Abuse of process of the court is a term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious, or oppressive, the ordinary remedy in such a case being to apply to strike out a pleading or stay the proceedings, or to prevent further pleadings being taken without leave. Beyond this, the court has jurisdiction to punish abuse of process by committal or attachment as a contempt when the court, by exercising its statutory powers, its powers under rules of court, or its inherent jurisdiction to stay frivolous or vexatious proceedings, can give an adequate remedy, it will not order committal”

while **BLACK'S LAW DICTIONARY, EIGHT EDITION** defines abuse of process as

“The improper and tortuous use of a legitimately issued court process to obtain a result that is either unlawful or beyond the process's scope. – Also termed abuse of the legal process, malicious abuse of legal process, wrongful process; wrongful process of law”

and goes on to say that:

“one who uses a legal process, whether criminal or civil, against another primarily to accomplish a purpose for which it is not designed is subject to liability to the other for harm caused by the abuse of the process”. *Restatement (second) of Torts at 682 (1977).*

8. From the two definitions above, the abuse of court process is a serious matter that can lead to the striking out of a pleading or punishment by committal of the one in breach. Mr. Matheka who appeared for the defendant/applicant urged the court to find that the plaintiff/respondent is guilty of such abuse in choosing to file this case in Nairobi when there is a High Court in Mombasa.; the cause of action arose in Mombasa and both parties reside and work for gain in Mombasa. There is no reply to the applicant's contentions.

9. After carefully considering the plaint, the defence and the instant application, I am satisfied that the applicant's application has merit. Both parties are agreed that the cause of action arose in Mombasa where they both reside and do business. The plaintiff has not explained why the suit was filed here in

Nairobi when there is a High Court in Mombasa with three sitting judges who could easily have heard and determined the plaintiff's claim. I am persuaded that the sole reason why the suit was filed in Nairobi was for purposes other than the search for justice. There was therefore no bona fides on the part of the plaintiff in instituting the case in Nairobi and the only inference I can draw is that the plaintiff intended to punish the defendant by imposing upon the defendant heavy traveling expenses and much time for travel between Nairobi and Mombasa to attend court sessions during the hearing of the case. Section 15 of the Civil Procedure Act requires that suits should ordinarily be filed in courts within the local limits of whose jurisdiction the defendant actually and voluntarily resides at the time of the commencement of the suit. In this case, that court is the High Court at Mombasa where the defendant actually and voluntarily resided at the commencement of this suit.

10. Accordingly I do allow the defendant's application dated April 3, 2007 and order as follows:-

(a) The plaintiff's suit dated January 23, 2007 and filed in court on the same day be and is hereby struck out as it was filed in abuse of the court process.

(b) The costs of this application and the costs of the suit shall be paid by the plaintiff to the defendant.

It is so ordered.

Dated and delivered at Nairobi this 18th day of July 2008.

R.N. SITATI

JUDGE

Delivered in the presence of:-