REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
CIVIL CASE 368 OF 2008

EDITH BILLIAH KWAMBUKA OSORO AND ANOTHER……PLAINTIFF

VERSUS

KENNEDY BOSIRE GICHANA ……..…....……DEFENDANT

RULING

The background information to this ruling is that the plaintiff moved to this court by way of a plaint dated 13th August 2008.

The plaint was accompanied by an interim application presented by way of Chamber Summons brought under Order XXXIX Rules 1, 2, 2A and 3, XIX Rules 1 and 2 of the Civil Procedure Rules and Section 63 (e) and 3 A of the Civil Procedure Act. It was seeking various reliefs. The matter came before court and interim orders in respect to that application were granted on 14.08.2008.

The court has not traced a notice of appointment for the Respondents counsel on record. That notwithstanding counsel for the defendant/respondent has presented to this court an application by way of notice of motion brought under Order XXXIX Rule 4 of the Civil Procedure Rules. The application is dated 17th August 2008 seeking stay of the orders granted in favour of the plaintiff on 14.08.2008 and or a discharge of the same as well as costs. That application has not been disposed off. This application had a supporting affidavit in support of the application. This application had also been accompanied by another application also by way of chamber summons seeking orders for the mentioned application to be heard during the vacation. It came up before this court on 18.08.2008. The application for the matter to be heard during the vacation was granted. But the application seeking stay and or discharge of the orders made on 14.08.2008 was deferred with an order that they be heard interparties.

This court has traced a notice of preliminary objection filed by counsel for the plaintiff dated 20th day of August 2008 and filed the same date. There is a replying affidavit to the defendant/respondents application of 17.08.2008 sworn by one Edith Billiah Kwamboka Osoro on 20th August 2008 also filed on the same 20th August 2008.

This court has traced a replying affidavit or grounds of opposition filed by counsel for the defendant/respondent in opposition to the plaintiff/applicants application dated 13.08.2008 and filed on 14.08.2008. It has been sworn by one Kennedy Bosire Gichana on the 20th day of August 2008 and filed on 22.08.2008.

That application has not been disposed off. In the meantime the defendant/respondent has come back to this court by way of notice of motion dated 27th August 2008 and filed on 28.08.2008. It is brought under Section 15 and 19 of Civil Procedure Rules and Order XLVI Rule 5 (2) of the Civil Procedure Rules and all enabling provisions of the law. It seeks an order that:-

(1) The suit be transferred to the District Registry of High Court of Kenya at Kisii for hearing and determination by the High Court of Kenya sitting at Kisii.

(2) Costs and incidentals to this application be provided by the respondents. It is supported by the grounds in the body of the application and a supporting affidavit.

The plaintiff applicant has opposed this application on the basis of grounds of opposition dated 2nd September 2008. They are 9 in total and these are:-

1. *The Honourable Court lacks jurisdiction to entertain the said application.*

2. *The High Court of Kenya has unlimited jurisdiction to hear and determine civil matters within the Republic of Kenya*.

3. *The suit is properly filed before the Honourable Court at Nairobi.*

4. *The provisions of the Civil Procedure Act in regard to jurisdiction to transfer does not apply to the High Court.*

5. *The application is misconceived and lacks merit.*

6. *The application is incompetent and it is brought in bad faith.*

7. *The application amounts to an outright abuse of the court process.*

8. *The main suit seeks an account of all the monies received by the applicant and as such there are no anticipated witnesses to be called in the circumstances.*

9. *The applicant has brought the present application to cause delay in the hearing and determination of the pending application.*

The same has been argued on Meru. The grounds put forward by the applicant are as follows:-

(1) Both disputants, as well as the office whose activities are sought to be strained are at Kisii.

(2) There is a high court at Kisii.

(3) Section 15 of the civil procedure Act makes provision that suits should be filed in courts situated in the local limits of the area where the subject matter and the defendant resides.

(4) This court has powers under order 46 rule 5 (2) CPR to grants the orders sought.

(5) It will be convenient to both parties if the matter is heard and disposed off at Kisii high court.

(6) No reason has been advanced as to why the matter was filed in Nairobi and not in Kisii.

In response counsel for the plaintiff/ applicant who is a respondent to the application under review, recrerated the grounds of opposition filed and then stated the following points:-

1. section 60 (5) creates one high court for the republic of Kenya where as section 60 (1) of the constitution endowes that high court with unlimited jurisdiction to handle any matter from any part of the country where ever the high court is and so this court is properly seized of the matter.

2. The provisions of the CPA which have been cited by the applicant have no application to the high court as these apply to subordinate courts only.

3. They contend the authority relied upon by the applicant is distinguishable as the learned judge did not consider the provisions of the constitution.

4. The subject matter of the suit is accounts which can be rendered any where as they do not involve any tangible object.

In response counsel for the applicant submitted that he agrees with the contention that there is only one the high court. But the court is invited that the one high court is represented by Registries in the out stations. That there is a registry at Kisii high court and so this matter should be transferred to Kissi Registry. They maintain that the CPA provisions apply and that order 46 CPR provision should be applied. On case law, applicant relied.

On the case of Mobil Oil Kenya Limited versus Alfred obuya Michira t/a Keroka Mobile filing Station decided by Mwera J. on 6/12/200.

At page 1 of the said ruling, it is observed that, the application had been brought under section 3A of the CPA and order 46 orule 5 CPR. The heading of the case indicates that it was being handled by Milimani Commercial Courts Nairobi as civil case number 716 of 2001. At line 6 from the bottom on page (1) is noted that counsel for the applicant therein had asked for the court to order that the suit be transferred to the high court at Kisii for hearing and final disposal. It is also noted on the same page of the ruling, that the action had arisen at Kisumu. Where as the defendant was at a place called Keroka in Kissi, while witnesses for the defendant were to come from the hinter land of Keroka.

At page 4of the ruling, the learned judge, set out the provisions of order 46 rules 5 (1) (2). At line 4 from the bottom ,the learned judge made the following observations .

"*This court, is of the view that order 46 rule 5 (2) civil procedure rule 5 should apply to the high court, as well as the subordinate court sitting in a given area. It may for convenience of parties, witnesses, time of trial etc for instance direct that it shall not it where sit normal sits the court house but move to the site or nearby market to hear a case. That is in order whether on the courts' own motion or on application, by one party"*

The learned judge continued thus at line 3 from the top:-

"*As for order 46 rules 5 (1) civil procedure rules, the high court whenever it sits in Kenya has Nairobi as the centrol office. But then it has district registries delineated by Administrative or District Zones at Mombasa, Nakuru, Eldoret, Machakos, Meru,Nyeri, Kisii, Kisumu ,Kakamega and now Bungoma .The court in Kenya is seen as one unit. Not that the high court while sitting at Nyeri, is any lesser than that sitting at Eldoret. The high court is one, but it has the centrol office at Nairobi and District Registries country wide. So if one judge of the high court sitting say at Nyeri, directs that a certain case filed there be heard at Eldoret, he is in no way being paternalistic or acting supervisory to his brother at Eldoret or vise vasa. In this courts understanding the high court,is simply saying to itself that it shall hear a given case filed at Registry A at Registry B.*

Given there is nothing stated, as to who among the high court judges, including the Hon , the CJ should direct any suit filed at the central office or a District Registry be tried here or there. So without appearing to say that it is not the C.J. to direct at what place a suit before the high court should be tried, this court is of the view that a judge of the High court may direct, that a suit at the centrol office or a District Registry be heard at this registry or that. In this courts impression that having all the relevant aspects in mind, a judge makes such a direction. That such a direction may be on application or on the courts own motion and that it does not mean that the "directing" Judge is in any way superior to the "receiving" judge. In stating so this court was a ware of the decision in the guardian Bank case (above)

In this case, this court, is of the view that the transaction hahing taken place within the jurisdiction of either the Kisumu or Kisii district Registries and that the defendant trades and lives near the Kisii District Registry to which he can conveniently, and without reduced expense ferry his witnesses may this

suit be moved for final hearing and trial at Kisii high court Registry".

This court in own decision delivered on 26th day of September 2008 in the case of Cecillia Wairimu Njagi and another versus Jackson Murithi Kathongo and another Nairobi HCCC no 303 of *2003* had occasion to revisit the same issue. Discussion on the position in law starts at page 4 line 9 from the bottom to end of page 9. Since the decision is a recent one and it is a reflection of this courts own thoughts as well as application and reflection on the matter, there is no harm in setting it out herein in extensor:-

"*This court has given due consideration to the rival arguments herein, perused the documents relied upon by either side, and proceeds to make the following findings on the mater.*

1. it is agreed by both sides and it's common ground that the subject matter is situate , and the litigants all reside within the jurisdiction of Embu High Court.

2. That the high court as established by section 60of the Kenyan constitution has unlimited country wide jurisdiction in both civil and criminal law. It therefore follows that by virtue of this power any high court is competent to hear and dispose off any matter from whichever part of the country.

3. It is trite law and this court has judicial notice of the same, that the civil procedure Act. Provisions empowering the high court to exercise supervisory powers over the subordinate courts whereby the high court, has power to transfer a matter from itself to the subordinate court, and from the subordinate court, to itself and from one subordinate court to another does not apply to the high court. There is no provision whereby one high court can transfer a matter from itself to another high court as a transfer.

4 The applicant no doubt was a live to this position and that is why he chose not to cite any of the Civil Procedure Act provisions, and chose to seek a venue through order 46 rule 5 civil procedure rules. These provide" 5 (1) every suit whether instituted in the centrol office or in a District registry of the High court ,shall be tried in such a place as the court may direct and in the absence of such direction a suit instituted in the centrol office, should be tried by the High Court, sitting in the area of such control office and a suit instituted in a district registry, shall be tried by the high court, sitting in the area of such district registry.

***(2)** The court may of its own motion or on the application of any party to a suit and for cause shown, order that a case be tried in a particular place to be appointed by the court provided always that in a pointing such a particular place for trial, the court, shall have regard to the convenience of the parties and their witnesses and to the date on which such trial is to take place and all the other circumstances of the case.*

5. A. Notwithstanding anything in rule 5 or in any other provision of the rules, civil proceedings by or against the government in the high court, shall not axcept with the consent of the government be directed to be tried elsewhere than at the high court sitting in the area of the centrol office."

Reading of the a fore set out provisions reveals that in order to avail a oneself of this provisions such a party has to satisfy certain ingredients namely:-

***(1)** The suit must have been instituted either in the centrol registry or in the District Registry. The suit herein was is instituted in the Nairobi. This court has judicial notice of the fact that Nairobi is officially known as the centrol registry. It also has judicial notice of the fact that outposts are called District Registries. For this reasons, Embu high court would qualify to be known as a District Registry.*

***(2)** The trial of such a suit may be tried in such a place as the court may direct. The exercise of this power is discretionary. This court has no doubt that like all other judicial this discretions, this one too is required to be exercised judiciously. The word used is "direct" and not transfer. Herein the high court has not directed as to which place the suit is to be heard. Hence the applicant request that the suit be heard at Embu Registry.*

(3) *If no direction is given, then the suit will be tried where the same has been instituted.*

(4) *There is jurisdiction for the court, either on its own motion or upon the application of any party to order that a case be tried in a particular place. This jurisdiction has however a fetter attached to it. The fetter is that good cause has to be shown. Herein the court has not acted on its own motion.*

It is a party who has applied and as such he has to show good cause. The second fetter is that if the court decides to direct, that the suit be heard in another place other than the place where it was instituted the court, has to have regard to the convenience of the parties, and their witnesses and to the date when the trial is to take place.

This court has applied these was fetter to the trial arguments on record and makes a finding that the cause demonstrated by the applicant is that:-

(a) Embu high court has jurisdiction to determine the matter. The respondent does not dispute this fact.

(b) That the subject matter as well as the litigants come from Kagio village in Kirinyaga which is 30km from Embu. The respondent does not dispute this .

(c) That costs on transport and witness expanses, will be lessened if the trial is moved to Embu. The respondent did not comment on the issue of the traveling and witness expenses being lessened if the trial is to be transferred to Embu.

(d) That the new location will be convenient to all the parties. The respondent response to this is that the move will only serve the convenience and personal reasons of the applicant but did not close what she meant by the applicants' own convenience and comfort. She however did not herself demonstrate that either the plaintiff and or the defendants would suffer if the trial is shifted.

(e) The date of the trial too is to be considered. The applicants' stand is that the pre trials have not been complied with, and as such the suit is not ripe for trial and so no inconvenience will be caused. The respondent response to this is that relocation will cause a delay.

Due consideration has been given to all the afore mentioned matters for and against the application and the court is of the opinion that the applicants' good cause demonstrate herein has not been ousted by the respondents' opposition. More so when the new 2nd defendant has been supported by the first defendant the second plaintiff is also to be taken not to be in apposition as the authority to depone on her behalf is not annexed. The court therefore takes it that 3 litigant are in favour of the re decition and it is only one who is not in such a favour whose reason for opposition have been ousted.

In addition to the above reasoning, this court taken judicial notice of the fact that the idea of opening out plaintiff though not mentioned in order 46 CPR was for purpose of bringing delivery of judicial service closer to the litigant and in doing so cut down on travel expenses and minimized costs. This is one of the costs out forward by the applicant and this court make a finding that justice will be best served by the parties seeking justice from the high court nearest to them to save on travel costs and witness, expenses. The court also make findings that it will be on record and les expensive to ferry witness to enable high court there Nairobi. This may also withdraws on accommodation costs both for parties and their witnesses as they can operate from home.

As for hearing dates this court is not in a position to comment about the conditions of the diary in Embu. However that not withstanding this court conclude clause in the directive to the effect that in view of the age of the suit the same be handled in priority basis both at the pretrial and trial staged"

Thinking back to the assessment the fact herein and upon review of the papers presented facts herein and upon perusal of the papers presented by either side for and against the application subject of this ruling a well as perusals of the entire record the court is of the opinion that the arguments herein have presented problems for determination by this court namely one based on technicalities and another based on the

merits of the application. The court is a line to the fact that neither counsel is intended them. However that notwithstanding the court is not pre decided from resenting the same once dated upon perusal of the record. The precaution is taken because the two technicalities touch on the laws stand on the defendant/respondent to present papers in these proceedings. It therefore follows that this has to be clarified first before the merits of the application are gone into so that the court does not issue orders in vain.

The first to be dealt with is the intention to oppose the plaintiff/applicants interim application which accompanied the plaint. This intention to oppose by the defendant is found in order 50 rule 16 CPR which is an invitation to oppose the interim application. It reads:-

"*Order 50 rule 16 (1) any respondent who wishes to oppose any motion or other application shall file and serve on the applicant a replying affidavit or a statement of grounds of opposition if any, not less than three clear days before the date of hearing.*

(2)Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under sub rule (1) may, with the leave of the court file a supplementary affidavit."

(3*) If a respondent fails to file a replying affidavit or a statement of grounds of opposition, the application may be heard exparte:"*

As mentioned earlier on, there is a replying affidavit by one Kennedy Bosire Gichana sworn on 17th August 2008 and filed the same 18th August 2008. That reply is in order. It is a sufficient response to the interim application in writing. The defendant/ respondent in his own capacity can agitate it orally in court. It however becomes problematic if it is to be agitated on his behalf by counsel. If it is counsel to agitate it on his behalf, then it means that such a counsel has to comply with the provisions of orders III CPR namely sub rule 8 there of . It reads:-

"*Order III rule 8 where a party having sued or defended in person appoints an advocate to act in the cause or matter on his behalf he shall give notice of the appointment, and provisionS of this order relating to a notice of change of advocate shall apply to a notice of appointment of an advocate with the necessary modifications "*

Applying that to the facts herein, it therefore follows that the defendant/respondent has a licence and authority to agitate that replying affidavit in person in his capacity as the defendant/respondent. However, if he intends to avail himself the services of counsel there must be a notice of appointment filed in court. None has been traced here in and if none was filed as at the time the said replying affidavit was filed, then all a appearances and representations made by counsel so far, in so far as they are meant to benefit the defendant are invalid null and void and exercises in futility although this will be appropriately gone into at the time of hearing the application to which the replying affidavit is meant to counter.

The next to be considered is the invitation to take any substantive step in the matter by the defendant. This court has judicial notice of the fact that such invitation is by way of service upon the defendant of the statement of claim namely the plaint. This unification is found in order v rule 9 (i). It reads "*order v rule 9 (1) wherever it is practiceable, service shall be made on the defendant in person unless he has an agent empowered to accept service, in which case service on the agent shall be sufficient"*

The mode of service is found in order v rule 7 CPR it reads:-

"*Service of the summons shall be made by delivering or tendering a duplicate thereof signed by the judge or such officer as he appoints in this behalf and sealed with the seal of the court"* It is noted that no copy of summons is on record and so this procedural step has not been undertaken by the plaintiff.

Service of the summons brings to the fore, the provisions of the order V III and IX procedures. Order VIII rules 1 (1) and 1 (2) provides.

" order VIII rule 1 (1) the defendant may and if so required by the court at the time of issue of the summons or at any time there after shall at or before, the first hearing or within such times as the court, may prescribe, file his defence.

(2)where a defendant has been served with a summons to appear, he shall unless some other or further order be made by the court file his defence within fifteen days after he has entered an appearance in the suit, and serve it on the plaintiff within seven days from the date of filing the defence.

Order IX rule 1. A defendant may appear at any time before Final judgement and may file a defence at any time before interculatory judgement is entered against him, or if no interclatory judgement is so entered at any time before final judgement.

2 (1) appearance shall be effected by delivering or sending by post to the proper officer a memorandum of appearance in triplicate in form no 25 Append IX A with such variation as the circumstances require, signed by the advocate by whom the defendant appears, or if the defendant appears in person by the defendant or his recognized agent "

Order III rule 1, any application to, or a appearance or act in any court ,required authorized by the law to be made or done by a party in such court may except where otherwise expressly by provided by any law for the time being in force, be made or done by the party in persons or by his recognized agent , or by an advocate duly appointed to act on his behalf"

Applying the above provisions to the facts herein, it is clear that the iinvitation to enter appearance is by way of service of summons to enter appearance.In the absence of a copy of summons to enter appearance on the record, the defendant/ applicant has not been properly invited to enter appearance.

Invitation to file a defence is the second step after entry of appearance. It therefore follows that in the absence of an invitation to enter appearance signified by service of the summons, there is no jurisdiction to file a memorandum of appearance. Infact none is on record. Following from the above, if there is no invitation to enter appearance, there is no invitation to file a defence, and if there is no invitation to file a defence there is no invitation to take any substantive step in the matter.

The filing of a substantive application to have the matter transferred to Kisii high court is a substantive step which in this courts' opinion, can only be undertaken if the defendant has (a) has been served with summon to enter appearance; and has entered appearance even under protest. In the absence of these two procedural steps being evident on the record, the application under consideration is in competent.

Further to this, the court, has noted that indeed there is a defence on record. However, from the above sequence, a defence can only be anchored on a memo of appearance entered by the defendant either in person or through an agent. There is no notice of appointment of advocate on record neither is there a memorandum of appearance through a recognized agent on record.

In the absence of these two documents, the presentation of the application under review by Minda and Company Advocate as advocates for the defendant is irregular. The entire process is null and void, and an exercise futility. Being found so, it is a proper candidate for striking out, and it is accordingly struck out for the reasons given. Having been struck out, there is no need to go into its merits.

(2)The plaintiff/Respondent to it will have costs of the struck out application.

Dated, Read and Delivered at Nairobi this 17th day of October 2008.

P.M. NAMBUYE

JUDGE