



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Misc Appli 1670 of 2007

ABID ALI HASHIM.....APPLICANT

VERSUS

ANTONY KIHONGE MUHIARESPONDENT

RULING

Before me is a notice of motion filed pursuant to Section 18 (1)(b) of the Civil Procedure Act. The applicant seek an order of the court to transfer Nairobi CMCCC No. 8792 of 2007 (*Milimani*) to Mombasa Chief Magistrate's Court for hearing and disposal thereof. The grounds in support of the application are that the Nairobi Chief Magistrate's court lacked jurisdiction to hear the matter because the cause of action arose in Mombasa and further that the defendant resides and conducts business in Mombasa. The application is supported by the annexed affidavit of Abid Ali Hashim, the applicant. The application is opposed. Antony Kihonge Muhia swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the Nairobi Chief Magistrate's court had jurisdiction to hear and determine the suit since he had initially purchased the motor vehicle from a motor vehicle dealer in Nairobi. He deponed that since he was a resident of Naivasha, it would be just and convenient for the suit to be heard and determined in Nairobi.

At the hearing of the application, I heard rival submissions made by Mr. Wena on behalf of the applicant and by Mr. Gachuhi for the respondent. I have carefully considered the said submissions made. Other than reiterating the contents of the application and the replying affidavit filed thereto, counsel for the respondent relied on the decision of Nairobi HC Misc. Civil Application No. 115 of 2001 James Kiiru Kiai vs. Equaby Gabreab & Anor (*unreported*). The issue for determination by this court is whether the applicant made a case for the transfer of the said suit from Nairobi Chief Magistrate's court to the Mombasa Chief Magistrate's court for hearing and determination. In the suit before the subordinate court, the respondent averred in paragraph 2 of the plaint that:

"The defendant is a male adult of sound mind residing and working for gain in Mombasa in the aforesaid Republic. Service of summons shall be effected through the plaintiff's advocates chambers."

The respondent did not state where the agreement for the purchase of the motor vehicle, which was the subject matter of the suit, was entered into. However, in paragraph 6 and 8 of the plaint, the respondent averred that he had traveled on several occasions to Mombasa to pursue the delivery of the motor vehicle and craved for the court to award him compensation for the loss that he incurred in the course of said travels.

From the pleadings, it was clear that the cause of action arose in Mombasa where the defendant resides

and conducts his business. Although **Section 3(2)** of the **Magistrate's Court Act** confers countrywide jurisdiction to a resident magistrate's court, in civil cases such jurisdiction is exercised subject to the limitation to the said court's jurisdiction as provided by **Section 5** of the **Civil Procedure Act** which states that:

“Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.”

Section 15 of the **Civil Procedure Act** limits the court's territorial jurisdiction in regard to where civil suits can be filed by plaintiffs against defendants. The plaintiff is required to file suit either where the cause of action arose or where the defendant resides or where the defendant conducts his business or works for gain.

It is therefore evident from the foregoing that the respondent herein ought to have filed the suit before the Chief Magistrate's court at Mombasa instead of the Chief Magistrate's court at Nairobi. In the above cited case of **James Kiiru Kiai**, Visram J quoted with approval the decision of **Kagenyi vs. Musiramo & Anor [1968] EA 43**, where Sir Udo Udoma C. J. held at page 45 as follows:

*“It is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities for stating that the principal matter to be taken into consideration are balance of convenience, questions of expense, interests of justice and possibilities of undue hardship; and if the court is left in doubt as to the whether under all circumstances it is proper to order a transfer, the application must be refused: See **Matayo K. Kaboha vs. Abibu Bin Abdulla and Others [1936-51]. 6 U. L. R. 121).**”*

The above principle would be applicable only where the court reaches a determination that two subordinate courts which are the subject of the application for transfer of the suit are courts which have equal jurisdiction to hear the matter in the first place. Ringera J in **Omwoyo vs. African Highlands & Produce Co. Ltd [2002] 1 KLR 698** citing the same decision of **Kagenyi vs. Misiramo & Another**, stated as follows in regard to an application for transfer filed pursuant to **Section 18** of the **Civil Procedure Rules**:

*“... the sole issue for determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. In **Kagenyi vs. Misiramo & Another [1968] EA 48**, Sir Udoma Udoma CJ held in relation to **Section 18** of the **Uganda Civil Procedure Act** – a provision which is in *pari materia* with **Section 18** of our code – that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it.”*

In the present application, it was clear that the respondent filed the suit before a subordinate court which did not have territorial jurisdiction to hear and determine the suit. The respondent should consider himself lucky that instead of seeking the dismissal of the said suit for want of jurisdiction, the applicant has instead opted to have the suit transferred to a court with competent jurisdiction.

I will therefore exercise my jurisdiction pursuant to **Section 18 (1)(b)(ii)** of the **Civil Procedure Act** and order the transfer of **Nairobi CMCCC No. 8792 of 2007 Antony Kihonge Muhia vs. Abid Ali Hashim (Milimani)** to the Chief Magistrate's Court Mombasa for hearing and final disposal. The applicant shall have the costs of the application.

DATED at NAIROBI this 28th day of NOVEMBER 2008.

L. KIMARU

JUDGE