



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

**Civil Suit 378 of 2007**

**MARGARET WANJIRU KIBE.....PLAINTIFF**

**VERSUS**

**CATHERINE NJERI KIBUE ALIAS OOSTERWYK.....1<sup>ST</sup> DEFENDANT**

**GERALD OOSTERWYK.....2<sup>ND</sup> DEFENDANT**

**HAPPY COW LIMITED.....3<sup>RD</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application before me is the Chamber Summons dated 17/09/2008 which seeks an order striking out the Defendant's Nos. 1, 2 and 3 application dated 10/03/2008 for transfer of this suit from Nairobi to Nakuru. The Applicant also prays that costs of this application be provided for. The application, which is expressed to be brought under Sections 3A and 18(1) of the Civil Procedure Act and Order VI Rule 13(1) (b) and rule 16 of the Civil Procedure Rules is premised on the following grounds:

**1 THAT the cause of action leading to this suit arose from Criminal Case No. 714 of 2005 which case was conducted in Nakuru but the Plaintiff was arrested in Nairobi where she was residing and carrying out business for gain.**

**2 THAT the present suit civil suit No. 378 of 2007 was filed in Nairobi by the Plaintiff to alleviate costs for all the parties as the witnesses who the plaintiff wishes to call reside in Nairobi and Mombasa.**

**3 THAT it is in Mombasa that the defendants Nos. 1, 2, 3 disrupted and closed the plaintiff's business unlawfully and yet the plaintiff in good faith filed the case in Nairobi.**

**4 THAT it is therefore in the interest of the defendants 1, 2 and 3 and the 4<sup>th</sup> Defendant to have this matter heard and disposed of at a neutral place.**

**5 THAT the prayers sought by the defendants 1, 2 and 3 are made in bad faith and are calculated to delay the trial and cause financial hardship to the plaintiff.**

2. The application is also supported by the sworn affidavit of **Margaret Wanjiru Kibe** dated 17/09/2007 in which she depones that the cause of action in this case arose in Nairobi and Mombasa; that

the Plaintiff carries on business for gain both in Nairobi and Mombasa; that the instant suit was filed in Nairobi because the subject matter of the Criminal Case No.714 of 2005 was situate in both Nairobi and Mombasa; that the instant application is brought in bad faith. The application is opposed on the following grounds:-

- (i) ***The application is misconceived and an abuse of the process of court,***
- (ii) ***There is no provision in law for such kind of application.***
- (iii) ***The Applicant cannot seek to strike out an application which she has not opposed.***
- (iv) ***The issues raised in this application ought to have been raised in the application it seeks to strike out.***

3. The application was canvassed before me by **Mr. Koli** (learned counsel for the Applicant, and **Mr. Ikua** learned counsel for the Respondent. As it turned out during the hearing of the application, the Applicant seeks to have the Defendant's application dated 10/03/2008 struck out for want of prosecution, though the grounds in support of the application show otherwise. The Applicant also says that if the Respondent was so minded, the instant application and the Defendant's application dated 10/03/2008 could have been withdrawn in order to pave the way for hearing of the main suit.

4. On his part, learned counsel for the Respondent contends that the Applicant has taken the wrong route to having the Respondents' application dated 10/03/2008 disposed of; that the orders sought, especially under the provisions of Order VI Rule 13 of the Civil Procedure Rules cannot be granted unless the Respondents have been fully heard on their said application. Counsel for the Respondents also says that the application as filed is fatally defective and that as such, the orders sought herein cannot be granted.

5. I have considered the application as filed and the submissions made by both counsel appearing. I note that this court has wide discretion under Section 3A of the Civil Procedure Act to make such orders as would meet the ends of justice or prevent abuse of the court process. In my view, I think that the Applicant's instant application is misplaced and misconceived. I find that the grounds in support of the application as found on the face thereof and in the affidavit in support, are at variance with the grounds given by counsel for Applicant during the hearing. The Applicant in essence is seeking to have the Respondents' application dated 10/03/2008 struck out for want of prosecution without laying a basis for the same. It is my further view that this application has resulted into further delay in having the main suit heard and determined although the Applicant says that she has extended an olive branch to the Respondents on the way forward. Parties should avoid actions that result in undue delay in having matters brought before the court being concluded timeously.

6. In the result, I find that there is no merit in the Applicant's application. The same is accordingly dismissed with no orders as to costs. I hasten to add that parties should now make an effort to set down the Respondents application dated 10/03/2008 for hearing or deal with it in such a manner as would pave the way for the hearing of the main suit.

It is so ordered.

**Dated and delivered at Nairobi this 24<sup>th</sup> day of Novmeber, 2008.**

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

.....For the Plaintiff/Applicant

.....For the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants/Respondents

.....For the 4<sup>th</sup> Defendant