



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 402 of 2008

WAKI CLEARING & FORWARDING AGENTS LIMITED.....APPLICANT

VERSUS

HIGHWAY CARRIERS LIMITED.....1ST RESPONDENT

REYNOLD CONTRUCTION CO. (NIG) UG.....2ND RESPONDENT

R U L I N G

The applicant Waki Clearing and Forwarding Agents Limited have come to this court, vide an application by way of notice of motion brought under section 17 and 18 of the Civil Procedure Act (through cited as rules) seeking the reliefs shown. It is dated 16th June 2008 and filed on 7th July 2008 and it seeks the following orders:

- (1) That the honourable court, do transfer Mombasa CMCC No 964 of 2008 from the Chief Magistrate Court's at Mombasa to the Chief Magistrates, court at Milimani Commercial Courts at Nairobi
- (2) That the costs of the application be made by the 1st respondent

The grounds in support are set out in the body of the application, supporting affidavit, and oral submission in court, and the major ones are that

- The suit should have been presented to the Chief Magistrates Court in Milimani Commercial Courts, Nairobi as opposed to the Mombasa Chief Magistrates Court.
- That the applicant named as the first defendant in the suit sought to be transferred has its registered office in Nairobi
- Where as the second defendant in the said case is based in Uganda.
- That the contract sought to be enforced was entered into and executed in Nairobi.
- The address of the applicant is shown to be in Nairobi
- It is their contention that where the contract was executed is where the cause of action arose.

- By reason of what has been stated above, the court, is urged to hold that Nairobi is the proper place for trial.

In response the respondent who is the plaintiff in the lower court, has opposed the application on the basis of grounds set out, in the replying affidavit and submission in court. The main ones are that:

- (i) The applicant carries' on business in Mombasa as per the documents exhibited
- (ii) The plaintiff is based in Mombasa.
- (iii) The consignment was to be delivered in Mombasa.
- (iv) The applicant though registered in Nairobi it has a branch office in Mombasa which handled the transaction subject of these proceedings.
- (v) That corporations are not to be treated as individuals, whose convenience has to be taken into consideration when considering such issues.

- The court, is urged to take into consideration the pleadings of the parties as presented to the lower court, and then dismiss the application.

Due consideration has been made of the arguments presented by both sides. The court, has also had occasion to scrutinize the pleadings exhibited and makes findings as follows:-

- Paragraph 1 of the plaint describes the plaintiff as a limited liability company, whose advocates address is in Mombasa. The company offers business through out East Africa.
- Paragraph 2 thereof describes the first defendant as having its registered office in Nairobi.
- Where as paragraph 3 describes the second defendant as a limited company established in Uganda with its registered office in Kampala plot No 2, Muwesi Road Industrial area.
- Paragraph 4 states in part that in the month of August 2007, the 1st defendant on invitation of the 2nd defendant contracted the plaintiff to deliver different consignment of cleared goods from the port of Mombasa to the 2nd defendants premises at Jinja, Kisolo and Malaba in Uganda.
- Where a paragraph 5 on the other hand states that the first defendant was appointed a clearing and forwarding agent for the 2nd defendant, while the second defendant was the owner of the cleared consignment which was delivered to the 2nd defendant premises in Uganda by the plaintiff.
- Vide paragraph 6 that the plaintiff later raised invoices in respect of every consignment that it delivered at Jinja, Kisolo and Malaba upon the 1st defendants request and instance. That the plaintiff duly delivered all the consignments as contracted by the 1st defendant and prepared invoices.

Due consideration has been made of the foregoing paragraph and the court, makes the following observations o the same:

- (a) Paragraph 4 of the plaint does not disclose the place where the first defendant received instructions from the 2nd defendant to deliver the goods for the 2nd defendants premises at Jinja, Kisolo and Malaba.
- (b) Paragraph 4 also does not disclose where the plaintiff received instructions from the 1st defendant to deliver the 2nd defendants goods at Jinja, Kisolo and Malaba in Uganda.
- (c) Paragraph 5 on the other hand does not disclose where the 1st defendant was appointed a clearing and

forwarding agent for the 2nd defendant

(d) Paragraph 5 also does not disclose where and when the goods were cleared.

(e) Paragraph 6 on the other hand does not disclose where the invoices were raised.

In view of the observations in number a, b, c, d, and e above there is no mention of either Nairobi or Mombasa anywhere.

Turning to the defence the observations are as follows:

(i) The 1st defendant denied parts of the description of the plaint but does not specify what parts of the description it does not agree with

(ii) Paragraph 3 there of does not disclose where the 1st defendant was appointed a clearing agent. Whereas it does not disclose where the plaintiff was also appointed as a clearing and forwarding agent for the 2nd defendant.

(iii) Paragraph 5 on the other hand does not disclose where the 2nd defendant issued instructions to deliver the goods. Like wise it does not disclose where the invoices were raised.

(iv) Paragraph 6 does not also declare where the 2nd defendant contracted the 1st defendant to deliver different consignments of cleared goods from the port of Mombasa.

From the above it is clear that the place of the contract of instructions not given.

This being the position, the court, has to turn to the law for assistance, section 17 and 18 of the Act. Section 17 gives power to transfer a suit from the lower court, to another, either on the courts, own motion or on application by a party, to transfer the said suit from one court, to another. Applying this provision to the observations made above, there is nothing to link the suit to Nairobi as opposed to Mombasa where it was filed.

Section 18 is the section that donates the power to exercise supervisory power over the lower court. As observed above, nothing has been demonstrated to entitle this court, exercise that power in the manner sought. It was necessary for the parties to insert in their pleadings, the places where each activity took place in order to enable the court, determine the suitable court, where the action should have been instituted and if instituted, in a wrong place then invoke its inherent jurisdiction of the court, to relocate the suit from the court of original initiation to another appropriate court. It therefore follows that in the absence of provision of particulars mentioned above there is nothing to oust the respondents assertion, that the instructions were given in Mombasa from the applicants branch office and all transactions subject of these proceedings were handled by that office, and that all witnesses and documents necessary for the trial as well witnesses will not be from the applicants head office in Nairobi, but from the Mombasa office within the proximity of the court, where the suit was filed.

Before making the final orders, it is important to make an observation of a procedural error which would have affected the out come of the application had it been meritorious. Paragraph 1 of the supporting affidavit reads:-

“That I am one of the Directors, conversant with the facts and matter in issue herein and duly authorized to swear on affidavit on its behalf.” paragraph 1 of the replying affidavit reads:-

“That I am the accountant of the plaintiff company herein and so competent to swear this affidavit”

The affected parties being juristic, it means that the authority to so depone has to be given in a particular mode accepted by law for corporate bodies and the one that this court, has judicial notice of, is one where

by the authority to so depone is one where the same has been given by way of a resolution of the board of Directors, or share holders. After the same has been given, then order 1 rule 12 (2) of the Civil Procedural Rules requires that the same be in writing and that the same be filed in the case. Where there is no compliance the particular process is incompetent. This means that both the supporting affidavit and the replying affidavit are incompetent.

Being in competent, the supporting affidavit cannot support the application. In its absence, the application will not be in compliance with the provision of order 50 of the Civil Procedure Rules which requires that an application has to be supported by the grounds in the body of the application and a supporting affidavit. If the application is faulted then there is nothing to be opposed. Likewise if the replying affidavit has been faulted, then there is nothing to oppose the application had it not been faulted.

For the reasons given above in the assessment, the application dated 6th June 2008 and filed on 7th July 2008 has been faulted. The same is firstly incompetent because the authority to depone the supporting affidavit is not annexed. By this reason the application does not comply with the requirements of order 50 Civil Procedure Rules and the same is liable to be struck out and it is accordingly struck out.

Had it survived the competence test, the application would not have been upheld for the reasons given

(2) Since both the application as well as the replying affidavit have been found to be faulty, each party will bear its own costs.

Dated, read and delivered at Nairobi this 21st day of November 2008.

R.N. NAMBUYE

JUDGE