

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI

Misc Civil Appli 215 of 2006

MAISHA FLOUR MILLS LIMITED.....DEFENDANT/APPLICANT

VERSUS

ZACHARIA NYATUKA ONYANCHA.....PLAINTIFF/RESPONDENT

R U L I N G

By a notice of motion dated 31st August 2006 filed on 18th September 2006, Maisha Flour Mills Limited, the Defendant/Applicant seeks to have the suit filed against it by Zacharia Nyatuka Onyancha (*hereinafter referred to as Plaintiff/Respondent*), as Milimani CMCC Number 422 of 2005 transferred to Nyeri Chief Magistrate's Court for hearing and final determination. It is the applicant's contention that the cause of action arose in Kiganjo in Nyeri and that it is in the best interest of justice that the suit be heard in Nyeri.

Baldev Singh Rajput the applicant's claims manager has sworn an affidavit in which He maintains that the Defendants registered offices are in Kiganjo (Nyeri area) and that the cause of action arose in Kiganjo and that the Defendant intends to call 5 witnesses and it will be costly for the Defendant to transport the witness to Nairobi.

The application is vehemently opposed by the Plaintiff through his advocate. In a replying affidavit sworn by the Plaintiff it is contended that the application is only intended to delay or frustrate the expeditions disposal of the trial of the Plaintiff's suit. It is further deponed that the Defendant has offices in Nairobi and will not suffer any prejudice if the suit is heard in Nairobi.

The Plaintiff's advocate submits that under **Section 14** of the Civil Procedure Act, the Plaintiff has the option to file the suit within the local limits of the jurisdiction of the Defendant's place of business or where the cause of action arose and that the Defendant carries on business in Nairobi where the suit has been filed. Finally it is submitted that as per Section 16 of the Civil Procedure Act the applicant cannot challenge the jurisdiction of the court since the same has not been raised, in the court trying the suit.

In relation to the ultimate point raised Section 16 of the Civil Procedure Act states as follows: -

“No objection as to the place of suing shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice.”

(underlining added)

First **Section 16** of the Civil Procedure Act is not applicable herein as it only arises in the case of an appeal which is not the case herein. Secondly the section would only apply where the issue of jurisdiction was never raised in the lower court. In this case it is evident from the defence paragraph 11 that the Defendant did raise an issue regarding the geographical jurisdiction of the court. I would therefore reject the Plaintiff's submissions in this regard.

Nevertheless, I have considered this application and it is evident that although the Defendant has its registered office in Kiganjo Nyeri District, and that the cause of action arose there, the Defendant also carries on business in Nairobi. This was deponed to by the Plaintiff in his replying affidavit and has not

been denied by the Defendant. This means that **Section 14** of the Civil Procedure Act which gives the Plaintiff the option of suing either where the cause of action arose or where the Defendant carries on business is applicable.

Although the applicant maintains that it intends to call 5 witnesses, the cost of transporting these witnesses to Nairobi cannot be said to be so prohibitive as to justify the transfer of the suit to Nyeri. I am satisfied that the suit is properly before the Chief Magistrate's Court in Milimani (Nairobi) and I do therefore dismiss the notice of motion dated 31st August 2006. I make no orders as to costs.

Dated, signed and delivered this 23rd day of January 2006.

H. M. OKWENGU

JUDGE