



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**  
**Misc Civil Appli 116 of 2006**

**OLD MUTUAL LIFE ASSURANCE CO. LTD ..... APPLICANT**

**Versus**

**MOHAMMED SAIDQUE KHAN ..... RESPONDENT**

**RULING**

In this Notice of Motion dated 2<sup>nd</sup> February 2006 the Applicant wants order:

“THAT the suit filed by the Respondent in reference to Nakuru CMCC No. 2900 of 2003 Mohammed Sadique Khan vs. Old Mutual Ltd Assurance Co. Ltd be transferred to the Magistrate’s Court sitting at Nairobi, Milimani Commercial Courts, for hearing and final determination.”

Grounds in support of that prayer are on the face of the Notice of Motion which is also supported by the affidavit deposed by Ann Gatonye the Chief Operations Officer of the Applicant Company.

The Applicant’s learned Counsel M/S Gathaara has ably argued the Notice of Motion ex-parte. The Respondent though served, did not appear for the hearing. But he had filed a replying affidavit dated 4<sup>th</sup> April, 2006.

The Applicant before me is the Defendant in the case sought to be transferred from the Chief Magistrate’s Court Nakuru where the Respondent before me is the Plaintiff.

Taking into consideration all that has been brought before me, the Applicant’s position is that its head office is in Nairobi and the contract between the two parties was made in Nairobi so that the cause of action arose in Nairobi. It is added that its witnesses will be from Nairobi. The Applicant does not know where the Respondent’s witness will come from.

Looking at the Respondent’s Replying Affidavit, it is apparent that the two parties met at Nakuru and the Respondent says the contract, the subject matter of the suit was consummated at Nakuru. The Respondent believing the Applicant is based at Nakuru. The Respondent states he is a person of poor health who will find it difficult to be traveling from Nakuru to Nairobi for this case. He is likely to suffer complications and hardship.

True the Respondent was not present during the hearing of this Notice of Motion, but I think he has good grounds as seen from his Replying Affidavit which I am entitled to look at in deciding the Applicant’s Application. Cases in Courts are known to involve going to court several times and may be for a long time. To a person with ill health, that alone creates a problem. If traveling a long distance and resultant expenses are added, I can foresee complications and hardships to the traveling ill health party whose witnesses, if any, I presume are at Nakuru. That may explain failure by the Respondent to appear for the hearing of this application.

On the other hand, I feel that in the circumstances of this case the Applicant can easily manage traveling to and fro the court at Nakuru which has jurisdiction to hear the suit just as the court at Nairobi.

From what I am saying therefore, this Notice of Motion is hereby dismissed and each party to bear its own costs of the application as the Respondent did not appear at the hearing.

Dated and delivered at Nairobi this 7<sup>th</sup> day of March, 2006

**J.M. KHAMONI**

**JUDGE**