

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Misc Appli 423 of 2006

SIMBA ESTATE LIMITEDAPPLICANT

VERSUS

ALEXANDER KIPRONO CHEPKWONYRESPONDENT

RULING

The Applicant has brought a Notice of Motion dated 30th May, 2006. The same is brought under Section 18 (1)(a) and Section 3A of Civil Procedure Act. The Applicant seeks that a suit filed by the Respondent at Bomet Magistrate’s court namely RM.CC. No.10 of 2006 be transferred to the Resident Magistrate’s Court at Milimani Commercial Courts. The affidavit in support of the application stated that the Defendant in the Bomet case that is the Applicant in this matter, is a limited liability company incorporated under the Companies Act. That its registered office is situated in Nairobi. That the witnesses, the applicant will call in respect of the action filed in the Bomet Magistrate’s court are all based in Nairobi. That summons and Plaint were served upon a director of the applicant in Nairobi. For that reason the Applicant stated in the affidavit that it will incur expenses in defending the suit in Bomet Magistrate’s court. The Applicant’s counsel in oral submissions repeated the averments in the affidavit in support of the application. Counsel also relied on various authorities which held that the residence and convenience of the parties should be considered when the court considers which court should entertain a suit. In particular the Applicant relied on the case of **Red Anchor Freight Forwarders Ltd v David Nthiwa Wambua Misc. Civil Application 1602 of 2004, High Court of Kenya at Nairobi**. In this case the court cited a portion from a book **R. Kuloba entitled Judicial Hints on Civil Procedure, Vol. 1 (Nairobi: Professional Publications Ltd, 1984), para. 134** as follows:-

“Where a party seeks an order to transfer the trial of a suit pending in one court to another court having jurisdiction, the applicant must make out a reasonable, strong case for the transfer. The factors to be considered are more than the mere balance of convenience, though that is relevant. They include (a) the balance of convenience, (b) questions of expense, (c) the interests of justice, and (d) the possibilities of undue hardship...”

In response the Respondent’s counsel opposed the application. He relied on the replying affidavit filed by the Respondent’s counsel. The Respondent’s counsel deponed that in civil suit a case is filed where the cause of action arose or in the alternative where the Defendant resides. He deponed further that the Respondent was an employee of the Applicant in its place of business at Bomet. That the injuries that are the subject of the suit in Bomet Resident Magistrate’s court occurred within the jurisdiction of Bomet court. That both the witnesses of the applicant and the respondent reside in Bomet. For this reason he concluded that the application to transfer the suit is an abuse of the court process. Having considered the evidence of counsel, it is pertinent to note that Section 15 explanation (2)-A as follows:-

“A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place”.

The Applicant in making the present application relied on the fact that its registered office is in Nairobi and summons and Plaint were served on its director in Nairobi. The Applicant in its submissions or in its affidavit in support was not heard to contradict the Respondent’s contention both in replying affidavit and also in the Plaint filed in Bomet Court that it has a business in Bomet where the Respondent was working and subsequently was injured. The Respondent’s counsel in his affidavit did state that the Respondent’s witnesses are based in Bomet. That was not contradicted by the applicant. I am however, in agreement

with the respondent that the said counsel was not qualified to depone to the fact that the witnesses of the Applicant are also based in Bomet. Such a deposition could only be based on information that ought to be disclosed in the affidavit. In considering the application other than being guided by the provisions of Section 15 particularly explanation (2) –A, I find that I am in agreement with the authority relied on by the applicant that for the court to make an order for the transfer of a suit the applicant needs to make a reasonably strong case for the transfer and in considering such an application the court ought to consider the balance of convenience to the parties. That balance of convenience would indeed include the expenses that the parties will incur, the interest of justice and hardship. The respondent in the Plaint filed in Bomet court, prescribed himself as a general labourer. In considering his convenience, I am of the view that it would be far more convenient for the Applicant to travel or transport his witnesses to Bomet court rather than require a general labourer to travel and probably to support the expense of travel for his witnesses to Nairobi. In any case in the Plaint filed in Bomet court the plaintiff stated that he was injured at the Respondent’s site called Gorgor Side. This is situated within the jurisdiction of Bomet court. This was not denied by the Applicant. It would therefore, seem that the applicant does have a subordinate office in Bomet which would mean that the Respondent was within his right as provided in Section 15 explanation (2)-A to have filed the case in Bomet court. I find therefore, the Applicant has failed to make a case for a transfer of the suit in Bomet court to Nairobi. The Notice of Motion dated 30th May, 2006 is therefore dismissed with costs to the Respondent.

MARY KASANGO

JUDGE

Dated and delivered this 30th October, 2006.

MARY KASANGO

JUDGE