



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA**

Civil Case 82 of 2004

PATRICK MUKOSERO

LUYIAKHAPLAINTIFF

V E R S U S

M/S ADVENTURERS ALOFT (K)

LTD.DEFENDANTS

R U L I N G

The suit herein was instituted on 12-11-04 by the plaintiff, *Patrick Mukosero Luyiakha*, against a limited liability company styled *Adventure Aloft (K) Ltd.* The plaintiff's claim against the defendant company is for damages for injuries said to have been sustained by the plaintiff on 14-11-99 when a balloon operated by the plaintiff "lost float control" and fell on the plaintiff thereby causing the latter injuries. The plaint dated 28-9-04 did not state where the accident involving the plaintiff and the defendant's balloon occurred. However in paragraph 7 of the plaint, the plaintiff averred that "the cause of action arose at Masai Mara and Narok within the jurisdiction of this honourable court."

On 12-11-04, the defendant company through its advocates on record, M/S Gichuki King'ara & Company, made an application to this court dated 11-11-04 seeking orders "*this matter be transferred to Nairobi to save time and costs and ensure expeditious determination of the matter.*"

When the matter came up for hearing before me on 18/9/06, Mr. Gachie, learned counsel for the applicant/defendant urged the court to grant the orders for the case to be transferred to Nairobi as the defendant company has its registered office in Nairobi and also because its numerous witnesses will hail from there. He submitted that it will be very expensive for such witnesses to travel to this court for hearing. In any case, the case, he said, should be transferred to the lower court for hearing and final disposal.

On his part, Mr. Kiveu, learned counsel for the respondent/plaintiff was of the opposite view. His client was unemployed and it would be very expensive for him to travel to Nairobi. Relying on his client's replying affidavit, Mr. Kiveu submitted that, as the defendant had already submitted to the jurisdiction of this court, the order for transfer should be disinclined.

The application was based on sections 15 and 3A

of the Civil Procedure Act, Cap 21. Section 15 (a) and (b) states:- 15. Subject to the Limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction -

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain: or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution.

Section 3A of the Civil Procedure Act states-

S.3A Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

It is explicit from the provisions quoted above that the suit must be instituted in a court nearest the defendant unless the defendant acquiesces to institution of the suit elsewhere. The High Court has jurisdiction nationwide. Any judge can hear any case filed in his station even where parties work or reside in another area where there is a resident judge. However, if claimants were given a carte blanche to file and prosecute suits in far flung places away from the respondents, it may in some cases result in unbearable yet avoidable cost and perhaps even pose the danger of denying defendants of the ability to defend. In part, this may have been the philosophy behind the provisions aforementioned. When a defendant seeks transfer of a suit from one high court registry to another, what considerations should the court have regard to in determining whether to grant or not to grant such application? I do not think the considerations governing grant of orders under section 18 of the Civil Procedure Act are irrelevant. These include the issue of expense, possibilities of undue hardship, balance of convenience and interest of justice; see *KAGENI v. MUSIARAMU* [1968] EA 43; See also this court's decisions in *CLEMENT WERE MUKHULE v. KAKAMEGA MUNICIPAL COUNCIL KAKAMEGA HC.MISC. APPL. NO. 8 OF 2005 (UNREPORTED)*; *EDWIN KABARAJI & 10 OTHERS v. AZAN L'LEMBE (KAKAMEGA HCC.A. NO. 44 of 2005 (UNREPORTED)*; and *WILLIAM MUKONDO OGANGO & ANOTHER v. JOSHUA ONANI OGEMBO (KAKAMEGA HCC.MISC. APPL. NO.68 OF 2005) (UNREPORTED)*.

This court has a duty to ensure that parties are not put to unnecessary expense in pursuit of justice or in defending rights and where, from the material before it, the court is able to discern that a defendant who has been brought to court will be exposed to less hardship in defending and or that it would be prudent to transfer the case, the court will grant the order but always bearing in mind that although the burden of satisfying the court that an order for transfer of a suit reposes on the applicant, the scales tilt in favour of the defendant. The court must guard against the possibility of a litigant seeking to shop for a judge of his/her choice under the guise of seeking transfer on other grounds.

Applying these principles to the instant case, has the defendant satisfied the court that it is entitled to the order sought? The defendant is a company. Its Managing Director states that it shall call 5 witnesses two of whom are in Nairobi while the other three are in Narok. But what is of relevance is where it carries on business not where its intended witnesses live or work. It does however seek transfer to Nairobi where it operates a hotel business.

Paragraph 7 of the plaint in which the plaintiff states that the cause of action "arose at Masai Mara and Narok" was not responded to by the defendant. The plaintiff in paragraph 2 of the plaint averred that the defendant had operations throughout the Republic of Kenya and elsewhere in East Africa. In paragraph 2 of its defence, the defendant admitted this fact. These averments remained unaltered in the Amended Plaint and the Amended Defence. Where is the nearest High Court Registry from where the defendant carries on business? The suit appears to have been filed in Kakamega where the plaintiff resides and therefore at his convenience. He did not take into account the convenience of the defendant as he should have. But the plaintiff cannot be faulted on this as the defendant had business operations throughout Kenya and elsewhere in East Africa. He was himself once an employee of the defendant. This fact was not controverted. On the material before me and doing the best I can, and applying the aforementioned

considerations, the order which commands itself best to me is to have this case tried in Nakuru nearer where the cause of action took place and the defendant also carries on business. I so order. The costs of this application shall be in the cause.

Delivered, dated and signed this 19th day of October, 2006

G. B. M. KARIUKI

J U D G E