



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 802 of 2003

RAPID KATE SERVICES LIMITED.....PLAINTIFF

VERSUS

FREIGHT FORWARDERS KENYA LIMITED1ST DEFENDANT

CONSOLBASE LIMITED2ND DEFENDANT

KENYA REVENUE AUTHORITY3RD DEFENDANT

RULING

In an application brought by way of Chamber Summons under Order XLVI rule 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act dated 26.4.2004 and filed in Court on 3.05.2004 the Second Defendant herein sought the orders that -

- (1) On the grounds set out in the annexed affidavit of Roger Dainty, this suit be transferred to the High Court in Mombasa for trial and disposal.
- (2) The costs of this application be provided for.

The application was supported by the Affidavit of one **ROGER DAINTY** a director of the Second Defendant and the grounds that -

- (i) the contract made between the Plaintiff and the Second Defendant was made in Mombasa and was to be performed and paid for in Mombasa;
- (ii) the said contract was made by the Plaintiff's office in Mombasa;
- (iii) the overwhelming majority, if not all, of the witnesses intended to be called by the parties reside and work in Mombasa and there would be a consequent saving of costs and avoidance of inconvenience to these witnesses and to all parties;
- (iv) the first and second Defendants carry on business in Mombasa and any execution of a judgement in the Plaintiff's favour (if it ultimately proven to be necessary) would have to be carried out in Mombasa;
- (v) the 3rd Defendant's office, so far as is relevant to the matters in issue in this suit, is also in Mombasa, and,

(vi) the only reasons given for this case to be tried and disposed of in Nairobi are based solely on the Plaintiff's assertion that all their legal disputes are dealt with by their Nairobi Office and that two of the importers (none of whom are party to this suit) are based in Nairobi and in Jinja, Uganda.

The Supporting Affidavit of ROGER DAINTY, a director of the Second Defendant/Applicant sworn on 26.04.2004, and filed on 3.05.2004 reiterates the above grounds in paragraphs 4 and 5 thereof, and in paragraph 5 thereof refers to the correspondence attached as Exhibit "RD1".

Miss Alela eloquently followed the grounds and the averments in the Supporting affidavit of Roger Dainty. Apart from relying also upon the provisions of the Civil Procedure Act and the Rules thereunder Miss Alela in support of the Second Defendant's application also cited several authorities including - Jazira Agencies (NRB) Ltd. -vs- Dolphin Stationers Ltd., (MSA HCCC No. 477 of 1998) Daniel Methu Kamau -vs- Soin Ltd. (HCCC No. 1302 of 1998), New Apostolic Church Trustees Registered -vs- Masp Enterprises (HCCC No. 619 of 1998) Oduor -vs- Plan International (HCCC No. 464 of 2001) and Barorogoza -vs- Mbarinda [1959] EA 125. I shall consider those authorities after I have set out the case of the first Defendant and the 3rd Defendant.

In her submission, Miss Alela included an assertion that she was also holding brief for Mrs. Azmina, Counsel for the first Defendant and she told the Court that the first Defendant, although having not filed any papers supported the application.

Mr. Gashindi, Counsel for the 3rd Defendant, associated himself with the submissions of learned Counsel for the 2nd Defendant. He told the Court that the events giving rise to the suit all occurred in Mombasa and that it would be convenient if the suit were transferred to Mombasa.

Predictably, Mr. Ouma learned Counsel for the Plaintiff opposed the application and relied upon the Replying and Supplementary Affidavits of Miss Margaret Ouko sworn on 14th and 28th June 2004, and filed in Court on those dates respectively. The application is predicated upon the provisions of Order XLVI rule 5 of the Civil Procedure Rules. In his submissions, this counsel told the Court that this Court does not have jurisdiction to transfer a case from one Court to another as the High Court was unified and had territorial jurisdiction. In his view, there was no plausible reason for transferring the suit for determination in Mombasa. The applicant had not demonstrated any inconvenience it will suffer and which cannot be compensated for in monetary terms. According to paragraph 6 of Miss Margaret Ouko's Affidavit, the Plaintiff's main witnesses will include its principals who lost their goods and who include representatives from -

- (a) Recoustra Enterprises in Jinja, Uganda,
- (b) Peter Karori of Nairobi
- (c) Agriquip Agencies EA Ltd. also of Nairobi

and that for these reasons any averment that all witnesses would come from Mombasa is not correct.

The side note to Rule 5 of Order XLVI is entitled "Place of trial" and Rule 5 (1) and (2) provide as follows -

5. (1) Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such place as the Court may direct; and in the absence of such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.

(2) the Court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the Court:-

PROVIDED always that in appointing such particular place for trial the Court shall have regard to the convenience of the parties, and of their witnesses and to the date such trial is to take place, and all circumstances of the case"

There is no doubt that under the said rule 5 (2) the Court has a wide and flexible discretion to order that a case be tried in a particular place. That discretion may however be exercised upon cause being shown, and that cause shall have regard to the convenience of the parties, and of the witnesses, the date of when the trial shall take place, and the circumstances of the case.

In the case of JAZIRA AGENCIES (NRB) LIMITED -VS- DOLPHIN STATIONERS LTD (Supra) P. W. Waki (as he then was) referred to Halsbury Laws of England -

"The Court's power to transfer proceedings from one Court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the Plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings. When making or refusing an order for transfer the Court will have regard to the nature and character of the proceedings the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case."

After discussing Hayanga's View in RATEMO & OTHERS (cited in the JAZIRA case) that there was only one High Court in Kenya which sits in different areas as directed by the Chief Justice (as opposed to subordinate courts established under various laws) concluded that - **"it was not forbidden for a Kenyan High Court judge sitting in location "A" to order a transmission or allocation of a case file before him to another judge sitting in location "B". It must be a matter of discretion for the judge. I believe it must be for compelling reasons which would be for the purposes of ensuring justice and this is all within the inherent power of the Court under Section 3A of the Civil Procedure Act."**

In the case of DANIEL METHU KAMAU -vs- SOIN LIMITED & OTHERS, Kasango J directed the hearing of the case to take place in Nakuru where all the witnesses were to be found, and that that was the place where the Plaintiff had instructed Counsel to file the suit, and not Nairobi.

In the **NEW APOSTOLIC CHURCH TRUSTEES REGISTERED -VS- MASPA ENTERPRISES** (supra), the applicant sought an order that the case be transferred to Kisumu from Nairobi. The Court held that the paramount consideration under Order XLVI rule 5 (2) is the convenience of the parties and their witnesses.

In **ODUOR -vs- PLAN INTERNATIONAL** [2001] K. L. R 1784 (HCK), the Plaintiff therein objected to the transfer of the suit from Nairobi to Meru on the ground that this court lacks jurisdiction to allocate work to a Court of concurrent jurisdiction.

Visram J. observed that whereas there is no express provision in the Civil Procedure Act (Chapter 21) for transfer of cases from one High Court to another, it did not mean that in a proper case this Court cannot transfer a case before it to another Registry of the High Court. The fact that there is no provision on a matter cannot prevent this Court from deciding it, if by doing so, it will be able to deliver justice. In doing that the Court will employ its unlimited and inherent jurisdiction.

Referring to the case of KISENGELA FARM LIMITED and OTHERS -VS- DAIMA BANK LIMITED and ANOTHER (Nairobi HCCC 473 of 2000 unreported) where Kuloba J. in answer to a contra argument by Counsel in that suit said"surely, if one were satisfied that the effect of a statutory silence construed in a particular way would result in injustice or an abuse of the process of the Court, then Section 3A clearly shows that the silence should not be construed in such a manner that in a proper case and in the interest of justice or to prevent abuse of the process of the Court, the residuary power there recognized and saved may be invoked and intra - High court horizontal case movements effected, provided that proper arrangements are made so as not to disrupt various civil registry diaries in respective

court stations, Divisions or among affected judges."

I would like to pose a little and consider whether or not there is express power for intra-High Court transfer of cases.

My brother Ibrahim J. shares the view with Kuloba J. (in the Kisengela case) that there is no express provision in the Civil Procedure Act for intra - High Court transfer of cases. They also seem to hold the view that in the absence of such provision, and in order not to cause any injustice to either of the parties, the court may exercise its inherent and unlimited civil jurisdiction under Section 3A of the Act, and that on the said basis may order the transfer of cases from the High Court Registry to another. Is this so in law?

Having myself closely examined the provisions of the Civil Procedure Act, I must concur with my brothers Hayanga, Kuloba and Visram that there is no such express provision for intra-High Court transfer of cases from one Civil Registry to another. In addition to the Court's inherent power under 3A to make orders to meet the ends of justice, there are provisions of order XLVI rule 5 (2) which expressly empower this Court to order that a case be tried in a particular place to be appointed by the Court. The language in this rule is I believe deliberately guarded that the suit be "**tried**" not "**transferred**" in a particular place appointed by the Court.

This power is clearly unlike that under Section 18 of the Civil Procedure Act where this Court may order the transfer of a case to a subordinate Court or withdraw the case, try and dispose it itself or order on how such suit shall be disposed.

The power of this Court under Order 46 rule 5 (2) is to order for the place where the suit shall be tried and for that purpose achieve the horizontal movement of intra-High Court cases from one Registry to another. In this way, this Court ensures that proceedings wherever began or whatever forum the Plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings. When making or refusing an order of transfer the Court will have regard to the motive and character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case.

In this particular case, the claim or remedy sought is Kshs.2,223,526.18 in respect of loss suffered by the consignees and claimed from the Plaintiff, as more particularised in paragraph 14 of the Plaintiff. Three of the Consignees including the largest loser are based in Nairobi, and the fourth consignee is an enterprise based in Jinja, Uganda. The convenience of the Plaintiff, and these expected witnesses dictates that their business and that of the Plaintiff are not disrupted by travelling to another place, Mombasa for them to give evidence on behalf of the Plaintiff at the trial of this suit.

For the witness travelling from Uganda his convenience dictates that he is not compelled to take another coach or aircraft to Mombasa. The Plaintiff who would be responsible for his travel and welfare would certainly wish to minimise his costs. The situation of the consignor, would be witness from United Arab Emirates, would not be different.

Over all therefore, the place of trial should be convenient to the Plaintiff unless there are overwhelming reasons compelling otherwise. In my opinion the fact that the contract was entered into and was performed in Mombasa, or that the 1st and 2nd Defendants are based in Mombasa though relevant are not paramount. These are Defendants in particular, together with the 3rd Defendant who have caused the Plaintiff loss and damage they cannot subject the Plaintiff to double inconvenience as well as loss even if that is to be proved. As for execution, in the event the Plaintiff were to be successful in its suit, there are clear procedures for execution of decrees.

The 3rd Defendant although supporting the 1st and 2nd Defendants in their quest to transfer the case for trial in Mombasa, has its principal legal offices, and indeed Headquarters are in Nairobi and will suffer no or little inconvenience by a trial in Nairobi.

In this case therefore, taking all those circumstances into account, convenience, expeditious disposal of suit, extra cost and hardship which may be visited upon the Plaintiff by transporting and hosting a large number of senior local and foreign witnesses (from outside the Court's jurisdiction) guides me to the conclusion that the most convenient place of trial shall be and remain in Nairobi.

The 2nd Defendant application dated 26th April 2004 and filed in Court of 3rd May 2004 fails and is dismissed with costs.

Dated and Delivered at Nairobi this 7th day of March 2005.

ANYARA EMUKULE

JUDGE