

REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
CIVIL SUIT 29 OF 2004
TRANSAFRICA CONVEYORS

LIMITEDOLE HIBY.....PLAINTIFF

VS

SOFITRA KENYA LIMITED.....DEFENDANT

RULING

Sofitra Kenya Limited, filed a motion pursuant to the provisions of Order XLVI rule 5 (i) and (2) of the Civil Procedure rules in which it sought for this suit to be transferred to Mombasa High court for hearing and disposal. The affidavit of one Hamif Somji sworn on 8th February, 2005 was filed to support the motion. The Plaintiffs filed grounds of opposition to object the motion.

The applicant averred that the cause of action arose in Mombasa where the defendant/applicant has its registered offices. It was also argued that all the witnesses to testify reside in Mombasa. It was further argued that it would be economical and convenient to the parties to have the suit heard in Mombasa. The respondents on their part were of the view that this case was properly filed within the jurisdiction of the Busia High Court because the agreement to convey the good was entered at Kampala in Uganda and that it will be convenient for witnesses from Kampala, Malaba and Busia to testify rather than go all the way to Mombasa. The application seeks to have this court exercise its discretion under Order XLVI rule 5(2) of the Civil Procedure Rules. The law invoked clearly states that this Court can only exercise such a discretion to appoint a particular place for trial after taking into account the convenience of the parties and their witnesses and to the date on which such trial is to take place, and all other circumstances of the case.

It is the submission of the defendant/applicant that the cause of action arose in Mombasa and that all the witnesses reside in Mombasa. The defendant therefore found it convenient and less expensive if the this dispute is heard and determined in Mombasa. The Plaintiffs state that the consignment of cocoa was loaded at kampala, Uganda for conveyance to be delivered at Mombasa. It is claimed that the consignment did not reach Riga as expected. At paragraph 8 of the Plaint, the Plaintiffs state that the cause of action arose in Mombasa. They however state that the main witnesses shall be summoned from Kampala in Uganda. The later fact is not denied by the defendant. The plaintiffs also claim costs they incurred in defending Kampala HCCC no.1206 of 1998. I have considered the rivaling submissions advanced by the parties. It is not in dispute that the cause of action arose in Mombasa. It is not also denied that the vital witnesses will have to be summoned from Kampala where the consignment was loaded. It is further not denied that witnesses will be summoned from Malaba and Busia entry points and the long room, Kisumu. The law sets out the conditions under which this court can exercise its discretion under Order XLVI rule 5 of the civil Procedure rules. After weighing the aforesaid submissions vis a vis the conditions set by the law, I am convinced that in the circumstances of this case that it will be convenient to the parties and their witnesses to have this suit heard and determined at Busia. Consequently, I will not disturb the matter.

The upshot, therefore is that the undated motion filed in Court on 17th February, 2005 is ordered dismissed. Costs of the motion shall abide the outcome of the suit.

DATED AND DELIVERED THIS 8th DAY OF April 2005.

J. K. SERGON

JUDGE