



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
Misc Civil Appli 1602 of 2004**

RED ANCHOR FREIGHT FORWARDERS LTD.APPLICANT

VERSUS

DAVID NTHIWA WAMBUA.....RESPONDENT

RULING

The applicant's Notice of Motion brought under s.18(1)(a) of the Civil Procedure Act (Cap.21) and Order L rule 1 of the Civil Procedure Rules, was dated 22nd November, 2004 and filed on 23rd November, 2004. It had one substantive prayer: that the suit filed by the respondent against the applicant as Mombasa RMCC No. 4199 of 2004 – *David Nthiwa Wambua v. Anchor Freight Forwarders Ltd* – in the Resident Magistrate's Court at the Mombasa District Registry, be transferred therefrom to the Resident Magistrate's Court at the Milimani Commercial Courts, Nairobi for hearing and determination.

The grounds in support of this application are, firstly, that the place of business and the registered offices of the applicant are situated in Nairobi, and that all the applicant's witnesses are also based in Nairobi. Secondly, it is stated that great inconvenience will be occasioned to the applicant if this matter is tried in Mombasa. Thirdly, it is stated that trial in Mombasa would be in violation of the provisions of s.15 of the Civil Procedure Act (Cap. 21).

Mr. Arthur Igeria, the advocate with the conduct of this matter on behalf of the applicant, swore an affidavit on 22nd November, 2004 in which he deposes that the respondent had, on 10th September, 2004 filed suit, RMCC No. 4199 of 2004 at the Resident Magistrate's Court in Mombasa, against the applicant. The deponent has been informed by the applicant's Managing Director, *Mr. P. Waita*, and he believes the information to be true, that the applicant's registered offices are situated in Nairobi and the applicant carries on its business at Nairobi. He further avers that the filing of the suit in Mombasa is of great inconvenience to the defendant, as all its witnesses reside in Nairobi. He says that the transfer of the suit to Nairobi will not prejudice the respondent in any manner whatsoever.

The respondent's replying affidavit was dated 14th December, 2004 and filed on 10th January, 2005. He avers that the cause of action had arisen at Port Reitz in Mombasa – a place within the local limits of the Mombasa District Registry. The deponent avers that the suit is founded on personal injury, and expresses the belief that the witnesses will be persons based at Mombasa. It is further averred that the plaintiff had himself accompanied the process server, one *John Kombe*, to the defendant's Mombasa office at Harbour House, 5th Floor, Moi Avenue in Mombasa, on 21st September, 2004 at 8.15 a.m.; and he did witness the summons and plaint being served upon a *Mr. Maina*, an employee of the defendant. Only in this way, it was deposed, was it possible for the defendant to know of the suit, and thereafter timeously to file and serve a memorandum of appearance and a statement of defence. The deponent further averred that the defendant, *in its statement of defence in RMCC No. 4199 of 2004 at paragraph 2, had admitted that it does carry on business in Mombasa; and that the defendant had also admitted the jurisdiction in this matter of the Mombasa Resident Magistrate's Court.*

On the occasion of hearing this miscellaneous application, on 17th June, 2005 the applicant was represented by Mr. Ngugi while the respondent was represented by Mr. Masika.

Mr. Ngugi submitted, consistently with his client's affidavit, that the applicant resides and conducts its business in Nairobi, and so it would cause the applicant great inconvenience if the suit in RMCC No. 4199 of 2004 (*David Nthiwa Wambua v. Red Anchor Freight Forwarders Ltd*) were heard in Mombasa. Learned counsel submitted that by s.14 of the Civil Procedure Act (Cap.21), a party may file suit either where the act in question took place, or where the defendant resides, and that since the taking place of the accident is itself denied, it follows that suit should have been filed where the defendant resided – which, it was claimed, is Nairobi.

Learned counsel, *Mr. Masika*, submitted that in cases of claims for compensation for wrongs linked to movables, suit is filed at a place determined by the plaintiff; and since in the instant case the cause of action arose in Mombasa, the suit could be filed in Mombasa as determined by the plaintiff.

Section 14 of the Civil Procedure Act (Cap. 21), thus provides:

“Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts.”

Learned counsel noted that the defendant had not denied in the statement of defence the pleading in the plaint, that the defendant's principal place of business was in Mombasa. In the circumstances, counsel submitted, it was proper in every respect to have the suit filed in Mombasa. Counsel urged that since *a party was bound by his pleadings*, it was not permissible that the defendant should belatedly come to deny that it had its main place of business in Mombasa.

Counsel further urged that the content of the affidavit by the advocate for the defendant, that the filing of suit in Mombasa would be inconvenient to the defendant, was improper as it was coming from an *advocate* and not the party competent to make the deposition: “that paragraph [of the affidavit] is in clear contravention of rule 3 of Order XVIII, which requires that affidavits be confined to facts within the knowledge of the deponent.” The alternative is that where a deponent makes averments on facts out of his knowledge, he is required to *disclose the source of his information*; and as counsel submitted, no such source of information had been disclosed on the side of the defendant. Counsel urged that paragraph 6 in *Arthur Igeria's* supporting affidavit (which reads: “THAT the filing of the suit in Mombasa is of great inconvenience to the defendant as all its witnesses reside in Nairobi”) be struck out. The effect of striking out paragraph 6 of the affidavit would be that there is no evidence to show that the applicant is inconvenienced by the filing of the suit in Mombasa.

From the statement in the pleadings, that the plaintiff was a turn-boy employed as a casual labourer by the defendant in Mombasa, and that he resided in Mombasa, learned counsel urged the Court to take *judicial notice* that casual labourers had very limited earnings, and so the plaintiff's right to prosecute his suit in Mombasa should not be taken away as proposed by the defendant. Such a submission is readily accepted by the Court.

Counsel cited in support of the plaintiff's position, the work by R. Kuloba entitled *Judicial Hints on Civil Procedure*, Vol. 1 (Nairobi: Professional Publications Ltd, 1984), para.134:

“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...”

Learned counsel also relied on the Ugandan case *Isadore M.K. Kagorogoza v. Bazilio Mbarinda* [1959] E.A. 127, in which Lyon, J had thus remarked:

“Mr. Starforth says he will call probably four witnesses, all of whom live in or near Kabale. The case concerns alleged facts which took place in or near Kabale. A view of the locus in quo may be necessary. And further, during the hearing it may be necessary for Mr. Starforth to send for additional witnesses to meet unexpected allegations that may be made by the plaintiff...The first consideration is the convenience of the parties and witnesses...”

in his rejoinder, learned counsel argued that the provisions of s.14 of the Civil Procedure Act (Cap. 21) relating to the place where a suit is to be filed, is qualified by s.15 which would dictate that the suit be filed where the defendant ordinarily resides. He contended that since the defendant was the party being “dragged to Court”, the balance of convenience should be construed to lie in its favour; and counsel was relying on the affidavit of the advocate, *Arthur Igeria*, in which it was deposed that the defendant carried on business in Nairobi.

It is clear from the plaint and from the defence that the whole truth has not been told as to the defendant’s place or places of business – and in particular about Mombasa as a place of business of the defendant. From the information on record it is not possible to state that the defendant does not own a very important business presence in *Mombasa*. It is also beyond doubt that the injury which is the reason for the suit, happened in Mombasa. It is equally clear that the defendant had not initially contested the filing of the suit in Mombasa.

It is bound to be the case, too, that those with personal knowledge of the circumstances in which the injury to the plaintiff occurred are in Mombasa and not in Nairobi.

I have not felt that a strong-enough legal argument is being articulated by the defendant, based on sections 14 and 15 of the Civil Procedure Act (Cap. 21) which makes a case for a preference of Nairobi to Mombasa as the proper place to file the suit.

In view of the averments in the affidavits from both sides, I have to conclude that more harm is done to a suitor if the suit is filed in Nairobi than if it is filed in Mombasa; and the one who is most vulnerable in all the circumstances is the plaintiff. It is the *plaintiff*, therefore, who is favoured by the balance of convenience. So, applying a well accepted principle which is also restated in a case such as *Isadore M.K. Kagorogoza v. Bazilio Mbarinda* [1959] E.A. 127, I now order that the suit shall be prosecuted before the Mombasa Court.

Specifically I will make the following orders:

1. The defendants’ prayer by the Notice of Motion of 22nd November, 2004 that the suit, Mombasa RMCC No. 4199 of 2004, be transferred to the Resident Magistrate’s Court at the Milimani Commercial Courts in Nairobi, is refused.
2. The defendant shall bear the plaintiff’s costs of this application, in any event.

Orders accordingly.

DATED and DELIVERED at Nairobi this 22nd day of July, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiff/Respondent: Mr. Masika, instructed by M/s. Mulongo & Co. Advocates

For the Defendant/Applicant: Mr. Ngugi, instructed by M/s. Igeria & Advocates.