

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Misc Civil Appli 520 of 2004

THE AUTOMOBILE WAREHOUSE (NKU) LTD.....APPLICANT

VERSUS

OSUMO ABIMA NYAUNDIRESPONDENT

RULING

The applicant has filed a notice of motion under **Section 18 and 3A of the Civil Procedure Act**, and **Order L Rule 1 of the Civil Procedure Rules** seeking the orders of this court to have **Kisii CMCC No. 187 of 2002** between **Osumo Abima Nyaundi -Vs- The Automobile Warehouse (NKU) Limited** be transferred to the Chief Magistrate's Court Nakuru for hearing and final determination. The application is supported by the annexed affidavit of Prakash S. Shah, a director of the applicant and supported by the grounds stated on the face of the application. The said grounds are that the applicant contends that the cause of action of the suit arose out of a hire purchase agreement entered into at Nakuru. The applicant states that it has its registered offices at Nakuru. The applicant further states that the respondent had filed the suit at Kisii in violation of **Sections 14 and 15 of the Civil Procedure Act**. It was the applicant's contention that the Kisii Chief Magistrate's Court lacked jurisdiction to hear and determine the said suit. The applicant complained that it had incurred and continued to incur heavy and unnecessary expenses in travelling from Nakuru to Kisii to attend the said suit. The applicant was of the view that the respondent would not suffer any prejudice if the suit is transferred to the Chief Magistrate's Court, Nakuru for hearing and final determination. The application is opposed. The respondent has filed grounds in opposition to the application. The respondent contends that the application is misconceived, frivolous, vexatious and lacking in merit. The respondent stated that the Kisii Chief Magistrate's Court had jurisdiction to hear and determine the said suit sought to be transferred.

At the hearing of the application, Mr Wamaasa learned Counsel for the applicant made submissions reiterating the grounds stated in the application. He submitted that the applicant's offices were in Nakuru. The transaction involving the suit motor vehicle was entered into in Nakuru. In accordance with **Section 15 of the Civil Procedure Act**, the said suit ought to have been filed at Nakuru. The applicant urged the court to order the suit transferred to Nakuru for hearing and determination.

Mr Ayuka, learned Counsel for the respondent submitted that the cause of action arose at Kisii. He argued that even though the contract for the sale of the suit motor vehicle was entered at Nakuru, the respondent had paid off the amount owed and therefore discharged the obligation imposed upon him by the contract. Learned Counsel submitted that the cause of action arose when the applicant had attempted to attach the respondent's motor vehicle at Nakuru. The respondent argued that the applicant had not defended the suit filed at Kisii. Interlocutory judgment had been entered. The respondent urged this suit to disallow the application.

I have carefully considered the said arguments made in this application. The issue for determination by this court is whether the applicant has established that the suit now pending before the Chief Magistrate's Court Kisii should be transferred to the Nakuru Chief Magistrate's Court. The applicant and the respondent both agree on the application of **Section 15 of the Civil Procedure Act** which requires that a suit should be filed where either the defendant resides or works or carries on business. In this application, it has not been disputed that the applicant has its registered offices in Nakuru and carries its business in Nakuru. It is further not disputed that agreement for the sale of the motor vehicle which is the subject matter of the suit was entered into between the applicant and the respondent at Nakuru. The point of divergence is the applicant's contention that the said suit related to the non-payment of the amount which the respondent had agreed to pay by instalments whereas the respondent contend that he had paid

in full the said amount. According to the respondent, the real issue in dispute is the applicants' attempt to attach his motor vehicle in spite of the fact that he had paid off the amount advanced to him by the said applicant.

Having carefully evaluated the submissions made by the applicant and the respondent it is evident that the issue of the agreement and whether or not the respondent had paid the amount agreed in hire-purchase agreement cannot be separated from the applicant's attempted attachment of the suit motor vehicle. In my opinion, a court which shall determine the issues in dispute will by necessity have to consider the interpretation of the agreement entered into between the applicant and the respondent. The said agreement was entered into at the applicant's offices at Nakuru. The cause of action in respect of the suit which was filed at Kisii therefore arose at Nakuru.

According to **Sections 14 and 15 of the Civil Procedure Rules**, the respondent ought to have filed the said suit at Nakuru where the cause of action arose and where the applicant's offices are situated. The applicant conducts its business at Nakuru. For the reasons stated, I find that the applicant has established a case to have the said suit transferred from Kisii to Nakuru. It does not matter that interlocutory judgment has been entered in the suit. That is not one of the issues to be considered by this court when determining whether or not to have a suit filed in the subordinate court transferred from one court to another.

In the premises therefore, I do hereby invoke this court's power as provided by **Section 18 of the Civil Procedure Act** and order the civil suit registered as **Kisii CMCC No. 187 of 2002** between **Osumo Abima Nyaundi** and **The Automobile Warehouse (NKU) Limited** to be transferred to the Nakuru Chief Magistrate's Court for hearing and determination. The respondent shall pay the costs of the application to the applicant.

DATED at NAKURU this 5th day of August 2005.

L. KIMARU

JUDGE