

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MISC APPLICATION 546 OF 2004

CMC MOTORS GROUP.....APPLICANT

VERSUS

REUBEN WANYONYI SIMIYU.....RESPONDENT

RULING

The applicant herein has made an application under the provisions of **Sections 3A and 18 of the Civil Procedure Act** seeking to have **Kitale SPMCCC No. 565 of 2005** (*Reuben Wanyonyi Simiyu –vs- CMC Motors Group Ltd*) transferred from Kitale Senior Principal Magistrate’s Court to the Chief Magistrate’s Court Nakuru for adjudication and determination. The grounds in support of the application are basically that the contract of sale of the motor vehicle, which is the subject matter of the suit, was entered into at Nakuru which is within the local jurisdiction of the Chief Magistrate’s Court Nakuru. The applicant therefore argues that in accordance with **Section 15 of the Civil Procedure Act**, the respondent ought to have filed the suit in Nakuru and not Kitale. The application is supported by the annexed affidavit of Richard Mugo Kuria, the Sales Manager of the applicant’s Nakuru branch. The application is opposed. The respondent, Reuben Wanyonyi Simiyu has filed a replying affidavit in opposition to the application. In summary, he depones that the applicant has its Branch offices at Kitale and therefore would not be prejudiced if the suit is heard and determined by the Senior Principal Magistrate’s Court at Kitale. The respondent has also invoked the provision of **Section 15 of the Civil Procedure Act, in particular Explanation 3(3)** to support his contention that the suit was properly filed before the Senior Principal Magistrate’s Court at Kitale. He has also deponed that part of the purchase consideration for the suit motor vehicle was paid at the Kitale Branch of the applicant.

At the hearing of the application, Mr Kisila Learned Counsel for the applicant and Mr Wanyonyi Learned Counsel for the respondent, apart from referring to decided cases, basically reiterated the contents of the application and the replying affidavit. I have carefully read the said pleadings and also considered the arguments made by the opposing parties to this application. The issue for determination by this court is whether or not the respondent filed the suit in question before right court. Both the applicant and the respondent have invoked **Section 15 of the Civil Procedure Act** in support of their respective submission. **Section 15** of the said Act generally states that suits ought to be filed where a defendant either resides or conducts business. In the case of a corporation, (as the applicant), **Section 15, Explanation 2** provides that,

“A corporation shall be deemed to carry on business at its sole or principal office in Kenya or in respect of any cause of action arising at any place where it has also a subordinate office, at such place”.

Explanation 3 states that

“In a suit arising out of contract, the cause of action arises within the meaning of this Section at any of the following places, namely- (i) The place where the contract was made; (ii) The place where the contract was performed or the performance thereof completed. (iii) The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable”.

In the present application it is generally accepted by both parties that the agreement in respect of

the suit motor vehicle was entered into at the Nakuru branch of the applicant. It is further not denied that part of the consideration for the purchase price was paid through the Kitale branch of the applicant. The applicant further does not deny that it has a branch office at Kitale. In the circumstances of this case, the applicant therefore fell within the meaning of a corporation as stated in Section 15 of the Civil Procedure Act, Explanation 2. The applicant has its branch offices at Nakuru and Kitale. Although the agreement was entered at Nakuru, payment of part of the purchase consideration was made at Kitale. The respondent therefore could file suit against the applicant either at Kitale Senior Principal Magistrate's Court or at the Nakuru Chief Magistrate's Court. The fact that the respondent filed the suit before the Senior Principal Magistrate's Court cannot therefore be used against him by the applicant to have the suit transferred to a venue of its choice and convenience. As was stated by Waki J (as he was then) in Nairobi HC Misc Appl. No. 10 of 2002 Akamba Public Road Services Ltd –vs- Emily Caroline Barassa (unreported) at page 2

“The discretion to transfer must however be exercised judicially and on sound basis. That is because the plaintiff in any suit has the right to choose any forum the law allows him to pursue his case. The right should not be interfered with unless a strong case is made out that in so proceeding an injustice will ensue. Regard shall be had to the nature and character of the proceedings, the nature of the reliefs sought, the interest of the litigants, matters of expense and other difficulties of the trial, but not a mere balance of convenience although it is relevant”.

This is a persuasive authority. I however wholeheartedly agree with its reasoning.

For these reasons, the application filed by the applicant must fail. The same lacks basis in law. **Kitale SPMCCC No. 565 of 2005** (Reuben Wanyonyi Simiyu –vs- CMC Motors Group Ltd) shall be heard and determined where it was properly filed by the respondent.

The application herein is therefore dismissed with costs.

DATED at NAKURU this 3rd day of October 2005.

L. KIMARU

JUDGE