



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI**

Misc Application 1219 of 2005

FELISTA WANJIRU NYINGI.....APPLICANT

VERSUS

SAMUEL CHEGE GACHIE T/a BRACE

ELECTRICALS & HARDWARE SUPPLIES.....RESPONDENT

RULING

The applicant's application by Chamber Summons dated 11th August, 2005 was filed on 12th August, 2005. It had one substantive prayer,

“THAT Murang'a No. 1 SRMCC of 1998 — *Samuel Chege Gachie v. Felista Wanjiru Nyingi* — be transferred to the Chief Magistrate's Court at Milimani for hearing and final determination.”

The grounds stated were as follows —

- (i) the dispute is on a commercial matter within the definition set out in the Chief Justice's circular letter of 18th November, 1997;
- (ii) the applicant has re-located her residential as well as business premises from Murang'a to Nairobi;
- (iii) the applicant carries on her business at Nairobi;
- (iv) the applicant has incurred infinite expenses in defending the suit since it was filed seven years ago;
- (v) the contested matter is a liquidated amount, and hence the transfer of the suit will not prejudice its prosecution;
- (vi) the plaintiff will not suffer any prejudice if the applicant's prayers are granted;
- (vii) the orders sought will serve the best interests of justice for both parties.

The application is supported by the affidavit of the applicant dated 11th August, 2005. She avers that she is the defendant in Murang'a SRMCC No. 1 of 1998, a suit which had arisen out of alleged breach of contract for services rendered to her at Murang'a. She says she is ordinarily based at Nairobi, where she

resides and carries on business. She avers that she has incurred a lot of expenses in travelling and other disbursements, since the filing of the suit seven years ago. It is deponed that the main suit has entailed many applications and one of these led to High Court Civil Appeal No. 49 of 1998 — and as a result the applicant has incurred substantial expenses. She apprehends that more costs will be involved if the suit continues at the Murang'a Courts.

On the occasion of hearing this application, on 14th October, 2005 learned counsel, Mr. Ochieng and Mr. Kimani appeared respectively for the applicant and the respondent. Mr. Ochieng contended that the case at the Murang'a Courts had taken a long time to come to a conclusion, and that it was better the matter be transferred to Milimani where the pace of trial was faster. He submitted that the claim was liquidated, and for this reason, trial in Nairobi would not prejudice the respondent.

Mr. Ochieng invoked s.18(1)(b) of the Civil Procedure Act (Cap.21) which empowered the High Court transfer matters between subordinate Courts vested with jurisdiction. He contended that the contentions in the grounds opposition, and the averments in the replying affidavit were not relevant to the prayers set out in the application.

Learned counsel, Mr. Kimani submitted that it was erroneous to claim, as the applicant had done, that the suit had taken an interminable period of time at the Murang'a Courts; because when, in February, 1998 a ruling there turned against the applicant, the applicant had appealed in High Court Civil Appeal No. 49 of 1998 —and the judgement on that appeal was rendered only on 12th April, 2005. During the pendency of the applicant's appeal, the suit in Murang'a could not proceed: and this is the cause of delay, rather than any inconvenience arising from geographical distance.

Learned counsel cited the general rule on the jurisdiction of Courts, which is set out in s.15 of the Civil Procedure Act (Cap.21):

“...every suit shall be instituted in a Court within the local limits of whose jurisdiction —

(a) the defendant, or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain...”

Mr. Kimani submitted that the suit had been filed at a time when both the plaintiff and the defendant were residing at Murang'a, and the dispute itself had arising in Murang'a town. The matter had been in every respect within the jurisdiction of the Principal Magistrate at Murang'a. As the respondent continued to live and work in Murang'a, a transfer of the case to Nairobi as prayed by the applicant, would not be without prejudice to the respondent. Counsel urged that a transfer to Mlimani would be for the benefit of the applicant but not of the respondent. Moreover, counsel urged, the fact deponed to by the applicant, that she has now relocated, in residence and in business, to Nairobi would not be a justification for transferring the suit from the Murang'a Courts to the Milimani Commercial Courts. The applicant has, besides, presented a concern to reduce expenses as a reason for the transfer sought; on this point, counsel urged: “If the case is transferred, the expenses are shifted from the applicant to the respondent.”

Learned counsel also doubted that the Chief Justice's circular of 1997 could apply to such a case which is being heard before a Magistrate's Court; and he contested the failure by the applicant to annex the said circular letter to the supporting affidavit.

Mr. Kimani submitted that Visram, J in High Court Civil Appeal No. 49 of 1998, had on 12th April 2005 granted the applicant herein leave to defend against the suit — in the Subordinate Court at Murang'a; and so there would be no basis in law for transferring the suit to a different Subordinate Court.

Learned counsel noted that the application had been brought under s.3A of the Civil Procedure Act (Cap. 21) — for a decision to be taken in the interests of justice. He urged that a transfer of the suit as prayed, would not serve the ends of justice and indeed, would be tantamount to allowing abuse of the process of the Court.

Mr. Kimani submitted that no evidence had been adduced to show that at the Mlimani Courts, business proceeded any faster than at the Murang'a Courts. He urged that a transfer to Milimani would not serve the interests of both parties, and submitted that the application was frivolous and vexatious and should be dismissed with costs.

In my assessment, the suit herein was quite properly filed at the Murang'a Magistrates' Courts, within the terms of s.15 of the Civil Procedure Act (Cap. 21). So in law, the suit properly falls to the Courts in Murang'a. Besides, the filing of the suit in Murang'a was for the convenience of both parties, who lived and worked in Murang'a. Now one of the parties (the defendant) continues to live and work in Murang'a, whereas the one who had filed suit has relocated to Nairobi. To suit her, she wants to migrate with the case to Nairobi, so that she can prosecute it with convenience to herself, and, of course, without accommodating the convenience of the defendant who maintained the status quo in his place of abode. Since that status quo had in the first place served as a factor of convenience to both parties, I will hold that, as a matter of equity, the one who changes the residential status quo is the one to bear any additional expenses resulting; and therefore the suit ought to stay where the defendant is based.

From the evidence placed before me, I have not formed the impression that the Murang'a Courts are any slower than the Milimani Courts, in the discharge of their work. Indeed, it appears that the prolonged pendency of the suit in Murang'a was thanks to the applicant's appellate motions in the High Court in Nairobi, rather than owing to any default on the part of the defendant.

I will, therefore, dismiss the applicant's Chamber Summons of 11th August, 2005 with costs to the respondent.

Orders accordingly.

DATED and DELIVERED at Nairobi this 25th day of November, 2005

J.B. OJWANG

JUDGE

Coram: J.B. Ojwang, J.,

Court Clerk: Mwangi

For the Applicant: Mr. Ochieng, instructed by M/s. Miller & Co. Advocates

For the Respondent: Mr. Kimani, instructed by M/s. R.M. Kimani & Co.

Advocates