

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
MISC APPL. NO. 58 OF 2004**

TESSO SERVICE STATION LTD..... APPLICANT

VS

DAL BIT PETROLEUM LTD RESPONDENT

R U L I N G

The defendant took out a motion pursuant to the provisions of Section 15 and 18 of the Civil Procedure Act in which the defendant company beseeched this court to exercise its discretion to transfer R.M.C.C.C. No. 13362 of 2003 at Milimani Commercial Court Nairobi to Bungoma S.P.M'S Court for hearing and disposal. The motion is supported by the affidavit of Martin Onyango sworn on 15th March 2004.

The applicant was served upon the Respondent but it did not file any replying affidavit or grounds of opposition as required under order L rule 16 of the Civil Procedure rules. When this motion came up for interpartes hearing the Respondent did not turn up despite having been served with a hearing notice as evidenced in the affidavit of service of Felix Loka Willy sworn on 11th May 2004. Consequently the applicant was granted leave to proceed for hearing ex parte pursuant to the provisions of order L rule 16 (3) of the Civil Procedure rules.

It is the submission of the defendant/applicant that the plaintiff should have filed the suit at Bungoma S.P.M'S court because the defendant resides within the jurisdiction of that court. Secondly that the cause of action arose at Malaba in Teso District within the Jurisdiction of that court. Thirdly that the agreement and delivery of the goods were made at Malaba. All these facts were contained in the affidavit in support of the motion sworn by Martin Onyango. These facts were not controverted nor contested by the Respondent who did not file a replying affidavit as required. I have no reason to doubt the facts as presented in the aforesaid affidavit. I will admit them as the truth in the absence of a contrary assertion.

Under Section 15 of the Civil Procedure Act, the law requires that an action can only be filed where the defendant resides or carries on business or where the cause of action wholly or partly arose. In this motion the applicant has deponed the following matters:

(i) That the defendant and its witnesses reside in Malaba and

(ii) That the agreement giving rise to this action was entered into at Malaba.'

I have considered the submissions made by the defendant's advocate. I have also considered the material placed before me. I have come to the conclusion that this is a proper case in which I should exercise my discretion in favour of the applicant consequently the motion is allowed as prayed.

DATED AND DELIVERED THIS 2nd DAY OF July 2004

J.K. SERGON

JUDGE