



REPUBLIC OF KENYA
HIGH COURT AT KISUMU
MISC CIV APPLI 121 OF 2004

ANDREW ACHOKI ONCHIRI APPLICANT

VERSUS

VERSUSKENINDIA ASSURANCE CO. LTD..... RESPONDENT

RULING

The application herein is seeking an order:

b) Nairobi Senior Resident Magistrate's Court Civil Suit No. 3158/2004 be transferred to Kisumu Chief Magistrate's Court for hearing and determination.

It was the submission of Mr. Onsongo Advocate that the cause of action relates to a contract of Insurance entered into by the parties within Kisumu. He further stated the defendant resides in Kisumu and there is no evidence that the respondents would suffer any prejudice if the orders *are* granted. He *referred* me to clause 13 of the *said* contract which states: "*Any dispute arising out of or under or in connection with this policy if triable by a Court of Law shall be tried and determined by the Court having jurisdiction over the place where this policy has been issued and according to the laws (including procedural and limitation laws).*"

The respondents filed grounds of objection wherein they stated that the application lacks merit and is *an* abuse of the Court process. Further Mr. Nganga attacked the affidavit in support of the application, in that it was not signed by a Commissioner.

My task was straight forward and the issue is whether to allow the *transfer* of the suit from Nairobi to Kisumu for hearing and determination. Ordinarily suits must be filed where the cause of action arose *unless they are* compelling reasons to do so. It is alleged that the Contract which is the subject of the dispute was concluded in Kisumu and above all there is a clause which restricted the parties freedom of filing suit outside the jurisdiction of Kisumu, where the cause of action arose and where the defendant/applicant resides.

Section 18 (1) (b) of Civil Procedure Act States:

"(1) *On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard or if its own motion without such notice, the High Court may at any stage.*"

(b) Withdraw any suit or other proceeding pending in any Court subordinate to it and thereafter: (i) Try or dispose of the same or

(ii) *Transfer* the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same."

The above Section gives the High Court unfettered powers to *transfer* any suit from one Subordinate Court to another Subordinate Court which has jurisdiction to hear and determine the matters in dispute, however the issues to be considered *are* that:

- 1) The cause of action must have arisen at the place where the suit is being transferred to,
- 2) That the defendant ordinarily resides or carries business at the place where the suit *is being* transferred.
- 3) That no prejudice would be suffered by the parties as a result of the intended transfer.
- 4) There must be evidence/material that the cause of action actually arose at the place where the suit is being transferred to.

The issue between the parties herein is *an* alleged contract which was concluded within Kisumu, however it is not enough to just make certain allegation that the contract took place in Kisumu but there must be ample evidence that actually and without any doubt the contract exists and the same was concluded within Kisumu. It is the contention of the applicant that the contract giving rise to the suit filed at Nairobi was entered, executed and Signed at Kisumu, therefore the suit ought to have been filed *in* Kisumu which *is the* Court of first jurisdiction, unless they *are* compelling *reasons* to militate against such filing. According to the applicant clause 13 of policy No. 113/070/11/03055/2002/12, in the event a dispute arose the Court having jurisdiction *is* the Court situated at the place where the policy was issued and executed and hence the contract was issued and executed in Kisumu. What was attached *as* evidence of the contract is a standard form in the name of Private *Car Insurance* Policy, which shows the policy number stated above. It does not have the names of the plaintiff *and* defendant. Further there is *no* material to show that it *refers* to the matter *in* dispute between the parties in Nairobi. Apart from the names of the parties missing, there is no where to show that it was actually signed and executed by the parties herein.

According to the plaint, the plaintiff 's seeking specific performance of a contract involving motor vehicle registration number KAN 431 R. The plaintiff was the insurer of the said motor vehicle and the said motor vehicle was stolen sometimes in September 2002. It is alleged that the applicant was the owner of the *said and as a result of* that theft he was compensated, however he refused to *surrender* documents to enable the plaintiff to assume ownership of the said motor vehicle In paragraph 3 of the plaint it is alleged:

"At all material times relevant to this suit the plaintiff was the insurer of motor vehicle registration No. KAN 431 R and the defendant the insured thereof."

While in paragraph 4 of the plaint:

"On or about 26th September 2002 the defendant reported theft of motor vehicle registration number KAN 431 R to the plaintiff for purposes of compensation thereof."

It is alleged in the plaint that the defendant/applicant was compensated sometimes in December 2002 but the vehicle was subsequently recovered. And the plaintiff sold the motor vehicle to a 3rd party, therefore needs the defendant to *transfer or* avail the remaining documents to affect the actual transfer of ownership, which the defendant disputes.

According to paragraph 2 of the defence the applicants states as hereunder:

2. "The *defendant denies* paragraphs 3 and 4 of the plaint and states that he has never had any business intercourse with the plaintiff as regards a motor vehicle registration Number KAN 431 R as alleged or at all and the plaintiff shall apply to strike out this suit and pray for costs."

Further in paragraph 3 of the *defence*, the applicant states:

"The defendant states that he *is* a total *stranger* to any claim, statement or allegation relating to motor vehicle registration Number KAN 431 R and accordingly all the plaintiff's claim set out in paragraphs 5, 6, 7, 8, 9 and 10 are denied and the plaintiff put to strict proof thereof."

The above denial reflects the applicant's reply to the plaintiff's allegation contained in the plaint. However in paragraph 5 of the defence, the applicant introduces the provisions of the private car insurance policy, which he now seeks to use to transfer the suit from Nairobi to Kisumu Chief Magistrate's Court. Faced with the above peculiar circumstances do I have the jurisdiction to transfer the suit as was urged by the applicant? The matter is *still pending before* the lower Court and to discuss the issue would prejudice the matter between the parties herein. The party wishing to *transfer* the suit must establish evidence that infact the contract exists *and Indeed it was entered into in* Kisumu. The Court cannot entertain allegations not backed by *evidence*, that the *contract was entered in* Kisumu. The applicant has denied the existence of any relationship with the respondent, while he seeks to benefit from a contract which does not have the names of the parties. And above all there is *no evidence* that it was signed by the parties. A party cannot have two ways, that is you cannot deny the existence of a relationship while at the same time wanting to benefit from an alleged contract.

Now having given this matter my utmost consideration, it is my judgment that there is *no* material to enable me to exercise my powers in favour of the applicant. There is no evidence before me to show that the cause of action arose in Kisumu and further there is no evidence that the alleged contract *was* concluded and executed in Kisumu to warrant me to transfer the suit, *therefore* it is my judgment that the application has no merit and the same is dismissed with costs to the respondent.

Dated and Delivered and Signed at Kisumu. This 14th day of June 2004.

MOHAMMED WARSAME AG. JUDGE

Ruling Delivered in the Presence of:

Mr. Onsongo for the applicant. No Appearance for the respondent.