



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO.6 OF 2004**

KENYA TEA DEVELOPMENT

AGENCY LIMITED.....PLAINTIFF

VERSUS

JOSEPH MBOYA OGUTU

T/A M/S OGUTU-MBOYA & CO. ADVOCATES...1ST DEFENDANT

DAVID OBARE OMWOYO

T/A OMWOYO AUCTIONEERS.....2ND DEFENDANT

RULING

This is an application by Notice of Motion dated 12th February, 2004 by the 1st Defendant for an order directing that this suit be tried at the High Court, Kisii or at any other place but at Nairobi. The application is made essentially under Order 46, rules 5 and 6 of the Civil Procedure Rules (the Rules) and Section 3A of the Civil Procedure Act, Cap.21 (the Act). Sub-rule (1) of rule 5 aforesaid gives the High Court power to direct the place where a suit instituted in the Central Office or in a District Registry of the High Court is to be tried. Sub-rule (2) of the same rule provides that the court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court. In appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case. See the proviso to the subrule. Section 3A of the Act of course saves the courts inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of its process.

The application is made upon the grounds that the cause of action wholly arose within the local limits of the High Court Registry at Kisii, that the 1st Defendant and all his witnesses are resident within the geographical jurisdiction of the Kisii High Court Registry; that the record of Kisii CMCC No.238 of 1998 from which the suit arose is housed at the Law Courts Registry, Kisii; that the Plaintiff has a branch at Kisii; that the convenience of the parties and their witnesses dictates that trial of the action be held at Kisii; that trial at Kisii may be sooner than at this division; and that the Plaintiff will not suffer any prejudice if the order sought is granted.

The Plaintiff opposes the application for the main reasons that there is no legal provision for the transfer of one High Court case to another High Court except with the consent of the parties; that the Plaintiff filed the suit in Nairobi because of justifiable fears and apprehensions that are within the Defendants' knowledge; that no party will suffer prejudice by a trial held at Nairobi; and that otherwise

there is no just cause to transfer the matter.

I have read the affidavit sworn in support of the application and that sworn in reply. I have also given due consideration to the submissions of the learned counsels appearing. I have also read each decision cited in support of their respective positions. Recently I had occasion to consider the issues raised in this present application. It was in **HCCC NO .676 OF 2003 (Milimani) (Unreported) , PETER NJOROGE KINYANJUI -VS- COMBROK LIMITED**. A similar application had been made there. I observed in that case that there is only one High Court in Kenya which sits at such various places as the Chief Justice may appoint. Section 60 of the Constitution is the authority for all that. I also observed that the High Court has a Central Office in Nairobi and the various District Registries set out in the schedule to subrule (1) of rule 2 of Order 46. Those District Registries are currently at Mombasa, Nakuru, Eldoret, Machakos, Meru, Nyeri, Kisii, Kisumu and Kakamega. There may have been addition of Bungoma and others. The High Court sits at all these registries. It is the same one High Court presided over by the various puisne judges, or acting judges duly appointed. These are not different and separate High Courts. We do not have two or more High Courts in this country. We have only one.

And that is important to bear in mind because when the High Court exercises its power to direct the place of trial, and if that place of trial were to be at a different registry of the High Court, the court will not thereby be transferring the suit from itself to another High Court, because there is only one High Court. It will simply be transferring the suit from one of its own registries to another. It is for this reason that I respectfully disagree with the argument of Hon. Onyango-Otieno, J (as he then was) in the case of **GUARDIAN BANK LIMITED -VS- NORLAKE INVESTMENTS LIMITED (Unreported)**, High Court Misc. Civil Application No.40 of 2000 (Milimani), where he held, in effect, that the power donated by subrule (1) of rule 5 of Order 46 does not extend to power to transfer a suit from one High Court Registry to another if different judges are in charge of those registries. I think, with respect, that it must be taken that a judge exercising the power donated by the above subrule will so exercise it in good faith and in the interests of justice, and not in seeking to supervise another judge of concurrent jurisdiction. However, I would add that an application under the subrule must be made in the suit for whose place of trial directions are sought. It would be improper for such application to be made at any other registry, as had happened before Onyango-Otieno, J. It appears to me, that the learned judge had that objection uppermost in his mind when he rejected the application before him, and properly so if I may respectfully add.

The long and short of all the above is that I hold that I have jurisdiction to direct under rule 5 of Order 46 that the present suit be tried at a place other than where it now is. I have considered all the matters placed before me in light of the guidance given by the proviso to subrule (2) of rule 5 aforesaid. I have also looked at the primary pleadings. To begin with the pleadings do not disclose a commercial dispute. I am at a loss to understand why the suit was filed in this division. The suit arises out of alleged illegal attachment and sale of the Plaintiff's goods in execution of decree in Kisii CMCC No.238 of 1998. That is not a commercial dispute. The Defendants reside and work for gain at Kisii. It has not been denied that the Plaintiff has a branch at Kisii. It appears to me that the balance of convenience dictates that trial of this suit be held at Kisii. The Plaintiff has stated in its grounds of opposition dated 8th April, 2004 that its filing of the suit at Nairobi "*was predicated upon justifiable fears, facts and apprehensions which are within the Defendant's knowledge*". These have not been stated for the benefit of the court.

I will in the circumstances grant the application. I direct that this suit be tried at the High Court, Kisii. For that purpose the court's record must necessarily be transferred there. It is so ordered. Costs of the application shall be in the cause.

DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF OCTOBER 2004

H. P. G. WAWERU

JUDGE

