

REPUBLIC OF KENYA

IN THE HIGH COURT

AT MACHAKOS

MISC. APP. CIVIL CASE NO. 71 OF 2004

GEORGE MUSEMBI WAMBUA ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

BLUE SHIELD INSURANCE CO. LTD ::::::::::::::::::::::::::::::::::::::: DEFENDANT

RULING

The Notice of Motion dated 4/5/04 is brought pursuant to Section 18 (b) (ii) of the Civil Procedure Rules and Section 3A Civil Procedure Act. It seeks orders that the court do withdraw Senior Resident Magistrate's Court Case 665/99 (Kangundo) and transfer the same to Machakos Chief Magistrate's Court for hearing and final determination. The grounds upon which the application is founded are in the body of the application. It is the applicant's contention that the cause of action arose along Machakos – Nairobi road on 12/12/96 and the initial suit, PMCC 848/97 was filed at Machakos Principal Magistrate's Court. Judgement in that case was in favour of the plaintiff/applicant.

Consequently, SRMCC which is a declaratory suit was filed in Kangundo court in i.e. SRMCC 665/99. The counsel for the applicant claims to have filed the suit in Kangundo by mistake. His prayer is that the suit in Kangundo be transferred to Machakos Chief Magistrate's Court for hearing and disposal. The applicant filed an affidavit in support of the application which reiterates the grounds.

The court was satisfied that the Respondents were duly served with the application and Hearing Notice but never filed any papers in response nor did they appear at the hearing. The application proceeded ex parte. Nevertheless, the court has to go ahead and consider the merits of the application.

The proceedings in both SPMCC 846/97 – Machakos court and RMCC 665/99 Kangundo court do confirm that the accident giving rise to this cause of action arose on the Machakos Konza Road. It is within the jurisdiction of the Machakos Chief Magistrate's Court.

In an application seeking the transfer of a suit from one court to another, the court will normally consider the issue of jurisdiction. Section 15 Civil Procedure Act provides that suits of this nature shall be instituted in a court within the local limits of whose jurisdiction the defendants reside, carries on business or works or provided that with the leave of the court, such suit can be filed where the defendant does not reside or work if he acquiesces to such institution. Lastly, such suit may be instituted where the cause of action arose whether wholly or in part.

It is not in doubt where the cause of action arose. The defence in the SRM 665/99 case admits that jurisdiction of the court but it is clear from the plaint that the defendant's address is Nairobi. The defendant being a company must have their offices in Nairobi as per the address contained in the pleadings. That being the case, that the defendant does not carry on business in Kangundo but in Nairobi the suit could only have been filed in Machakos court where the

cause of action arose or in Nairobi where the defendant carries on his business or has its registered office. The Kangundo court has no jurisdiction to entertain the declaratory suit.

Under Section 18 (1) of the Civil Procedure Act, the High Court is given a wide discretion to transfer or withdraw suits from one court to another. However, this section has to be read with Section 15 Civil

Procedure Act. So that if the court in which the suit had been filed had no jurisdiction to entertain the suit, then there is no suit before that court capable of being transferred. In the circumstances the Kangundo Court having had no jurisdiction to entertain the declaratory suit RMCC 665/99 and whether it was filed there by mistake or not, which this court doubts, there is no suit to transfer to Machakos Chief Magistrate's Court. Accordingly the application to have the declaratory suit withdrawn and transferred to Machakos Chief Magistrate's Court lacks merit. It is hereby dismissed.

Dated at Machakos this 24th day of November 2004

Read and delivered in the presence of

R.V. WENDOH

JUDGE