

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 313 OF 2001

VISCO ENTERPRISES LTD.....APPLICANT

=V E R S U S=

UNIBILT (K) LTD.....DEFENDANT

R U L I N G

The application before the court is dated the 13.12.2001. The main prayer is for this court to order for the transfer from Nairobi Chief Magistrate's court to Mombasa Chief Magistrate's court, the Nairobi Chief Magistrate's court Civil Suit No.728 of 2001 for trial and final disposal. It is based on the affidavit of the applicant's director Harsukh Pattack sworn on 13.12.2001. In the affidavit it is deponed that the applicant is a limited liability company based at Mombasa and that its' registered office is at Mombasa. That the contract of the sale of the goods in respect of which the suit arose, was entered into at Mombasa and that the delivery of the goods was made at Mombasa. That before the defendant filed the suit; it was warned by the plaintiff that the case should be filed at Mombasa and not at Nairobi. He added that all the directors reside in Mombasa. According to the Defendant/Applicant, therefore, the case should have been filed nowhere but Mombasa. The applicant also argued that the affidavit filed by the Respondent was so filed by a Director/Receiver who came into the picture much too late to know the truth of things.

In reply the Respondent argued that there was no real evidence that the Defendant carried on business or was registered in Mombasa or that the directors resided at Mombasa. It claimed that the Applicant produced no documents to prove its allegations upon which this application is based. Otherwise the Respondent denied all those facts and sought for the dismissal of the application.

I have carefully considered the affidavits and the arguments presented by both parties. The application is brought under Section 15 of the Civil Procedure Act, which states as follows:-

“Subject to the limitation aforesaid, 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 voluntarily resides or carries on business or personally works for gain; or

(b) any of the Defendants (where there are more than one) at the time of commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain, provided either the leave of court is given or the business, or personally works for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part arises.”

According to this section, in the main, a suit should be filed where the defendants actually resides or carries on business or personally works for gain or the cause of action wholly or partly arose or at any court with the leave of court or with the consent or acquiescence of the defendant in such institution.

In this application the defendant swears that it is registered in Mombasa, and carries on its business in Mombasa. It further deponed that its directors also reside in Mombasa while the contract of sale also was entered into in Mombasa. The Respondents in reply did not depone that those deponents in

the Applicant are lies. It simply stated that the assertions were not proven by documents. It is my view that I so hold, that much of what the Applicant deposed in support of this application is not really controverted. I do not consider the sworn facts by the Applicant such as that the applicant company's registered office is in Mombasa, or the directors are residing at Mombasa or that their main business is being carried on at Mombasa, as untruths. I believe the facts in the Applicant's affidavits are true and I accept them. This means that I also accept the fact that the contract of sale was entered into at Mombasa. Indeed that fact is not denied in the replying affidavit.

I finally have considered and taken into account the fact that the Applicant raised the issue of the proper court at which to file the suit before the suit was filed by the Respondent but note that the Respondent ignored the concern. However, the latter has no bearing in deciding this application.

Having come to the conclusions above, I am left with no alternative and indeed it is my finding that the plaintiff should have filed the suit not at Nairobi but at Mombasa considering also the effect of Section 15 of the Civil Procedure Act produced herein above.

The upshot is therefore that this application must succeed.

ORDER

1. The Nairobi Chief Magistrate Civil Case No.728 of 2001 to be and is hereby ordered transferred to Mombasa Chief Magistrate's Court where it will be heard and fully determined.
2. Costs of this application are to the applicant herein to be agreed upon or assessed as the case may be.

Dated and delivered at Mombasa this 20th day of March, 2003.

D. A. ONYANCHA

J U D G E