



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 308 OF 2002

EMMA WAMBUI.....APPLICANT

V E R S U S

MARY ONGEWE.....RESPONDENT

R U L I N G

Emma Wambui (Emma) took out a Chamber Summons dated 21st March, 2002 invoking Sections 6, 17 and 3A of the Civil Procedure Act for various orders. That application ought to have been by way of Notice of Motion as there is no procedure provided for it under those Sections of the law, or under Section 15 of the Act which learned counsel for Emma invoked in submissions without seeking to amend the application. No objection was raised to the procedure however but the court takes a serious view of careless drawing of Court pleadings. In appropriate cases they will be struck out, but in this matter I opt to deal with the substance of the application that defect notwithstanding.

The application seeks two substantive orders namely:-

- “1. That proceedings in Senior Resident Magistrates Civil Case Number 34 of 2001 in Chuka and Senior Resident Magistrates Civil Case Number 173 of 2002 at Meru be stayed.***
- 2. That the said cases be transferred to the Senior Principal Magistrates Court at Milimani Nairobi.”***

The main prayer is for transfer of the two cases to Milimani Commercial Courts, Nairobi and the decision thereon will thus determine the first prayer.

According to the documents on record Emma sold a motor vehicle to **Mary Ongewe** (Mary) on 24th November, 1999 and they executed a written agreement. It is not clear from that document where the agreement was entered into or where payments were to be made. It is however common ground that Emma ordinarily stays in Nairobi while Mary stays in Meru. Both say the agreement was made where they stay respectively. Some disagreement arose over the payment of the balance of the purchase price and Emma moved in to repossess the motor vehicle. Mary went before the Chuka Court and filed RMCC No. 34 of 2001 to stop her. That was in June 2001.

Apparently that suit was withdrawn on 4th July, 2001. Emma once again either repossessed or attempted to repossess the vehicle on 11th March, 2002 at Meru but Mary rushed to Meru Court and filed CMCC No. 173 of 2002 to stop her. An injunction was issued on the same day. The following day Mary filed another application to compel Emma to release the vehicle which was apparently repossessed on the previous day either before or after the grant of the injunction. I am told there is another application to commit Emma to prison for disobeying the injunction which application has already been argued and was pending Ruling by the time this application was argued on 10th April, 2002.

Learned Counsel for Emma Mr. Thuo submitted that the procedure adopted in withdrawing the Chuka case was improper and that therefore the suit was still existing which follows that the existence of two current suits in different Courts is an abuse of Court process. That of course would be the legal position if the facts were right. But I cannot ignore the Court order withdrawing the Chuka suit which has not been challenged or set aside. I agree with learned Counsel for Mary, Mr. Mose that the Chuka suit is non-existent and it is futile, therefore, to seek transfer thereof.

As for the Meru case, Mr. Thuo submitted that it was improperly before that Court since it ought to have been filed where the Defendant (Emma) ordinarily resides and/or carries on business, which was Nairobi. The pleadings filed by Mary state the residence of Emma as Nairobi. He cited Section 15 and 17 of the Civil Procedure Act for that proposition. Section 15 as far as is relevant states:-

**“.....every suit shall be instituted in a Court within the local limits of whose jurisdiction .....**

***(a) the defendant at the commencement of the suit actually or voluntarily resides or carries on business, or personally works for gain.***

***(b) .....***

***(c) the cause of action wholly or in part arises Explanation (3) – In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely –***

***(i) the place where the contract was made;***

***(ii) the place where the contract was to be performed or the performance thereof completed;***

***(iii) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.***

***Section 17 donates the power to transfer suits which may be instituted in more than one Court.***

So that, it is not merely the residence of the Defendant that determines the place of suing in this matter. It seems to me, as submitted by Mr. Mose, that Mary had options to exercise depending on where the contract of sale was made or performance was intended, which as I have stated is not certain. As is stated in Mulla on the Indian Code of Civil Procedure on identical provisions relating to transfer of cases:-

***“The plaintiff as arbiter litis or dominus litis has the right to choose any forum the law allows him. This right is subject to control under Sections 22 & 24 (Kenyan Section 17 & 18). The burden lies on the applicant to make out a strong case for transfer. A mere balance of convenience in favour of proceedings in another court is not sufficient ground, though it is a relevant consideration. As a general rule, the court should not interfere unless the expenses and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purpose of working injustice. What the court has to consider is whether the applicant had made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction.”***

As I also stated in Mombasa HCCC 20 of 1997 **HEINZ ISBRECH -VS- CHARLES NDIGA (UR)**

***“ The courts power to transfer proceedings from one court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the plaintiff has initially***

*chosen should be dealt with or heard or determined by the court most appropriate or suitable for those proceedings. When making or refusing an order of transfer the court will have regard to the nature of the relief sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power which will be exercised having regard to all the circumstances of the case. ”*

In this matter the subject matter of the dispute is a motor vehicle which is within the jurisdiction of the Meru Courts. It is common ground that the Meru Chief Magistrate’s Court has pecuniary jurisdiction to try the suit. It is not denied that some considerable proceedings have taken place before that Court so far and although there was obtuse reference by Mr. Thuo to injustice being meted out on Emma in those Courts, no factual or legal basis was laid for such aspersions and they must, therefore, be ignored. At all events, there is always the avenue of appeal and judicial review which matters are not before me. None of the matters stated in the authorities cited above compel me to find in favour of the Applicant.

All in all there are no merits in the application which I dismiss with costs.

**DATED at NAIROBI this 17th day of April, 2002.**

**P.N. WAKI**

**JUDGE**