



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC APPLICATION NO. 296 OF 2001**

**SHAMIT VARMA & 2 OTHERS.....APPLICANT**

**VERSUS**

**M. A. BAYUSUF & SONS.....RESPONDENT**

**RULING**

This is an application by directors of Kenya Gypsum ltd for an order that Mombasa SRMC No. 4309/98 be transferred either to Nairobi Chief Magistrate's Court of Kajiado SRMS Court for determination of the outstanding issues and alternatively for an order that the application for examination of directors in Mombasa SRMCC No. 4399/98 be dealt with either at CMS Court Nairobi or SRMS Court Kajiado.

The suit sought to be transferred was heard on the merits in Mombasa and a judgment entered against Kenya Gypsum ltd – the defendant in the suit. Execution proceedings have started. A warrant of attachment of defendant's properties was given on 5.9.2000. Apparently when the Decree holder failed to find any attachable properties if filed an application for examination of the directors under Order XXI Rule 36 Civil Procedure Rules. That application is fixed for hearing on 10.5.2000.

The purpose of this application is to transfer the application for examination of the directors (applicants herein) from Mombasa to either Nairobi or Kajiado.

The application is made under section 18(1) of Civil Procedure Act and Order XXI of Civil Procedure Rules. Under Section 18(1)(b)(ii), the High Court has power on application of any of the parties or on its own motion to withdraw a suit or other proceedings pending in any subordinate court to transfer the suit for trial or disposal to any court subordinate to it.

Firstly, the suit SRM's Civil suit No.4309/98 is not pending for hearing. It has been disposed of by the Mombasa Court. In my view the application for examination of the directors are not "other proceedings" in the context of section 18(1)(b) of Civil Procedure Act. The application for examination of the directors of an integral part of the suit.

Secondly, it is only parties to a suit who have the authority to apply for the transfer of the suit. Thus it is only the defendant Kenya Gypsum ltd that can apply for the transfer of the suit. The present applicants are not parties to the suit.

Thirdly, it is clear from order XXI Rule 36(b) CP Rules that applicants have been summoned for examination as officers of the defendant and not in their individual capacities. Indeed, the purpose of the examination is not to affix any personal liability on the applicants but to disclose the assets of the defendant if any. In reality, the application for examination of directors is against the defendant company through its directors. There is no independent suit against the directors, which would entitle them to make an application independently of the defendant company in the suit.

For the above reasons the application is incompetent and misconceived it is dismissed with costs to be paid by the applicants.

E. M. Githinji

Judge

4.5.2001

Mr. Munga for applicants present

Mr. Otieno holding brief for Nyongesa present Order: Ruling to be typed and supplied as prayed by Mr.

Otieno

E. M. Githinji

Judge