



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPLICATION NO.299 OF 2001

MOHAMED ABU ALI.....PLAINTIFF

=V E R S U S=

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

R U L I N G

The applicant who is the 2nd Defendant in Nairobi, Milimani Resident Magistrate's Court Civil Case No.E.J.780 of 2000, applies for orders that the said case be transferred to Mombasa Chief Magistrate's Court for hearing and final determination. He does so under Section 18(1)(b) of the Civil Procedure Act.

The grounds put forward in support are that the motor accident the subject of the Respondent's claim aforesaid occurred at Kipevu, Mombasa; that the applicant and his co-defendant in the case lived and still reside in Mombasa; that the witnesses of the defendants reside and still live in Mombasa; that the defendants if this application will not be granted, will have to transport themselves and their witness to Nairobi during the hearing of the case which will therefore be expensive to them; that the Respondent has offices in Mombasa and at the time of filing the case in Nairobi knew that its witnesses were also based in Mombasa; that the filing of the case in Nairobi failed to take into account the above factors.

The Respondent opposed the application arguing that its witnesses who were said to be residing in Mombasa at the time of filing of the case have since been transferred to Nairobi and Thika; that the Resident Magistrate in Nairobi has also the jurisdiction to hear the case which in the first instance is before that court; that in any case it is the Plaintiff who had a right where to file his case and this one chose Nairobi which is the Headquarter of the Plaintiff herein. He based this last argument on the Nairobi Misc. Application No.74 of 1996, **Kenya Commercial Bank Ltd. –vs- Jafferson Nyongesa**, where my brother Mbaluto J., decided so, stating further that under S.3(2) of the Magistrate's Court Act and by Mulla on Civil Procedure at page 165, it is the Defendant/Applicant who has to satisfy this court that there is a good case for the application to transfer.

I have no doubt that under the provisions of the Magistrates Act, the jurisdiction of Resident Magistrates extends all over Kenya. Presuming that the said Ruling is good law and that I am persuaded to follow it, the position would then be that the applicant has a burden to shift in his favour on the balance of probability. I am persuaded that he has shifted that burden. He like his co-defendant reside in Mombasa. The defendant carried and carries on business in Mombasa. The cause of action occurred in the local jurisdiction of the Resident or Chief Magistrate Mombasa. The applicants and indeed the Plaintiff's witnesses at the time of filing the suit, resided in Mombasa. Having the case heard in Nairobi would increase the expense of the applicant in terms of traveling by himself and his witnesses to Nairobi. I accordingly would on the basis of the said authority find that the applicant has shifted the burden upon him and has shown good grounds to persuade this court to transfer the case to the Chief Magistrate's Court Mombasa.

Before I make the final orders however, I examined the provisions of the Civil Procedure Act which is the one to guide this court on such matters unless any other law makes a provision in relation to the issue raised herein. I am myself not aware of any other relevant provisions. Section 14 of the Civil Procedure Act under which a suit for compensation for a wrong done against a person or movable property, such as the one before the court, would fall, states thus:-

“Where a suit is for compensation for wrong to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another, the suit may be instituted at an option of the plaintiff in either of those courts. Illustration – (a) A resides in Mombasa beats B in Nairobi. B may sue either in Mombasa or Nairobi”

This section in my view, is the one under which the authority, aforementioned was decided. It gives the Plaintiff a choice, as the illustration (a) quoted shows. But what would be the position if - A who resides in Mombasa beats B who also resides or carries on business in Mombasa and Nairobi. Would A be at liberty to file the matter in Nairobi? And Section 15 of the same Act states:-

“Subject to the limitations 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 and voluntarily resides or carries on business or personally works for gain or

b)

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

Explanation (2): – A corporation shall be deemed to carry on business at its sole or principal office in Kenya, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place”.

Applying the above sections to the issue before me, I find that the Plaintiff herein carried on business in Mombasa as per the explanation (2) above under S.15 of the Civil Procedure Act. The fact that its principal office was and still is Nairobi does not remove it from the above explanation. On the contrary, it completely fits it in. The scenario here therefore is that both the Plaintiff and the Defendants reside or carried on business in Mombasa at the time when the Plaintiff filed the said Nairobi Resident Magistrate’s Court case No.EJ 780 of 2000. And yet since the defendant or defendants resided in Mombasa, as was in this case, the Plaintiff should have filed the suit, as per S.15(a) of Civil Procedure Act, in Mombasa. Even more imperative, is where as in this case, the defendants resided in Mombasa and the Plaintiff as well resided or carried on business in Mombasa, as per the explanation (2) given under S.15(c). The Plaintiff should under those circumstances have filed the case aforementioned in Mombasa. The words used under S.15 of the Civil Procedure Act, do not seem to give the plaintiff a discretion. This means that if the conditions therein stated are operating at the time of the filing of the suit the Plaintiff **shall** institute this suit at the court so prescribed.

It is my view therefore that every application of this nature should be examined carefully upon its own facts and circumstances but once any such case falls within one or more of the sections 11 to 15, then the court should strictly follow and apply the clear meaning of the same.

With great respect to the court that decided the aforementioned case, Misc. Civil Application No.74 of 1996, it may not be always the case that the Plaintiff will have the freedom to choose the court in which to file his case.

This application must therefore succeed and the following are the court’s orders:-

ORDERS:

1. The Nairobi Milimani Resident Magistrate's Court Civil Case No.EJ 780 of 2000, be and is hereby transferred from the said court to Chief Magistrate's Court Mombasa for trial and disposal thereof.

2. The costs of this application are to the Applicant/Defendant.

Dated and delivered at Mombasa on the 21st day of March, 2000.

D. A. ONYANCHA

JUDGE

Delivered in the presence of:-

Mr. Ouma – for Khatib -for Applicant/Defendant

Mr. Mabeya -for Respondent/Plaintiff