



REPUBLIC OF KENYA



**Blue Nile Rolling Mills Ltd v Hardware (Miscellaneous Application
E001 of 2024) [2024] KEHC 8963 (KLR) (19 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8963 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
MISCELLANEOUS APPLICATION E001 OF 2024
MA OTIENO, J
JULY 19, 2024**

BETWEEN

BLUE NILE ROLLING MILLS LTD PLAINTIFF

AND

ISILO MWANGAZA HARDWARE DEFENDANT

RULING

Introduction

1. This Ruling is in respect of Notice of Motion Application dated 9th January 2024 by the Defendant seeking the following orders; -
 - i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. That this Honourable Court be pleased to withdraw and transfer Thika CMCC No. 721 of 2016 – Blue Nile Rolling Mills Limited v Isiolo Mwangaza Construction Company to the Chief Magistrate’s Court in Isiolo for trial and final disposal;
 - v. That this Honourable Court be pleased to issue further orders it deems fit and just in the circumstances;
 - vi. That the costs of this application be provided for.
2. The application is expressed to have been brought under the provisions of Sections 18 (1) (b) (ii) of the *Civil Act*, Cap. 21 Laws of Kenya and Order 51 Rule 1 of the *Civil Procedure Rules*.



3. The application is supported by the affidavit of Ms. Sally Nyambego, the Defendant's Counsel sworn on the 9th day of January 2024.
4. The main ground of the application is that according to the applicant, the cause of action in this matter arose in Isiolo and not in Thika where the Plaintiff commenced the subject proceedings.
5. In opposition to the Application, the Respondent filed their Replying Affidavit sworn on 9th April 2024 by Mare Gaso Lolo, an employee of the Plaintiff, the Respondent herein.
6. The application was canvassed by way of written submissions. The plaintiff's submissions are dated 24th April, 2024 whilst the Respondent's submissions are dated 27th May, 2024.

Submissions

7. The Defendant who is the Applicant herein submitted that the cause of action in this matter arose in Isiolo where the Defendant is based and not in Thika where the Plaintiff has instituted the suit. Consequently, it was the Applicant's prayer that the instant suit, being Thika CMCC No. 721 of 2016 – Blue Nile Rolling Mills Limited v Isiolo Mwangaza Construction Company (hereinafter referred as (Thika CMCC No. 721 of 2016) be withdrawn and transferred by this court to the Chief Magistrate's Court at Isiolo.
8. In support of his application, Counsel for the Defendant cited the case of David Kabungu v Zikarenga & 4 Others Kampala HCCS No. 36 of 1995 where the court discussed the circumstances under which an order for transfer of suits may be granted by a court. It was further submitted that Section 18 of the Civil Procedure Act gives this Court the powers to transfer suits as prayed in the present application.
9. It was submitted by the Defendant's Counsel that by transferring this suit as prayed, this Court will be giving effect to Section 1A and 1B of the Civil Procedure Rules as well as Article 159 (2) of the Constitution since this will ensure justice is rendered in a just and expedient manner.
10. The Plaintiff/Respondent on its part asserted that the cause of action in the subject suit arose in Thika, where the Respondent is based and not in Isiolo as alleged by the Plaintiff. In support of its position, the Plaintiff annexed as "MG-1" copies of an invoice and loading instructions demonstrating that the goods were invoiced and loaded at Thika for onward transmission to the Applicant.
11. According to the Plaintiff, the suit was rightfully filed at the Thika Law Courts where the Plaintiff carries on its business as evidenced by the attached documents and therefore, in line with Section 15(c) of the Civil Procedure Act, the cause of action in this matter arose in Thika. Consequently, the Chief Magistrate's Court at Thika has the requisite territorial jurisdiction over the matter. That the following are the sequence of events that culminated to the suit by the Respondent against the applicant; -
 - i. The Defendants/Applicants herein purchased hardware materials from Blue Nile Rolling Mills Limited, the Respondent herein, which is based in Thika.
 - ii. The subject goods were invoiced, released and dispatched by the Plaintiff from the Plaintiff's warehouse in Thika.
 - iii. The Defendant failed to pay for the goods as per the agreement between the parties, hence the Thika CMCC No. 721 of 2016.
12. It was further the Plaintiff's submissions that the instant application by the Defendant is brought in bad faith and is merely meant to delay hearing and conclusion of the suit. The Plaintiff asserted that



the Defendant never questioned the jurisdiction of the trial court since this suit was filed way back in 2016. That for that reason, the Defendant is guilty of laches.

13. In support of its position, the Plaintiff cited the case of *Gogfrey Otieno Onyango (suing on behalf of Ronald Onyango) & 2 Others v Crispin Oduor Obudo & 8 other* [2014] eKLR where the court discussed the provisions of Section 15 of the *Civil Procedure Act*, regarding the place of institution of a suit.
14. In the circumstances, the Respondent/Plaintiff prays that the Application be dismissed with costs in its favour.

Analysis And Determination

15. I have considered the application, the affidavit filed in support thereof as well as the submissions by the Applicant/Defendant. I have also considered the replying affidavit filed by the Respondent and its written submissions. The issue for determination in this application is whether the Defendant's notice of motion application dated 9th January 2024 for transfer of suit is merited and therefore should be allowed.
16. The Application by the Defendant is one for the withdrawal and transfer of the Thika CMCC No. 721 of 2016 from the Chief Magistrate's Court in Thika to Isiolo Chief Magistrate's Court for hearing and final disposition. The Application is principally brought under section 18 of the Civil Procedure Act.
17. The main ground of the application as deponed in the supporting affidavit sworn 9th January 2024 by Ms. Sally Nyambego, the Defendant's Counsel is that the Defendant is based in Isiolo and therefore, the Thika CMCC No. 721 of 2016 ought to be withdrawn therefrom and transferred to the Isiolo Chief Magistrate's court.
18. The Plaintiff, in opposition to the application asserted that the cause of action in the subject suit arose in Thika where the Plaintiff is based and not in Isiolo as alleged by the Defendant. According to the Plaintiff, the application by the Defendant is merely intended to delay the hearing and final conclusion of the matter.
19. Citing section 15(c) of the *Civil Procedure Act*, the Plaintiff maintains that the Thika Chief Magistrate's Court is possessed of requisite jurisdiction over the case, the cause of action having arisen in Thika.
20. The place of institution of a suit is guided by among others, section 15 of the *Civil Procedure Act* which provides as follows; -

“ 15. 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. any 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, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or



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

21. It is therefore clear that a suit may be instituted in a court within the local limits of whose jurisdiction a defendant resides, works or carries on business. A suit may equally be instituted where the cause of action, whether partially or wholly, arises. See the decision in the case of *Gogfrey Otieno Onyango (suing on behalf of Ronald Onyango) & 2 Others v Crispin Oduor Obudo & 8 other* [2014] eKLR where the court held as follows; -

“The jurisdiction of filing a suit is not limited to where the Defendants domicile. The place where the cause of action arose is also a consideration as envisaged under section 15 of the Civil Procedure Act. It is not disputed that the 5th, 6th, and intended 7th, 8th, and 9th Defendants are all companies registered in the UK. However, what the Plaintiffs herein are seeking to enforce are agreements that were apparently entered into in the Country (Kenya). It is also not a necessity that a Plaintiff files a suit where the Defendant resides. As I have stated earlier, where the cause of action arose whether or not partly is also a consideration in determining the jurisdiction where to file the suit.”

22. From the pleadings and submissions filed, I note that the genesis of this dispute is that the Applicant herein (the Defendant in the main suit) ordered for goods from the Plaintiff's shop in Thika. That the goods were invoiced by the Plaintiff in Thika and subsequently loaded into the Defendant's truck for onward transportation to the Defendant's premises in Isiolo. That the Defendant defaulted in making payment and the Plaintiff, in 2016, instituted the Thika CMCC No. 721 of 2016 for recovery of the monies due.

23. Taking into account the facts of this case as presented by the parties and taking into account the provisions of section 15 of the Civil Procedure Act, the Plaintiff was perfectly entitled to commence the suit at Thika Chief Magistrate's Court.

24. The next question for this court to answer is whether the application by the Defendant for withdrawal and transfer of suit from Thika Chief Magistrate's court to the Isiolo Chief Magistrate's Court is merited.

25. I have perused the Defendant's application, the supporting affidavit and submissions. I note that the sole and only ground disclosed in support of the application for transfer is that the Defendant is based in Isiolo. The Defendant has not annexed any documentary evidence in support of the application. Further, the Defendant has also not disputed the Plaintiff's version on the factual background of the dispute. This court, in determining this application, will therefore be guided by the facts, as presented by the Plaintiff.

26. The power of the High Court to transfer suits from one Court to another is contained under Section 18 of the *Civil Procedure Act* which states as follows; -

“ 18. Power of High Court to withdraw and transfer case instituted in subordinate court

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—



- a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
 - (i) try or dispose of the same;
 - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
 - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”

27. In *David Kabungu v Zikarenga & 4 others* Kampala HCCS No. 36 of 1995, the Court stated the following concerning circumstances under which a court may order transfer of suit; -

“Section 18(1) of the *Civil Procedure Act* gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. The burden lies on the Applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is relevant consideration. As a general rule, the court should not interfere unless the expense 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 purposes of working injustice. What the court has to consider is whether the Applicant has made a case to justify it in closing doors of the court on which the suit is brought to the Plaintiff and leaving him to seek his remedy in another jurisdiction It is a well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused. Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer could be refused.....” [Emphasis added]

28. Perusing the Defendant’s application and the supporting affidavit, I note that no basis has been disclosed in support of the application for transfer. In its submissions, the Defendant has merely stated that it is based in Isiolo and contrary to the Plaintiff’s assertion, the cause of action in this matter arose



in Isiolo. However, unlike the Respondent who provided invoices and loading notes, the Applicant failed to provide any evidence to support their position.

29. In the premises, I find that the Defendant/Applicant has not laid any basis for this court to exercise its power of withdrawal and transfer of suits under section 18 of the Civil Procedure Act in its favour. The Application by the Defendant for the withdrawal and transfer of Thika CMCC No. 721 of 2016 from the Thika Chief Magistrate's Court to the Chief Magistrate's Court in Isiolo therefore fails.
30. Further, I note from the pleadings that the Thika CMCC No. 721 of 2016 was filed way back in 2016 and has been ready for hearing since 2018. It is in the interest of the *Civil procedure Act* and the *Rules* made thereunder that courts facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes. In my view, allowing this application by the Defendant will run afoul to the letter and spirit of Act.
31. In sum, the Defendant's application dated 9th January 2024 for the withdrawal and transfer of the Thika CMCC No. 721 of 2016 to the Chief Magistrate's court in Isiolo is not merited and is hereby dismissed with costs to the Respondent/Plaintiff.
32. It is so ordered.

SIGNED DATED and DELIVERED IN VIRTUAL COURT THIS 19TH DAY OF JULY 2024

ADO MOSES

JUDGE

In the presence of:

Moses – Court Assistant

Kembo For the Applicant

.....N/A...For the Respondent

