



**REPUBLIC OF KENYA**

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

**MILIMANI COMMERCIAL & TAX DIVISION**

**MISC. APPLN NO.E907 OF 2020**

**KENNEDY MAKANGA KIILU ..... APPLICANT**

**-VERSUS-**

**AYUB BARASA NYONGESA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the Notice of Motion by the applicant dated 29/07/2020 brought under *Articles 48, 50(1), 165(6) of the Constitution of Kenya and sections 1A, 1B, 3A, 15 and 18 of the Civil Procedure Act*.
2. The application sought orders to stay the proceedings in **Nakuru Chief Magistrate Civil Case No. 372 of 2020** and to transfer the same to the Chief Magistrate's Court at Milimani or Mavoko for hearing and disposal.
3. The grounds for the application were set out in the body of the Motion and the Supporting Affidavit of **Kennedy Makanga Kiilu** sworn on 29/07/2020. These were that; the matter in Nakuru was instituted contrary to *section 15 of the Civil Procedure Act* as the defendant resides in Kitengela and that the cause of action did not arise in Nakuru.
4. The defendant contended that he resides and works for gain in Nairobi and that the Agreement for Sale dated 06/02/2019, which is the subject of the dispute herein, was signed by both parties in Kitengela. That the cause of action arose in Kitengela whereon the performance of the agreement was to be. The plaintiff did not respond to the application.
5. Counsel for the applicant filed submissions in support of the application which the Court has considered. It was submitted that the Court has jurisdiction to stay the proceedings. The cases of **Gichuhi Macharia & Another & Kiai Mbaki & 2 Others [2016] Eklr, Robert Gathigana Njagi v. John Mutua Manda [2017] Eklr** amongst others were relied in support of those submissions.
6. That under *section 15 of the Civil Procedure Act*, the suit should be instituted where the defendant resides or the cause of action arose. The decision of **Masinde Muliro University of Science and Technology v. Fraca Servcom Ltd [2010] Eklr** was cited in support thereof.
7. Further, that since the cause of action arose in Kitengela, the court that has jurisdiction is the Mavoko Chief Magistrates Court. That in any event, it will be unjust, expensive and inconvenient to the applicant if the suit proceeds in Nakuru.
8. *Section 15 of the Civil Procedure Act* provides: -

*“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.”*

9. In **Masinde Muliro University of Science and Technology v Fraca Servcom Ltd [2010] Eklr**, the Court held that: -

*“The general principle as to where to file suit is set out in section 15(a) of the Civil Procedure Act ... In suits where the cause of action arises out of contract, as this case, the cause of action arises at any of the three places, that is to say, the place where the contract was made, the place where the contract was to be performed or the performance thereof to be completed and the place where in performance of the contract the money to which the suit relates was expressly or impliedly payable. ...*

*Case law to the effect that the principal matters to be considered for transfer of the suit are the balance of convenience, questions of expense, interests of justice and possibilities of undue hardship see Matayo K. Kaboha v. Abibu Bin Abdulla and Others [1936-51] 6 U. L. R 121”.*

10. I am in full agreement with the foregoing. I reiterate the same and apply it in this case.

11. In the present case, the applicant contended that the sale agreement, the subject matter of the suit, was executed in Kitengela, that he ordinarily resides, carries on business and works for gain in Nairobi and the monies the subject matter of the agreement was payable in Kitengela.

12. **Section 15** aforesaid is clear on where a suit should be filed. In a suit arising out of contract, the cause of action arises where the contract is made, or is to be performed or where performance of the contract and where any money to which the contract relates is expressly or impliedly payable.

13. In the present case, no doubt the applicant has squarely brought himself within the provisions of **section 15 of the Civil Procedure Act**. He deposed, which was not denied or controverted, that he resides within Kitengela of the greater Kajiado County. The cause of action arose in Kitengela. The Mavoko Chief Magistrates Court is the court within the local limits of Kitengela. The cost of transport to and from court for the witnesses will be minimal compared to Nakuru. He thereby satisfied the test of local or territorial limits provided under the law.

14. In any event, the Agreement for sale dated 06/02/2019, which is the subject matter of the dispute between the parties herein, indicates at paragraph 4(b) that the applicant was to complete the purchase price of Motor Vehicle Registration Number KCG 544T by depositing monthly installments into Faulu Micro-Finance Bank, Kitengela Branch. With that, no doubt that the cause of action arose in Kitengela as its performance by payment was to be there.

15. **Section 18 of the Civil Procedure Act** clothes the High Court with jurisdiction to transfer any suit from one subordinate court to the other where the latter has competence to try and dispose of it. This provision is backed up by **Article 165(6) of the Constitution** regarding the supervisory jurisdiction of the High Court over the subordinate courts.

16. The foregoing coupled with the overriding objective that the court should exercise its powers in order to facilitate a just, expeditious, proportionate and affordable resolution of civil disputes, militates in favour of the applicant. In my view, it will be a grave inconvenience and highly expensive for the defendant and his witnesses to commute from Nairobi to Nakuru to attend to the hearing of the suit.

17. Accordingly, I find that the application is meritorious and I allow the same as follows: -

a) The **Nakuru Chief Magistrate’s Court Civil Case No. 372 of 2020** be and is hereby withdrawn from the Chief Magistrate’s Court, Nakuru and transferred for hearing and final determination at the Chief Magistrate’s Court in Mavoko.

b) The costs of this application to be borne by the respondent.

**DATED** and **DELIVERED** at Nairobi this 4th day of March, 2021.

**A. MABEYA, FCI Arb**

**JUDGE**