



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

MISC CIVIL APPLICATION NO. 39 OF 2021

BUD AND BLOOMS LTD.....APPLICANT

-VERSUS-

JONATHAN BALONGO OKUMU.....RESPONDENT

RULING

1. This a ruling on the Notice of Motion dated 24th February 2021, and filed on 2nd March 2021, seeking the following orders:-

a. Spent

b. Spent

c. That this honorable court be pleased to withdraw Butali Principal Magistrate court civil suit No. 116 of 2018 and transfer it to the Chief Magistrate's Court at Nakuru for hearing and disposal by a magistrate of competent jurisdiction.

d. That costs of the application be provided for.

2. The application is premised on the following grounds:-

i. That the respondent instituted Butali Principal Magistrate court civil suit no. 116 of 2018 against the applicant seeking inter alia general and special damages for an injury that occurred while he worked for the applicant at Nakuru.

ii. That the Respondent mischievously filed the suit in Butali whereas the cause of action arose in Nakuru where the applicant carries out business.

iii. That Butali Principal Magistrate court civil suit no. 116 of 2018 offends the provision of section 15 of the civil procedure Act which deals with the place of suing for compensation for wrong to the person or movable property which requires that the suit be filed where the cause of action arose or where the Defendants resides.

iv. That on 17th May 2018 the Respondent purported to effect service of summons to enter Appearance, Plaint, Verifying Affidavit, Plaintiff's list of witnesses Plaintiff's witness statement and Plaintiff's List of Documents and annexures' upon an unauthorized officer of the applicant

who failed to inform the principal officers of the applicant of the existence of the suit.

v. That the service of the pleadings effected on 17th May 2018 offends the provision of Order 5 rule 3 of the civil procedure rules which deals with service upon a corporation.

vi. That the respondent has obtained an ex-parte judgment against the applicant for a sum of Kshs 250,000/= and has communicated the process of execution unless an order of stay is granted, the applicant stands to suffer irreparable loss and damage.

vii. That the applicant only came to know of the existence of Butali Principal Magistrate Civil suit No 115 of 2018 when Shivaji Wagh, the Applicant's general manager was served with a notice of entry of judgment on 10th February 2021 through Whatsapp on his mobile no 0720xxxxxx.

viii. That the applicant has already moved the court at Butali with a view of setting aside the ex-parte judgment entered against the applicant and the applicant deserves a chance to make his case.

ix. That it is just and proper that this honourable court withdraws Butali Principal Magistrate case no 116 of 2018 and transfer to the Chief magistrate Nakuru for hearing and determination by a magistrate of competent jurisdiction.

3. The application is supported by the annexed affidavit sworn by **Shivaji Wagh** who restated the ground of the application. In his supplementary affidavit filed on 14th September 2021, he deponed that the judgment in Butali Court has been set aside vide the court order issued on 3rd June 2021 and the applicant was allowed leave to defend the suit.

4. He further averred that it was in the interest of justice that the proceedings in the Butali Court be stayed pending the hearing of this application.

5. In response to the opposing the application the respondent filed a replying affidavit dated 7th April 2021 and filed on 15th April 2021. He contends the application is aimed at obstructing justice and delay in expeditious disposal of the matter. No appeal or review has been preferred and thus he will be prejudiced by the decision to transfer the matter.

6. He contends the defendant owed him a duty of care which they failed to exercise and he was electrocuted when renovating the applicant's greenhouse. The defendant was served with the summons to enter appearance and failure to enter appearance and file a defense necessitated the request for judgment.

7. He averred that the application lacks merit and urged the court to dismiss the same.

8. The application was canvassed by way of written submissions. The applicant filed submissions dated 17th September 2021 and the respondent filed submissions dated **21st October 2021**.

APPLICANT'S SUBMISSIONS

9. The applicant submitted that the matter in being Butali PMCC No. 116 of 2018 has already been set aside and is scheduled for hearing on 15th November 2021. He submitted that in the interest of justice and in the spirit of not rendering the application nugatory, he urged this Court stay any further proceedings before the Butali Principal Magistrate and Cited the case of **Gichuhi Macharia & Anor vs Kiai Mbaki & 2 Others (2016) eKLR**.

10. The applicant submitted that the suit ought to have been filed in Nakuru Chief Magistrate which is within the local limits of the jurisdiction of the defendant as provided under **section 15 of the civil procedure** and cited the case of **VNM vs SMM & Anor (2018) eKLR**.

11. The applicant further submitted that this Court has jurisdiction to withdraw and transfer the suit

under **Section 18 of the Civil Procedure Act**. He submitted that the applicant carries on its business in Nakuru Town, the applicant witnesses reside in Nakuru and the case ought to have been heard and determined in Nakuru and the proceeding with the suit in Butali Court will prejudice the applicant. He urged this Court to transfer the suit to the Chief Magistrate's Court at Nakuru for proper disposal with costs.

RESPONDENT'S SUBMISSIONS

12. The respondent submitted that the Magistrate Court's Act Section 3(2) gives Magistrates Court a country-wide jurisdiction to hear and determine any suit notwithstanding the residence of the defendant or where the cause of action arose and cited the case of Betty Nyamusi Machora vs Betty Nyanduko Makori (2018) eKLR.

13. The respondent further submitted that the Magistrate Court at Butali has an equal jurisdiction over the matter regardless of whether the matter arose in Nakuru and if the suit proceeds in Butali, the applicant will not suffer any substantial loss but transfer of the suit to Nakuru will occasion unreasonable delay. He urged this Court was urged to dismiss the application.

ANALYSIS AND DETERMINATION

14. I note from the averments that upon setting aside judgment earlier entered, Butali Court set down the matter for hearing on 15th Novemebr 2021. On 20th September 2021, this Court issued an order staying further proceedings before Butali Court pending this ruling. The issue that is remaining for this Court's determination whether the applicant has demonstrated reasons to warrant transfer of this matter to Nakuru Court for hearing.

15. The High Court is empowered to transfer suits from one subordinate to court to the other by Section 18 of the Civil Procedure Act which provide as follows:-

“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as the 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; or

(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”.

16. A party seeking transfer of a suit has the burden of providing sufficient reasons as to why the transfer is merited. The Court is vested with discretion to either grant or decline to grant the transfer.

17. Section 15 of the Civil Procedure Act provides as follows:-

“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

18. The parties do not dispute the cause of action arose in Nakuru and the defendant operate business in Nakuru. The respondent attached employment contract indicating that he was employed by the applicant in Nakuru. From documents filed, the respondent is claimng damages for injuries sustained while working in Nakuru for the defendant/applicant. The applicant has indicated that its witnesses are based in Nakuru. The respondent on the other hand contends that the transfer will occasion unnecessary delay but does not explain why he chose Butali over Nakuru where the cause of action arose.

19. Further to the above, the fact that the defendant has witnesses who may be required to travel from Nakuru if the case does not proceed virtually may ocassion delay. The date earlier set by Butali Court has passed and it has to be set down again for hearing. A silimar process that will be taken if the the matter is to proceed in Nakuru Court.

20. In my view the disposal of this matter will be expeditious and economical if it is transferred to Nakuru Court for hearing and determination

21. FINAL ORDERS

1) Butali PMCC No.116 of 2018 is hereby transferred to Nakuru Chief Magistrate Court for hearing and determination.

2) The matter to be set down for hearing on priority basis.

3) Costs in the cause.

RULING dated, signed and delivered via zoom at **Nakuru** This **2nd** day of **December**, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Mogire holding brief for Konosi for applicant