



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. E 263 OF 2019

SWISS DELI TRADE (PANAMA) INC..... PLAINTIFF

VERSUS

PRIVAMNUTS EPZ KENYA LIMITED.....DEFENDANT

RULING

1. This suit, by Swiss Deli Trade (Panama) Inc (**the Plaintiff or Swiss Deli**), seeking to enforce the terms of two Promissory Notes against Privamnuts EPZ Kenya Limited (**the Defendant or Privamnuts**). It is a claim for USD 602,000.

2. After filing the claim through a Plaint dated 28th August 2019 and filed on the same day, Swiss Deli has sought a summary end to these proceedings by filing a Notice of Motion dated 4th September 2019 for Judgment for the claimed amount. The Motion is brought under the provisions of Order 36 for summary Judgment.

3. In answer to that application Privamnuts has, inter alia, raised a Preliminary Objection to the application. The Court deals with one objection for reasons that will be apparent shortly. Privamnuts asserts that this honourable Court lacks jurisdiction to hear and determine the Plaintiff's suit pursuant to Section 15 of the Civil Procedure Act, it is indeed a challenge not only to the application but the entire proceedings.

4. Section 15 provides as follows:-

15. Other suits to be instituted where defendant resides or cause of action arises;

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. *Explanation.* (1)—Where a person has a permanent dwelling at one place and also a temporary residence at another place, he shall be deemed to reside at both places in respect of any cause of action arising at the place where he has such temporary residence.

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.

Explanation. (3)—In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely—

(i) the place where the contract was made;

(ii) the place where the contract was to be performed or the performance thereof completed;

(iii) the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.

Illustration.—(a) A is a tradesman in Nairobi. B carries on business in Mombasa. B by his agent at Nairobi buys goods of A and requests A to deliver them to Mombasa by rail. A may sue B for the price of the goods either in Nairobi, where the cause of action has arisen, or in Mombasa, where B carries on business.

Illustration.—(b) A resides at Kisumu, B at Nairobi, and C at Mombasa. A, B, and C being together at Nakuru, B and C make a joint promissory note payable on demand and deliver it to A. A may sue B and C at Nakuru, where the cause of action arose. He may also sue them at Nairobi, where B resides, or at Mombasa, where C resides; but in each of these cases, if the non-resident defendant objects, the suit cannot proceed without the leave of the court.

5. This Court has no difficulty accepting counsel Gachuhi’s submissions that parts (a), (b) and (c) of the provisions of Section 15 are to be given disjunctive application. The Plaintiff can elect either of the three as the place of suit.

6. In the matter before Court, it is common ground that Privamnuts is a limited liability company carrying on business in Embu. Indeed, the affidavit of service sworn by G. M. Karuoro on 12th September 2019 shows that summons to enter appearance were served on the Defendant’s offices located at Kangonde market within Embu County. So for purpose of Section 15 the Defendant is a resident or carries out business within Embu County.

7. Counsel Gachuhi asks this Court not to pay too much attention on the place of residence or business of the Defendant but to give regard to where the cause of action wholly or in part, arose (Part (c)). Counsel then points this Court to explanation 3(iii) of Section 15 which reads:-

“In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely—

(i)

(ii)

(iii) The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.”

8. Counsel for the Plaintiff submitted to Court that payments in respect to the promissory notes were to be made to the Plaintiff’s place of business being the Panama. There is truth in that because the promissory notes (of 12th September 2017 and 6th October 2017) themselves oblige the Defendant “to pay Swiss Dell Trade (Panama) Inc, within a principal place of business at Calle Aquilino de la Guardia 8; Panama City”. So in terms of the explanation note relied on by the Plaintiff for choosing to file the suit at the Commercial Division of the High Court in Milimani Nairobi and not Embu, emphasis is given on where

the money was to be paid.

9. This is where the Court finds some difficulty on the choice of place because the money was to be payable in Panama (which is outside Kenya) and not Nairobi. Once the Plaintiff chose to file suit in Kenya, then the place where the suit should have been filed could only be influenced by the conditions set out in Sections 15(a) or 15(b). The place where the cause of action, wholly or in part, arose was no longer available as it would take the Plaintiff to a place outside Kenya.

10. This Court has given regard to the three authorities cited to it by the Plaintiff and cannot find anything in those decisions that can persuade it to move away from the conclusion reached. Take for example the decision of Ogola J in **Godfrey Otieno Onyango (Suing On Behalf of Ronald Onyango) & 2 others v Crispin Oduor Obudo & 8 others [2014] eKLR**. In that decision the learned Judge held that:-

“Although 5 of the Defendants were domiciled in the UK, nevertheless the cause of action arose in Kenya”.

Here the Defendant is domiciled in Embu and on the Plaintiffs own admission payment on the contract was to be made in Panama. Within Kenya, the place of suing could only be in Embu.

11. So what is the appropriate order to make? The Defendant asks this Court to dismiss the suit for want of jurisdiction and to follow the decision in **Charles Ndungu Kirobi v Esther Muthoni Mungai[2012]eKLR**.

12. In considering the appropriate order, the Court must bear in mind the purpose of Section 15 *vis-à-vis* the unlimited jurisdiction of the High Court and whether there was bad faith or improper motive in the suit been filed in the wrong place.

13. The High Court of Kenya not only has unlimited original jurisdiction in civil matters but also countrywide jurisdiction. However, the stations of the High Court are distributed giving regard to the need to facilitate reasonable and equitable access of the services of the Court (Section 12 of the High Court (Organization and Administration Act). For purposes of civil cases the places where stations of the High Court have been set up and registries outside opened Nairobi are in the schedule to appendix 9 of the Civil Procedure Rules or as from time to time amended by the Chief Justice.

14. Amongst the objectives for the provisions on place of suing is to ensure that suits are filed in as much as possible where the cause of action arose or where the subject matter is situate or in some instances where the Defendant arises. Suits should not be instituted in places that causes unnecessary hardship to the Defendant and which may hinder access to justice. Again suits should not be lumped in one station when they could be heard elsewhere as this may lead to clogging up of some Courts in a way that flies in the face of equitable access to justice.

15. The provisions of Section 15 which restricts the institution of suits within the local limits of High Court stations should be viewed in that light. So that “territory jurisdiction” placed by Section 15 does not mean that the “wrong” High Court does not have substantive jurisdiction in respect to the matter.

16. If I understand the rationale for the provisions of place of suing to be as discussed above, then this Court has power to simply transfer this suit to the place it should have been filed in the first place. This Court is not bereft of substantive jurisdiction but must pay homage to the noble objective of the provisions of Section 15 in ordering the place of suing as it does.

17. This Court upholds the Preliminary Objection under the provisions of Section 15 of The Civil Procedure Act with costs to the Defendant.

However, the suit shall not be dismissed. Instead, the Court orders that it be transferred to the High Court at Embu for hearing and disposal.

Dated, Signed and Delivered in Court at Eldoret this 2nd Day of June 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Oyoo holding brief for Gachuhi for the Plaintiff.

No appearance for the Defendant