



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC. CIVIL APPLICATION NO. 114 OF 2018**

**SHELTER CONVEYOR LIMITED.....APPLICANT**

**VERSUS**

**THE ASSOCIATION FOR THE PHYSICALLY**

**DISABLED OF KENYA (APDK).....RESPONDENT**

**R U L I N G**

1. By its Notice of Motion dated 7/4/2018 and filed in court on 12/4/2018 the application prays that NAIROBI MILIMANI COMMERCIAL COURTS, CMCC No. 8361 OF 2017 be transferred from that court to the Chief Magistrates Court in Mombasa for hearing and final disposal. The grounds for the need for transfer are given to be that the defendant has its registered offices in Mombasa where it also carries out business and that the contract was entered in Mombasa. That application must be seen to further the defendants contention at paragraph 15 of the statement of defence to the effect that the contract was entered in Mombasa where the defendant has offices and carries out business and therefore, the magistrates court in Nairobi has no jurisdiction to entertain and determine the suit.

2. In opposition to the application, the Respondent filed a replying affidavit in which it is contended that the contract for clearance was in Nairobi where the delivery of the suit motor vehicle was also to be made. It was also contended that all the RTGs payments were made in Nairobi and therefore the witnesses as from the bank are based in Nairobi where it is also alleged the motor vehicle got lost.

3. The determination of this application must answer only one question; between the magistrates court sitting in Nairobi and that in Mombasa which is the most convenient place of sitting and determination of the dispute. To me the place of sitting as between different magistrate court registry is more of a question of both convenience and suitability of meeting the overriding objectives of the court as well as meeting the principle of administration of justice in Kenya and not that of jurisdiction. It is enduring constitutional principle that justice shall not be delayed.

4. That enduring principle is carried on and exemplified in the overriding objective provisions which dictate that justice must be administered in a just, expeditious, proportionate and affordable manner. To me these are the underpinning for those provisions at part II of the Civil Procedure Act dealing with place of suing. The provisions of the Act are worded as to leave no doubt that a suit for the recovery of compensation for a wrong to a person or movable property ought to be filed where the cause of action arose or where the defendant resides or carries out business. If however the cause of action arose within the local jurisdiction of one court and away for the local jurisdiction where the defendant resides or carries out business, the plaintiff has the option to choose where to file his suit. That is my reading of Section 14 and 15 of the Civil Procedure Act. Those two provisions are worded, with full explanations as follows:-

**“Suit for compensation for wrong to the person or movables**

**14. Where a suit is for compensation for wrong done 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 court, the suit may be instituted at the option of the plaintiff in either of those courts.**

***Illustration.—(a) A residing in Mombasa beats B in Nairobi. B may sue A either in Mombasa or Nairobi.***

***Illustration.—(b) A residing in Mombasa publishes at Nairobi statements defamatory of B. B may sue A either in Mombasa or Nairobi.***

**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”

5. In the matter before me, the pleadings filed by both sides reveal that there was indeed an agreement to clear and deliver a disclosed motor vehicle by the defendant to the plaintiff which delivery was not effected even though the payments were made to the defendant/Applicant. The only point of departure is where the cause of action arose.

6. It is pleaded by the defendant that the vehicle was lost to armed robbers as the vehicle was being delivered to the Respondent/plaintiff but without stating explicitly where the delivery was due.

7. That pleading is made on the face of the assertion by the plaintiff in the witness statement that the local purchase order indicated the place of delivery to be Nairobi. If the delivery was due in Nairobi and was never made then I do find that the cause of action here accrued when there was failure to deliver in Nairobi and therefore Nairobi was the proper place of suing.

8. Once there was established by pleading that the contract would be concluded by delivery in Nairobi and no such delivery was made, there was established the ingredient that a cause of action had accrued by non-delivery as contracted. That state of facts, isolate Nairobi as the proper place of suing and it should not be open to the defendant to now assert otherwise.

9. Even if the defendant place of business remained Mombasa, the law vested upon the plaintiff the liberty to make a choice to as to place of suing thereof.

10. I therefore do find that the suit was properly filed at the Milimani Commercial Courts in Nairobi and therefore the Application for transfer cannot be granted but must fail.

11. I disallow the Notice of Motion dated 7/4/2018 and award the costs thereto to the Respondent.

12. Before I concludes however, there is a submission made by the applicant while relying on a decision often quoted in application of this nature. That decisions is in *Omwoyo vs African Highlands and Produce Ltd [2002] KLR where Ringera J*, cited with approval the Ugandan decision in *Kagenyi vs Musiramo & Another* for the proposition of law that only a suit filed in a court with jurisdiction can be ordered transferred. That line of submission is clearly self-defeating and difficult to follow. One may only need to say that by law, a magistrates court has jurisdiction throughout the territory of Kenya and as said before the choice of a registry of the lower court is for convenience which is tied to the need of administration of justice that unnecessary costs need be avoided and prompt and proportionate dispensation of justice need be furthered. With the overriding objectives being with us here I hold the view that the current position of the law is that the ends of justice would be the all-important consideration for a court to take regard of.

**Dated and delivered at Mombasa on this 01 day of February 2019.**

**P.J.O. OTIENO**

**JUDGE**