



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

MISC.CIVIL APPLICATION NO. 91 OF 2019

MUCHINA CHRISTOPHER.....1ST APPLICANT

KENINDIA ASSURANCE CO. LTD.....2ND APPLICANT

-VERSUS-

GREAT RIFT EXPRESS SHUTTLE SERVICES LTD..1ST RESPONDENT

RULING

[1] Before the Court for determination is the Notice of Motion dated **23 April 2019**. It was filed by the two applicants, **Muchina Christopher** and **Kenindia Assurance Co. Ltd** pursuant to **Article 159** of the **Constitution Sections 3A, 12, 15, 18 and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; and **Order 51 Rule 1** of the **Civil Procedure Rules, 2010**, for orders that the Court be pleased to transfer **Eldoret CMCC No. 225 of 2017: Great Rift Express Shuttle Services Ltd vs. Muchina Christopher Macharia and Kenindia Assurance Co. Ltd** to the Chief Magistrate's Court at Milimani Commercial Courts, Nairobi, for hearing and determination; and that the costs of the application be provided for.

[2] The application was premised on the grounds that the Respondent filed a suit against the Applicants vide a Plaint dated **8 March 2017** at Eldoret Law Courts; and that at paragraph 4 thereof, it was pleaded that the alleged accident occurred on **14 March 2015** on Waiyaki Way near Kabete in Nairobi; and therefore that the Respondent's intention in filing the suit in Eldoret is forum-shopping. It was further the contention of the 1st Applicant that he resides and works for gain in Nairobi; and that it would cause great inconvenience, hardship and expense for the Applicants and their witnesses if the suit was to be heard in Eldoret. The final ground raised by the Applicants is that there is another matter pending before Milimani Commercial Courts, being **CMCC No. 1832 of 2018**; and therefore it would only be prudent that all these cases be heard at the Milimani Commercial Courts Nairobi as no justification has been given why the Respondent opted to file his suit in Eldoret.

[3] In support of the application, the Applicants relied on the Supporting Affidavit sworn by the 1st Applicant and the annexures thereto, which included the pleadings filed in **Eldoret CMCC No. 225 of 2017** and **CMCC No. 1832 (Milimani Commercial Courts, Nairobi)**. It was thus the averment of the Applicants that, he proposes to demonstrate, at the hearing, that the Respondent's suit is fraudulent; and that this can only be manifest if the two cases are heard in **Nairobi** where the alleged cause of action arose. He added that no prejudice will be suffered by the Respondent on account of the proposed transfer. The Applicant's case was urged by **Mr. Omwenga** who relied on **Article 165(6)** of the **Constitution** and **Section 15(b)** of the **Civil Procedure Act**, as well as the cases of **Kithita Ngeana vs. Mwaniki Kisume [2018] eKLR** and **Zephaniah Ngaira Angweye vs. Rogers Senaji Mulemi and Another [2019] eKLR** to buttress his arguments.

[4] The Respondent resisted the application vide the Replying Affidavit sworn on **10 May 2019** by its Operations Manager, **Simon Ndungu**. According to the Respondent, the application is not only belated, but is also a waste of judicial time, in that it is self-defeating from the standpoint of **Section 15** of the **Civil Procedure Act**. The Respondent asserted that, since the 2nd Applicant is an insurance company carrying out its business throughout Kenya, including **Eldoret Town**, where it owns a building for that purpose by the name **Kenindia Plaza** on **Oginga Odinga Street**, the instant application was filed in abuse of the court process. The Respondent further pointed out that it is common ground that, in the Eldoret matter, the alleged accident occurred on **14 March 2015**; while the Nairobi suit is in respect of an occurrence on **15 March 2015**. In that regard therefore, the Respondent took the stance that the ground that there is another matter pending before the **Milimani Commercial Courts** in Nairobi is untenable.

[5] The Respondent also faulted the Applicants for non-disclosure of a material fact, namely, that they had raised a preliminary objection before the trial court on the ground of jurisdiction and that the same was dismissed by the lower court. Annexed to the Replying Affidavit are copies of the Notice of Preliminary Objection, written submissions in respect thereof and the ruling of the court thereon. Hence, it was the contention of the Respondent that, granted the ruling of the lower court, the only avenue available for the Applicants was to appeal the same.

[6] **Mr. Nabasenge, Advocate**, also relied on **Section 15** of the **Civil Procedure Act** and asserted that the Respondent had the option to sue in Nairobi or Eldoret and cannot therefore be faulted for having filed the suit in Eldoret. He was of the view that no justification had been made for transfer for purposes of **Section 18** of the **Civil Procedure Act**, granted that the Nairobi suit concerns a totally different cause of action by a different party. In reaction to the authorities cited by Counsel for the Applicants, it was the contention of **Mr. Nabasenge** that they are both distinguishable, in that, in the first case, both parties were resident in Mwingi, while in the second case, the trial Judge had been transferred to Mombasa; hence the case was consequently transferred to Mombasa for the purpose of expediting its disposal.

[7] I have given due consideration to the application and all the averments in the affidavits filed herein, including the Applicant's Supplementary Affidavit, in the light of the relevant provisions of the law. I have, likewise, given due consideration to the submissions made herein by Learned Counsel. The approach adopted herein by the Applicants is that it was improper for **CMCC No. 225 of 2017** to be filed in Eldoret, granted that the accident in issue occurred in Nairobi; and that the Defendants also reside in Nairobi for purposes of **Section 15** of the **Civil Procedure Act**.

[8] Accordingly, the contention of the Applicants is that the suit was only filed in Eldoret with the sole intention of forum shopping. In my considered view however, that argument is flawed. This is because is no disputing that, apart from the fact that the 2nd Applicant has its principal office in Nairobi, it also has a branch in Eldoret, and that it does business in that branch at the building known as Kenindia Plaza on Oginga Odinga Street. That being the case, **Section 15(b)** of the **Civil Procedure Act** does acknowledge that:

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 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 Explanation (2) under **Section 15**, it is noted that a corporation shall be deemed to carry on business not only at its sole or principal office in Kenya, but also in any place where it has a subordinate office.

[10] In the circumstances, the Respondent had the option to sue in Eldoret, with leave of the court, provided it is shown, either that the cause of action arose within the jurisdiction of the Eldoret subsidiary office; or that other defendant, the 1st Applicant herein, acquiesced to the filing of the suit in Eldoret Chief Magistrate's Court. From the averments in the affidavit, it appears that there was no such leave or acquiescence; and there is no dispute that the accident occurred in Nairobi and therefore outside the territorial jurisdiction of the 2nd Defendant's Eldoret office.

[11] Nevertheless, the Respondent raised the issue of *res judicata* and submitted that this very issue of jurisdiction was raised before the lower court and that the parties made exhaustive submissions thereon, copies of which have been exhibited herein as annexures to the Replying Affidavit of **Simon Ndungu**. The Applicant's preliminary objection challenged the territorial jurisdiction of the Eldoret Chief Magistrate's Court, and was hinged on **Section 15** of the **Civil Procedure Act**. The ruling of the lower court dated **27 September 2018** shows that the lower court applied its mind to the relevant provisions of the law, including **Sections 11, 14 and 15** of the **Civil Procedure Act** and came to the conclusion that:

"I also agree with the plaintiff's submissions that the 1st defendant being an insurance company, carries on its business throughout Kenya and this suit is therefore properly before this court..."

[12] I would agree that the lower court having so held, the issue of jurisdiction became *res judicata*; and could only be challenged by way of review or appeal. In this respect **Section 7 of the Civil Procedure Act** provides that:

"No Court shall try any suit or issue in which the matter in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title...and has been heard and finally decided by such Court."

[13] Needless to say that the doctrine of *res judicata* applies to interlocutory decisions as well. Hence, in **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 Others) Civil Appeal No. 36 of 1996)**, the Court of Appeal made this point thus:

"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation..."

[14] In the premises, the Principal Magistrate having pronounced himself on that matter of his jurisdiction to hear and determine **CMCC No. 225 of 2017**, the Applicant could only make an approach to this Court by way of an interlocutory appeal if need be; but not by way of a similar application raising the very issue that was determined by the Principal Magistrate.

[15] The foregoing being my view of the matter, I find it pointless to consider the merits of the application and would accordingly strike out the application for transfer dated **23 April 2019**.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 10TH DAY OF JULY, 2019

OLGA SEWE

JUDGE