



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

MISC. CIVIL APPL. NO. 197 OF 2019

WILLIS OWINYAPPLICANT

VERSUS

JAMES GODWIN DIANG'A KETTARESPONDENT

RULING

The Applicant, **WILLIS OWINY**, is the Defendant in the case of **JAMES GODWIN DIANG'A KETTA Vs WILLIS OWINY, KISUMU CMCC NO. 475 OF 2019.**

1. By his application dated 25th October 2019, he sought orders to have that case transferred to the Chief Magistrate's Court, Nairobi.
2. His application is premised on the assertion that he is resident in Nairobi, and also that the cause of action arose in Nairobi.
3. Pursuant to **Section 15 (a) and (c)** of the **Civil Procedure Act**, the Applicant submitted the suit ought to have been instituted where the Defendant resides or where he works for gain.
4. The Respondent, **JAMES GODWIN DIANG'A KETTA** pointed out that the Applicant had admitted that the contract between the parties herein was partly executed in Kisumu.
5. He submitted that although the vehicles which were the subject matter of the suit, had been delivered to the Applicant in Nairobi, the Sale transaction had taken place in Kisumu.
6. It is common ground that the subject matter of the suit was a motor vehicle Registration Number **KCM 644J**.
7. It is further common ground that the Agreed Purchase Price for the vehicle was Kshs 1,100,000/=.
8. In his Defence, the Applicant herein made it very clear that he would challenge the Jurisdiction of the Chief Magistrate's Court, Kisumu, to hear and determine the suit.
9. Having filed the Defence on 14th October 2019, the Applicant moved to the High Court on 30th October 2019, to seek the transfer of the case to Nairobi.
10. The Respondent submitted that pursuant to **Section 15 (1) (c), 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.”

11. Therefore, if the parties entered into the contract at Kisumu, as asserted by the Respondent, the cause of action could be deemed to have arisen in Kisumu.

12. Meanwhile, if the contract was to be performed in Nairobi or if the performance of the contract was to be completed in Nairobi, the cause of action could be deemed to have arisen in Nairobi.

13. Thirdly, if any money was payable in Nairobi, the cause of action could be deemed to have arisen in Nairobi.

14. Accordingly, pursuant to **Explanation (3) (i)**, the suit could have been instituted in Kisumu, if indeed, the oral contract between the parties was entered into in Kisumu.

15. **Section 15 (a)** of the **Civil Procedure Act** stipulates that a suit shall be instituted in a court within the local limits of whose jurisdiction the Defendant, at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain.

16. At paragraph 3 of the Plaintiff, the Respondent acknowledged that the Applicant (who is the Defendant) resides and works for gain in Nairobi.

17. Therefore, the suit could have been instituted in Nairobi.

18. However, it is important to note that pursuant to **Section 15 (c)** of the **Civil Procedure Act**, a suit could be instituted in a court within the local limits of whose jurisdiction;

“.... the cause of action wholly or in part arises.”

19. I find that even if the Defendant was resident in Nairobi, that was not the only place at which suit could be instituted. I so find because **Section 15** of the **Civil Procedure Act** gives three options where suits can be filed as follows;

(a) where the defendant resides, carries on business or personally works for gain, at the commencement of the suit; or

(b) where the defendant, at the time of commencement of the suit, voluntarily resides or carries on business, or personally works for gain, provided either leave of the court is given or if the defendant who does not reside, or carry on business or personally work for gain, acquiesced in such institution; or

(c) where the cause of action, wholly or in part, arises.

20. In this case, the Defendant has not acquiesced in the institution of the suit in Kisumu. Therefore, the 2 options left, for determining where suit could have been filed are either where the defendant was resident, carried on business or personally worked for gain; **OR** where the cause of action arose.

21. Pursuant to **Section 17** of the **Civil Procedure Act**;

“Where a suit may be instituted in one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.”

22. I find that, if the oral contract was entered into in Kisumu, the suit could have been instituted in Kisumu.

23. And as the performance of the completion of the contract was to be done in Nairobi, the suit could be instituted in Nairobi.

24. Coupled with the fact that the completion was to be performed in Nairobi, is the fact that the Defendant is resident in Nairobi and the vehicle that is the subject matter of the suit is in Nairobi.

25. The legislature did not give weight to the place where the Plaintiff is resident, when considering the court at which suit should be filed.

26. Therefore, in my considered opinion, and pursuant to the provisions of **Section 17** of the **Civil Procedure Act** I order that the suit be transferred to the Chief Magistrate’s Court, Milimani, Nairobi, for hearing and determination.

27. In respect to the costs of the application dated 25th October 2019, I order that it shall abide the determination of the substantive suit.

28. In the event the suit is successful, the Defendant will also pay the costs of the Applicant.

29. But if the suit is ultimately unsuccessful, the Plaintiff will pay the costs of the application.

DATED, SIGNED and DELIVERED at KISUMU

This 10th day of December 2019

FRED A. OCHIENG

JUDGE