



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL ADMIRALTY & TAX DIVISION**

**CIVIL SUIT NO. 73 OF 2018**

**GROHE DAWN WATERTECH FITTING**

**DIVISION PTY LTD.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**IDEAL CERAMICS.....DEFENDANT/APPLICANT**

**RULING**

1. This ruling relates to Notice of Motion Application dated 12<sup>th</sup> July 2018, brought under the provisions of sections 1A, 3A and 15 of the Civil Procedure Act and Order 47 Rule 6 of the Civil Procedure Rules. The Applicant is seeking for orders that:-

- a. pending hearing and determination of this Application there be and is hereby issued an order of stay of proceedings in this suit;
- b. the suit be transferred to the High Court in Mombasa for hearing and disposal;
- c. costs of this Application be paid for by the Plaintiff.

2. The Application is supported by an affidavit of dated 12<sup>th</sup> July 2018, sworn by Anish Doshi the Director of Defendant's Company. He deposed that, the Defendant (herein "the Applicant") is a Company with headquarters, Directors and Senior Management staff based in Mombasa and more specifically along Makande Road, next to Brookside Depot in Shimanzi. That the information and documentation relating to all the affairs of the Applicant are made and/or kept and managed in Mombasa, where all its operations are done. Therefore it will be very expensive for the Applicant to proceed with and defend this case in Nairobi.

3. That the Civil Procedure law requires a suit to be filed in the Court within the local limits of whose jurisdiction the Defendant resides or carries on business. The instance in this case, the Defendant as aforesaid is based in Mombasa hence the case ought to have been filed in Mombasa and not Nairobi, and that the Plaintiff filed this case in Nairobi deliberately to frustrate the Defendant/Applicant, hence it is in the interest of justice that this Application be granted and the suit be transferred to the High Court in Mombasa for hearing and disposal.

4. However the Application was opposed by Plaintiff's (herein the "Respondent") vide a Replying Affidavit dated 4<sup>th</sup> September 2018, sworn by Gerald Lunjala, the Regional Account Manager of the Plaintiff's Company. He deposes that the Civil Procedure Act, requires suits arising out of contract be determined either where the cause of action arose or in the place where the contract was made or the place of performing the contract or where the monies related to the suit are payable, and that the decision of the Plaintiff/Respondent to file the suit in Nairobi was informed by the foregoing Civil Procedure laws and rules.

5. That the Distribution Agreement between the parties which is the subject matter of this suit, was signed in Nairobi rendering Nairobi the most suitable place for filing and determining this suit, and that both parties to the suit have their branch offices in Nairobi, thus strengthening the case for suitability of Nairobi as the right place for adjudicating matter.

6. Further that it is untrue and false that the Defendant/Applicant are solely based in Mombasa, as they have by their own admissions, through the printout marked "AD1" annexed to the supporting Affidavit, deposed that that they are based in both Mombasa and Nairobi. Similarly the invoices issued by the Plaintiff /Respondent in relation to the distribution of the Cobra Taps bear, the Nairobi address of the Defendant/Applicant thus disaffirming the Defendant/Applicant's claim that they are solely and entirely based in Mombasa.

7. It was averred that, the parties to the contract which is the subject matter of this suit, intended to have Nairobi as the place for the performance of the contract. Therefore it is in the interest of Justice and fairness for the Court to uphold the terms and conditions of the parties' contract.

8. Finally it is argued that whereas the Defendant/Applicant has a right to instruct a Counsel of their choice, the location of the Advocate's office is not a legally accepted ground for shifting the forum for filing and determination of a suit. If this were the case, most of the suits in the Country will be filed in Nairobi, where most law firms are based, notwithstanding the location of the subject matter.

9. The Applicant's averments that the suit should be transferred to Mombasa on the ground that the information and documentation is kept in Mombasa is flimsy and is a strategy aimed at delaying the conclusion of the matter. The contract documents referred are neither bulky nor permanently affixed to their offices so can easily and conveniently be moved around. Therefore the Application herein is vexatious, obviously ill-founded, an abuse of the court process and an attempt to delay determination of the matter herein, noting that the Defendant/Applicant do not dispute the debt.

10. I have considered the Application and the reasons advanced in support and in opposition thereto. The Application is founded on the provisions of section 15 of the Civil Procedure Act which states 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;

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.

11. I have considered the application and I find that it is premised on the following conditions of the law; Section 15 of the Civil Procedure Act which states 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.

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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.

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12. And Order 47 of the Civil Procedure Rules which states as follows:-

“ [Order 47, rule 1.] Institution of suits in High Court.

1. Every suit in the High Court may be instituted at the central office of that court situate in Nairobi or in a District Registry.

[Order 47, rule 2.] Schedule of District Registries and areas.

2. (1) There shall be District Registries and Deputy Registrars of the High Court at the places and for the areas set out in the Schedule in Appendix G.

(2) The Chief Justice may by notice in the Gazette amend the Schedule to subrule (1) by the addition or deletion of any area, place of Registry or District Registrar or by the variation of any area.

[Order 47, rule 3.] Title of suits filed in a District Registry

3. Suits filed in a District Registry shall be intitled as suits in “The High Court of Kenya at .....(District Registry)”, and shall be serially numbered in that Registry.

[Order 47, rule 4.] Suits filed in a registry remain there when all defendants\* reside within that area.

4. Where the defendant resides or carries on business, or all the defendants (if more than one) reside or carry on business within the area in the District Registry whereof a suit has been instituted, all when all proceedings shall be taken in such registry subject to any order fixing reside within that the place of trial made by the court under rule 8.

[Order 47, rule 5.] Proceedings against the Government.

5. Notwithstanding anything in rule 4, in any civil proceedings against the Government the defendant shall for the purposes of this Order be deemed neither to reside nor to carry on business within the district of any District Registry.

[Order 47, rule 6.] Place of trial. 6. (1) Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such place as the court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.

(2) The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:

Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.

[Order 47, rule 7.] All preliminary steps taken before the District Registrar.

7. In a suit proceeding in a District Registry all formal steps preliminary to the trial and all interlocutory applications shall, in the absence of a judge, be made and taken before the District Registrar; and when such suit is ready for trial it may be set down for hearing before a judge sitting at the place of the Registry.

[Order 47, rule 8.] Appeal from decision of District Registrar.

8. (1) Any person affected by any order or decision of a District Registrar made in any preliminary step or upon an interlocutory application may appeal to a judge; and such appeal may be made notwithstanding that the order or decision was in respect of a proceeding or matter as to which the District Registrar had jurisdiction only by consent.

(2) Such appeal shall be by way of endorsement upon the record by the District Registrar at the request of any party within fourteen days from the making of such order or decision, and the record bearing such endorsement shall forthwith be sent to the registrar of the High Court who shall give such directions for the hearing of the appeal as he may consider reasonable.

(3) The hearing of an appeal under this rule shall be before a judge in chambers.

[Order 47, rule 9.] Taxations in District Registries.

9. A District Registrar with regard to suits tried in his area shall have the same power of taxing costs as the registrar has as a taxing officer under any Rules of Court, and all such rules shall apply to the taxation of costs by a District Registrar.

[Order 47, rule 10.] Appeals from subordinate courts.

10. An appeal from a decree or order of a subordinate court to the High Court may be filed in the District Registry within the area of which such subordinate court is situate;

and the District Registrar shall, upon the payment to him of all fees, endorse the date of filing upon the memorandum of appeal, and forward the papers to the High Court Registry in that area for hearing and disposal.

13. However, I note that the provisions of the Civil Procedure Act that determines where a suit will be instituted are provided for under Section 11-15 of the CPA. Section 11 provides for the court in which the suit should be instituted. Section 12 provides that a suit shall be instituted where the subject matter is situate. Section 13 and 14 deals with suits for immovable and movable property respectively, while section 15 deals with the institution of suit where the defendant resides or where the cause of action arises.

14. It is therefore clear that Section 15 deals with two issues where the Defendant resides or cause of action arises.

15. In the instant case, it is averred that the Defendant Company and its Senior Managers are situated in Mombasa. The documents to be used in this matter are held in Mombasa. And therefore the Defendant will incur a cost if the matter were heard in Nairobi. However, the Plaintiff/Respondent argues that the Defendants have a branch office in Nairobi and that the contract which is the subject matter was executed in Nairobi. In addition the Plaintiff has no office in Mombasa.

16. I have considered the documents annexed to the respective affidavits and I find as follows:-annexture "AD1" is a letter head of the defendants/Applicant and shows its address as follows:-

Corporate Head Office:

Makande Road, Next to Brookside Deport,

Shimanzi, Mombasa,

P. O. Box 82271-80100,

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Nairobi: Westlands, Jalaram Rd T:0718000 006

Mombasa Rd: T: 0718 000 007

Mombasa: Shimanzi, Makande Rd: T: 0718000 008

Nyali. Opp. City Mall T: 0718 000 009

17. It therefore clearly shows that the Applicants have an office in Nairobi. However annexure AD2 which is the PIN certificate indicates their registered address to be in Mombasa. To support the averments that the Defendants/Applicants have an office in Nairobi, the Plaintiffs have annexed on the RA a Distribution Agreement marked "GL1" which is said to have been executed in Nairobi which averments are not disputed. In addition, the Plaintiffs/Respondents have annexed several commercial invoices and airway bills which shows the

Defendants/Applicants address as follows:

Ideal Ceramis Limited

P.O. Box 82271

Nairobi.

Kenya

18. In conclusion I find that it is a fact that the Defendants/Applicants have been operating a branch/office in Nairobi although their main office is in Mombasa.

19. The Plaintiffs on the other hand have no office in Mombasa. It is also not disputed that the contract which is a subject matter herein, was executed in Nairobi. To order that this matter be transferred to Mombasa will have the same effect on the Plaintiff who will have to incur expense costs of transferring witnesses to Mombasa. Therefore the very issue that the Defendant is complaining of will affect the Plaintiffs. In the given circumstances, there is no justification to transfer this matter and I therefore disallow the application. The costs thereof to be in the cause.

20. Those are the orders of the Court.

**Dated, delivered and signed in an open Court this 9<sup>th</sup> day of October 2018**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Wesonga holding brief for Mr. Bwire for the Plaintiffs/Respondents

Mr. Akhulia holding brief for Mr. Oluga for the Defendants/Applicants

Langat.....Court Assistant