REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 191 OF 2016

FRANCIS MWANGI GITHUKU.....1ST APPELLANT

VERONICA NYAMBURA MBURU…….....2ND APPELLANT

VERSUS

JANE WAMBUI KINGARI.....1ST RESPONDENT

MICHAEL IRUNGU GITHII…….....2ND RESPONDENT

(Being an Appeal from the Ruling delivered by the Hon B. N. Ireri (Mr), Principal Magistrate delivered on the 21st July, 2016)

JUDGMENT

1. Section 15 of the Civil Procedure Act governs theappropriate place to institute civil suits. It provides as follows:

> 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
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> (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
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> (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*.(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.
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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.

2. In this case, the Plaintiff instituted suit at Thika Law Courts. The subject matter is breach of contract. It is undisputed that the Defendants reside in Nairobi.

3. In the court below, the Defendants took objection the place of suing. The Plaintiff insisted that Thika was an appropriate place. The Learned Trial Magistrate heard the parties and gave a reasoned ruling holding that Thika was an appropriate location for the suit and that the Thika Law Courts had jurisdiction to hear and determine the suit.

4. In pertinent part, the Learned Magistrate ruled as follows:

> However, having looked at paragraphs 1 and 2 of the Plaint, it is indicated that the Plaintiffs work for gain and at Ruiru (sic) which is well within the jurisdiction of this Honourable Court. I also note from the annextures that the money involved herein was paid at Ruiru Family Bank which is well within the jurisdiction of this Honourable Court and in light of section 15(c) of the Civil Procedure Act then this Court would have the requisite jurisdiction to try this matter.
>
> Further, paragraphs 3 and 4 of the Plaint describe the Defendants as residing and working for gain within Nairobi and trading as Lake Naivasha Institute. I note that in Paragraph 1 of the Defence, the Defendants admit the descriptive paragraphs of the Plaint which I have referred to herein, the Defendants in paragraph 13 of the Defence have expressly admitted the jurisdiction of this court, the defendants cannot and should not be allowed to now turn back and state that the court has no jurisdiction, this would be tantamount to promoting an abuse of court process which this Honourable Court will not allow.

5. Hence, it would appear that the Learned Magistrate based his ruling on three points:

> a. That the Defendants had not contested the Plaintiffs' descriptions of the parties in their Statement of Defence;
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> b. That Under Explanation 3 of section 15(c), part payment of the contract was to be done in Ruiru which is within the geographical jurisdiction of Thika Law Courts; and
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> c. That jurisdiction was admitted in the pleadings anyway and parties must be bound by their pleadings.

6. The Learned Magistrate dismissed the Defendant's objections on jurisdiction. The Defendants are aggrieved and have approached this Court on appeal.

7. During the oral hearing of the appeal, Mr. Change appeared for the Appellant. On each of the three grounds relied on by the Learned Magistrate, he addressed me as follows:

> a. On the ground that the Defendants had not contested the Plaintiffs' descriptions of their place of abode, he conceded the point – but pointed out that, therefore, the suit should be filed in Nairobi and not Thika.
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> b. On the place where the subject matter is situate, Mr. Change was adamant that it is Naivasha and not Ruiru. The subject matter of the contract, he argued, was a partnership agreement over Lake Naivasha Institute – a college based in Naivasha town. Further, he argued that the account to which any sums were to be paid pursuant to any agreement between the parties is in Thika. Lastly, he

argued that the Learned Trial Magistrate misapplied Explanation 3…

c. On the issue of admitted jurisdiction in the Statement of Defence, Mr. Change relied on the Supreme Court Case of Yusufu…. To argue that it is not possible for the parties to confer jurisdiction on a court by agreement or waiver of right to object.

d. Finally, Mr. Change faulted the Learned Trial Magistrate for basing his decision on the place of residence of the Plaintiff.

8. On his part, Mr. Kamonjo made three arguments:

a. First, he argued that the Learned Trial Magistrate did not base his argument on the residence of the Plaintiff. This was not the *ratio* of the decision, Mr. Kamonjo argued. The *ratio* of the decision is based on the place of performance of the contract which, Mr. Kamonjo argued, was in Ruiru since that is where the Plaintiff paid the money.

b. Second, Mr. Kamonjo argued that the agreement was to be made in Ruiru – meaning that place of the contract was Ruiru.

c. Third, Mr. Kamonjo argued that under section 5 of the Civil Procedure Act, courts can try all suits unless barred.

9. I can easily make the following determinations off-hand:

a. The place of suing never depends on the place or residence or business of the Plaintiff. To the extent that the Learned Trial Magistrate intimated that that was a ground for his findings in holding that Thika Law Courts was the appropriate place to sue, that was a misdirection.

b. Jurisdiction cannot be conferred by the parties – so a party who admits or acquiesces to jurisdiction in his pleadings can still raise it as a bar to a suit at a later stage in the proceedings.

10. It is also clear from the pleadings that the Defendants live and work for gain in Nairobi. Therefore, if the place of residence or business will be the jurisdictional hook, then, the appropriate place for the suit would be Nairobi's Milimani Commercial Courts and not Thika Law Courts.

11. It seems to me that Mr. Kamonjo sought to base his jurisdiction on two theories:

a. One, Mr. Kamonjo argued that the contract was partly performed in Ruiru because that is where the monies were paid.

b. Two, Mr. Kamonjo contended that the contract was to be entered into in Ruiru.

12. Respecting the first argument, Mr. Kamonjo's contention is that this was a claim for a breach of contract and the contract was partly performed in Ruiru – which would give Thika Law Courts a jurisdictional hook in the case. The argument here is that the Plaintiff paid the amounts in Ruiru within the local limits of Thika Law Courts. Mr. Change countered that the amounts were only paid in Ruiru because that is where the Plaintiffs had an account; that, in fact, there is no logical sense in which one can say the amount was paid in Ruiru since it could have been deposited into the account of Lake Naivasha Institute from any place in the Republic.

13. Mr. Change is surely right. The place where money is deposited in a bank does not establish a jurisdictional hook in a claim. If the opposite were true, the results would be absurd. One could travel all the way to any part of the country (or world) to access a bank in which to transmit funds in a business transaction in order to establish a jurisdictional hook in the place where the bank is located. In my view, the only time the place where money is paid can establish a jurisdictional hook is when the contract specifies where the monies are to be paid or where the monies are actually paid in cash or cheque at a

particular location. In such a case, one can logically say the contract was performed or monies were paid at a particular location. Consequently, this theory is unavailing for the Plaintiffs.

14. A separate inquiry would be whether the fact that the contract was to be made in Ruiru provides that jurisdictional hook to Thika Law Courts as Mr. Kamonjo argues in his second point. The Respondent claimed that the partnership agreement was to be signed in Ruiru and that, therefore, the case could be filed in Thika as the place of contract. Unfortunately for the Respondent, the place where the contract was to be signed is not pleaded and is, therefore, not before the Court. It cannot, therefore, not be used as a basis for grounding geographical jurisdiction.

15. Fortunately for the Respondent, I do not think this ends the analysis. I have perused the pleadings in the Court below. It seems quite plain to me that this is not a suit sounding in contract. Paragraphs 6-12 of the Plaint are clear that no contract was ever entered between the parties. Mr. Kamonjo argued as much on appeal: the argument was that the contract would have been entered in Ruiru. No contract was ever signed or concluded. In other words, monies were paid in anticipation of a contract; a Partnership Agreement. The real claim, therefore, is that the Defendants, then, failed to conclude the contract despite the monies paid in anticipation of the contract.

16. It seems to me, therefore, this is a suit sounding in unjust enrichment or promissory estopped (if the cause of action exists in Kenya) not contract. In reality, what the Respondent can recover is not damages for breach of a contract which was never concluded but for disgorgement of funds paid to the Defendant in anticipation of a contract and which the Defendant has refused to pay. Alternatively, the Respondents are claiming for damages for a promise to conclude a contract by the Defendants which they relied on, to their detriment, and that an injustice can only be avoided by enforcement of the contract. That, anyway, is the theory of the Plaintiff's case. In other words, this is an action for a refund, with interests, of monies paid to the Defendants or for damages for detrimental reliance on the promises made by the Defendants. This, therefore, is a claim sounding in what used to be called ?money had and received? or, in the very old days of forms of action it was known as *indebitatus assumpsit*. In modern parlance is known as a claim in restitution or ?implied in law contract?. An American decision, ***Rotea v. Izuel (1939) 14 Cal.2d 605, 611 [95 P.2d 927]*** defined it as such:

> The action for money had and received is based upon an implied promise which the law creates to restore money which the defendant in equity and good conscience should not retain. The law implies the promise from the receipt of the money to prevent unjust enrichment. The measure of the liability is the amount received.' Recovery is denied in such cases unless the defendant himself has actually received the money.

17. Alternatively, Respondents' claim is one based on detrimental reliance on promises allegedly made by the Defendants. The doctrine of promissory estoppel simply holds that when a person has induced another to reasonably rely on a promise, then that person should compensate the other person for any harms the other person has suffered in reliance of that promise. The doctrine, as a cause of action, is now captured in the American Restatement (2nd) of Contracts in section 90 thus:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.
>
> (2) The remedy granted for breach may be limited as justice requires.

18. In either cases, it seems to me that the claim the Plaintiff is not a claim in contract though it is based on a promise or promises allegedly made by the Defendants. Those alleged promises were made in Ruiru. That fact is plain from the Plaint. It follows, then, that the cause of action wholly arose in Ruiru and that the pleadings clearly establish that fact. Consequently, by dint of section 15(c) of the Civil Procedure Rules, Thika Law Courts within the local limits of which the alleged promises were made, is the appropriate place for suing since that is where the cause of action wholly arose.

19. Consequently, and for the reasons above, I will dismiss the appeal with costs.

Dated and delivered at Kiambu this 3rd day of March, 2017.

JOEL NGUGI

JUDGE