



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 397 OF 2012**

**JUSTUS MUNYINYI MACHARIAT/A**

**GUSII PROPRIETARY CLUB.....PLAINTIFF**

**VERSUS**

**DAKIANG'A DISTRIBUTORS LIMITED.....DEFENDANT**

**RULING**

1. The Application before me is a Notice of Motion dated 7<sup>th</sup> August, 2012 and filed on 13<sup>th</sup> August, 2012 wherein the Defendant has sought orders for the transfer of this suit to the District Registry, High Court at Kisii for hearing and determination. The Motion is anchored on Sections 15 and 19 of the Civil Procedure Act and Order 47 Rule 6 (2) of the Civil Procedure Rules, 2010. The grounds for the application are contained on the face of the motion and in the Supporting Affidavit of Lydia Nkirote Manene sworn on 7<sup>th</sup> August, 2012.

2. It was deponed that it is in the interest of justice that the instant suit be transferred to the High Court of Kenya at Kisii as the cause of action arose within the local jurisdiction of that Court. That at all material times the Plaintiff was carrying on business within Kisii Municipality where the defendant's registered offices were also located.

3. Mr. Nyanyuki, Learned Counsel for the Plaintiff submitted that Section 15 of the Civil Procedure Act is coached in mandatory terms with regard to the place of suing, that in view thereof the High Court at Kisii had the geographical jurisdiction to entertain the matter since the cause of action arose in Kisii County a fact that has been admitted by the Plaintiff in Paragraph 3 of the Plaintiff. It was further submitted that the Defendant intended to call and rely on witnesses who reside and work for gain within the Kisii Municipality. That in addition, the Defendant intended to put forth a case that would require the court to visit the Plaintiff's stores situated within the Kisii Municipality. It was therefore the contention of the Defendant, that having the matter heard in the Nairobi High Court would increase costs for the Defendant if the prayers sought in the application were not granted.

4. Opposing the Application, the Plaintiff filed a Replying Affidavit of Justus Munyinyi Macharia sworn on 13<sup>th</sup> September, 2012. It was contended that the Defendant's application lacked merit as the Defendant's intention was to have the suit transferred to a station where it could manipulate the court file and cause delay. The Plaintiff averred that the present suit was precipitated by the wrongful eviction of

the Plaintiff by the Defendant from the suit premises. That this prompted the Plaintiff to file a Reference to the Business Premises Tribunal whereby the Tribunal found in favour of the Defendant. That thereafter, the Plaintiff filed an appeal on 1<sup>st</sup> December 2005 in the High Court in Nairobi in **HCCA No. 950 of 2005 Justus Munyinyi Macharia Vs Dakianga Distributors Limited** where the appellate proceedings were conveniently held. It was contended that the Defendant did not raise the issue of prejudice during the pendency of the appeal proceedings and cannot therefore raise the same in the instant suit.

5. Learned Counsel for the Plaintiff, Mr. Nduati submitted that the court found in favour of the Plaintiff in the **HCCA No. 950 of 2005** on the issue of liability, that the Court thereafter directed that the Plaintiff file a fresh suit with regard to the compensation for loss and damages. Mr. Nduati therefore argued that the cause of action did not arise from the suit premises as alleged by the Defendant as the matter before the court was the award of damages to the Plaintiff for the Defendant's wrongful acts. It was therefore submitted that in matters of compensation, Section 14 of the Civil Procedure Act stipulate that the Plaintiff has the right to elect where to institute the suit and as such Section 15 of the Civil Procedure Act was subject to Section 14. In the foregoing, Counsel to the Plaintiff urged the Court to dismiss the Application.

6. I have considered the Affidavits on record and the oral submissions of counsel. In addition to Sections 15 and 19 of the Civil Procedure Act, the Defendant predicated its application on the provisions of Order 47 Rule 6 (2) of the Civil Procedure Rules, which gives the High Court the power to invoke its inherent jurisdiction and transfer a case from one High Court Registry to another. Further, Sections 1A and 1B of the Civil Procedure Act introduced the overriding objective of the Act and the Civil Procedure Rules made thereunder. The overriding objective is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act. In the case of **John Gakure & 148 Others vs. Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007**, Waki, JA expressed himself thus:-

***“Jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court's view, dealing with a case justly includes inter alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases”.** (Emphasis added)*

7. In this regard, it is the court's view that in all proceedings, parties and their advocates are under a statutory duty to assist the court to further that overriding objective. Likewise, the Court is under a statutory obligation, while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder, to give effect to the overriding objective. In order to attain this objective, the court must strive towards ensuring the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources and the timely disposal of the proceedings at a cost affordable by the respective parties. See the case of **Hangzhou Agrochemical Industries Ltd -Vs- Panda Flowers Limited (2012) eKLR**.

8. This then brings me to the issue of the circumstances under which the court may direct that a matter filed in a particular High Court registry be heard in a different place. In the case of **Rapid Kate Services Limited vs. Freight Forwarders Kenya Limited & 2 Others [2005] 1 KLR 292 Emukule J** stated as follows :

***“Whereas under Rule 5(2) of Order 46 the Court has a wide and flexible discretion to order that a case be tried in a particular place, that discretion may however be exercised upon cause being shown, and that cause shall have regard to the convenience of the parties, and of the witnesses, the date of when the trial shall take place, and the circumstances of the case. The Court's power to transfer proceedings from one Court to another is a useful corrective measure to ensure that proceedings wherever began or whatever forum the plaintiff has initially chosen, should be dealt***

*with or heard or determined by the Court most appropriate or suitable for those proceedings. When making or refusing an order for transfer the Court will have regard to the nature and character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power of the Court under Section 3A of the Civil Procedure Act.. Although there is only one High Court in Kenya which sits in different areas as directed by the Chief Justice (as opposed to subordinate courts established under various laws) it is not forbidden for a Kenyan High Court sitting in one location to order a transmission or allocation of a case file before him to another judge sitting in another location. It must be a matter of discretion for the judge and it must be for compelling reasons which would be for the purposes of ensuring justice and this is all within the inherent power of the Court under section 3A of the Civil Procedure Act. (Emphasis added)*

9. It is then clear from the above cases that when considering whether or not to transfer a suit, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. The Court must also factor in the expense which the parties in the case are likely to incur in transporting and maintaining the witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of each particular case. See the cases of **Hangzhou Agrochemical Industries Ltd (supra)**, **David Kabungu Vs Zikarenga & 4 Others Kampala HCCS No. 36 of 1995**, **Atta (Kenya) Ltd Vs Nesfood Industries Ltd (2012) eKLR** and **Francis Gathogo Vs Evans Ondansa & Anor. (2007) eKLR**. Consequently, the issue for determination in this application is whether the Defendant has provided sufficient reason for the Court to exercise its discretion in its favour and transfer the instant suit to the District Registry in the High Court at Kisii.

10. With regard to the nature and character of this suit, it is not disputed that the parties herein had a landlord-tenant relationship which the Defendant sought to terminate on 16<sup>th</sup> December 2004 by a issuing the Plaintiff with a Notice. After the issuance of the notice to terminate that relationship, the Plaintiff filed a reference at the Business Premises Tribunal, which consequently ruled in favour of the Defendant. Aggrieved by this decision, the Plaintiff filed HCCA No. 950 of 2005 in the High Court at Nairobi, which overturned the decision of the Business Tribunal and found that the notice issued by the Defendant for the termination of the tenancy was contrary to law.

11. In paragraph 53 of the Judgment in that appeal, the court held that it could not order the reinstatement of the tenant into the premises, since the Defendant had since demolished the suit premises. As such the court found that the Plaintiff was entitled to damages for the wrongful conduct of the Defendant and that in the circumstances, the parties were granted liberty to address the court on the assessment of quantum of damages that the court was likely to award. In this regard, I agree with the Plaintiff that the instant suit arises from **HCCA No. 950 of 2005 (supra)** as the court had already determined the question of liability. The nature and relief that the Plaintiff is therefore seeking is that of damages which this court has the jurisdiction to determine.

12. However, the Defendant is not amenable to the suit being heard and determined at Nairobi on the ground that the cause of action arose in Kisii County. That it intends to call witnesses who reside and work for gain in Kisii County. Further, the Defendant contended that it planned to put forth a case that will most likely require the court to visit the Plaintiff stores situated within Kisii Municipality. That owing to this, the Defendant would be forced to incur extra costs to its detriment if the case is heard at Nairobi. The Defendant therefore submitted that it was in the interest of justice to have the matter heard at the Kisii High Court as this would save on the costs. The Plaintiff did not seriously challenge this position. He contended that under Section 14 of the Civil Procedure Act, he had the liberty to institute a suit anywhere he elected. That may be so, but I find that under Section 1A, 1B and 3A of the Civil Procedure Act and under Order 47 rule 6 (2) the Court is enjoined to consider whether the Defendant has made out a strong case for the transfer of a suit.

13. In paragraph 4 of the his Replying Affidavit, the Plaintiff deponed that:-

***“ 4. THAT I strongly believe it is intended to have the suit transferred to a station where the defendant can manipulate the file and frustrate and/or embarrass the expeditious determination of the matter”***

Despite such grave allegation, the Plaintiff did not offer any proof as to why he would believe that the Defendant planned to manipulate the court process at the Kisii High Court. It is not in dispute that the High Court is perfectly entitled, where it deems appropriate, to direct that a matter filed in one place be heard by the same Court sitting at a different place. The mere fact that the change of venue may involve the change in the presiding officers concerned does not derogate from the fact that it is still the same High Court hearing the matter. A Judge of the High Court is a Judge wherever he is and carries with him the jurisdiction of that court. The mere posting to different stations is, in my view, simply an administrative arrangement which does not deprive the Judge of his Constitutional mandate.

14. In this case, the Defendant has enumerated various factors in a bid to persuade the court to transfer the suit. Such include the fact that the matter arose from a premises located in Kisii County and it intended to call witnesses that were resident in that area. No doubt that the Defendant is likely to incur unwarranted expenses in transporting and maintaining the witnesses to attend and give evidence in court at Nairobi. This in essence is bound to be prohibitive and might deny the Defendant justice. The mere fact that **HCCA No. 950 of 2005 (supra)** was determined in Nairobi does not bar the Defendant from seeking the leave of this court to have the suit transferred to the High Court at Kisii. The trial of the Appeal did not require attendance of witnesses or visiting the premises as contended by the Defendant. In this suit however, it has been deponed by the Defendant that witnesses will be called from Kisii. This was not challenged or denied by the Plaintiff. In this court’s view therefore, the High Court at Kisii has the jurisdiction to assess and determine the issue of damages. In as much as the Plaintiff craves justice, the Defendant also has a right to have its case heard in a court in which it would be able to produce witnesses without undue delay or expense to prove its case. As a general rule, the court should not interfere with the Plaintiff’s right under Section 14 of the Civil Procedure Act, unless the expense and difficulties of the trial would be such as to lead to an injustice. Since the Plaintiff has not convinced the court that he will be prejudiced by the transfer of the suit as sought, the Defendant’s prayer is merited.

15. In the premises I allow the Defendant’s Notice of Motion dated 7<sup>th</sup> August, 2012. I direct that this Suit be heard by the High Court sitting at Kisii. Accordingly, this file will be transferred to Kisii High Court Registry where further proceedings will be undertaken. Accordingly, the Plaintiff will bear the costs of this application.

**DATED and SIGNED at BUNGOMA this day 20th of February, 2014.**

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**A. MABEYA**

**JUDGE**

**DELIVERED and SIGNED at NAIROBI this 5<sup>th</sup> day of March, 2014**

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**J.B. HAVELOCK**

**JUDGE**