



ATTA (KENYA) LIMITED.....PLAINTIFF

VS

NESFOOD INDUSTRIES LIMITED..... DEFENDANT

RULING

1. This ruling addresses a preliminary objection by the Defendant dated 11th June 2012 and filed on 12th June 2012.
2. The objection is premised on the fact that this court lacks jurisdiction to hear this suit as the cause of action arose in Mombasa. The contract was made in Mombasa; the contract was to be performed in Mombasa and the parties carry on business in Mombasa.
3. Counsel for the Defendant Mr. Kabahaki submitted that Section 15(a) of the Civil Procedure Act requires suits to be instituted in a court within the local limits of where the defendant carries on business. Section 15 (c) requires that suits be filed where the contract was made or where it was to be performed or where money was to be paid. He submitted that the Plaintiff's and Defendant's physical addresses were in Mombasa and that is where the contract was entered into. The contract was also to be performed in the same geographical location and which is where money was also to be paid. This court therefore lacked geographical jurisdiction to hear the matter. He further described the move to file the suit in Nairobi as amounting to forum shopping.
4. On his part, Mr. Omuga for the Plaintiff submitted that the preliminary objection was merely a delaying tactic. He told the court that under Article 165(3) of the Constitution of Kenya, 2010, this court had unlimited jurisdiction in criminal and civil matters. The Civil Procedure Act as an Act of Parliament could not override the Constitution. He further argued that Section 15 of the Civil Procedure Act only applies to subordinate courts. He cited the case of **Riddlebarger vs. Robson & Others Civil Appeal No. 20 of 1958** for this proposition. This court therefore had jurisdiction to hear the matter. He dismissed as misplaced the argument that filing the suit in Nairobi amounted to forum shopping.
5. In reply, Mr. Kabahaki clarified that the Defendant was not contesting the jurisdiction of this court but was driven by the need to uphold access to justice by ensuring that costs of litigation were ameliorated. That is why there are High Court stations in several geographical locations around the country.
6. I have considered the preliminary objection based on the rival arguments of counsel for the parties.
7. The legal question arising from the objection is whether one station of the High Court would lack jurisdiction to try a matter instituted before it on grounds that the cause of action arose in a geographical location nearer to or within the location of another High Court within the context of Section 15 of the Civil Procedure Act.
8. The purport of Section 15 of the Civil Procedure Act is to ensure that suits are filed in the place that is most convenient and cost effective. The ingredients of where the cause of action arose, where

performance of the contract to be carried out, where the parties reside and where parties carry on business are all indications that a party should not be inconvenienced by the institution of suits.

9. The Plaintiff submitted that Section 15 of the Civil Procedure Rules was only applicable to subordinate courts hence the objection lacked merit. Having studied the whole procedural regime under the head of place of suing beginning Section 11 of the Act to Section 18, I am unable to fully disassociate myself with this argument. This is because Sections 17 and 18 which deal with transfer of suits do not expressly contemplate transfer of suits as between one High Court to another. The only aspect as to why it should be possible to transfer a suit from one High Court to another on grounds of jurisdiction under the Civil Procedure Act is that the definition of “court” in the Act includes High Court. Otherwise Sections 17 and 18 of the Act are explicit that they deal with suits filed in subordinate courts.

10. Be that as it may, given that the Constitution of Kenya Act, 2010 gives this court unlimited original jurisdiction in civil and criminal matters, and given the supremacy of the Constitution over the Civil Procedure Act, and given further that Article 159 (2) (d) of the Constitution vouches for substantive justice even in the face of procedural technicalities, a party seeking to oust the jurisdiction of one station of the High Court in favour of another, must, in my view go beyond the face value of the tenets of convenience stipulated in Section 15 of the Civil Procedure act. At the minimum, the applying party must demonstrate that the right of access to justice under Article 48 of the Constitution is at threat. This should be advanced by placing before the court material showing that beyond the pillars of convenience stipulated in Section 15 of the Civil Procedure Act, there is a verifiable motive on the part of the Plaintiff to use geographical inconvenience to defeat the substantive ends of justice. A mere apprehension of such a possibility may not suffice. Further, the Applicant should demonstrate that it has come to court at the earliest opportunity with its request.

11. In addition, it should not be lost that where a party files suit in a station that is not necessarily the most convenient under the threshold of Section 15 of the Civil Procedure Act, that party exposes itself to the punishment of having to shoulder considerably higher costs and must be prepared to meet such costs of the counterparty, in the event that the claim fails.

12. In the present matter before the court, I am, from my review of the nature of the claim, unable to discern any deliberate move by the Plaintiff to use the forum of instituting suit as a weapon of inconvenience to the Defendant. The claim in this matter is substantially supported by documentation and is not of the nature that either party would need to invest heavily on witnesses. Secondly, the Defendant has substantially submitted itself to the jurisdiction of this suit by filing a statement of defence and a detailed response to the application for summary judgment by the Plaintiff. Thirdly, both parties have already appointed advocates based in Nairobi without any indication of difficulty. I am therefore not convinced that it is in the interest of either party at this stage of the litigation to have the matter transferred to Mombasa for disposal.

13. In the result, the Defendant’s Preliminary Objection fails and is hereby dismissed with costs to the Plaintiff.

14. The parties may fix the Notice of Motion application dated 17th May 2012 for hearing and determination by this court on a date suitable to them.

IT IS SO ORDERED.

DATED, SIGNED and DELIVERED in Nairobi this 5th day of July 2012.

J. M. MUTAVA
JUDGE