



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**MISCELLANEOUS CIVIL APPLICATION 298 OF 2012**

**NUTECH SYSTEM AND TRADING COMPANY LTD .....APPLICANT**

**VERSUS**

**EAST AFRICAN EXCAVATION CO LTD.....RESPONDENT**

**R U L I N G**

These proceedings were originated by way of a Notice of Motion dated 30<sup>th</sup> May 2012 by which the applicant is seeking the transfer of Bungoma Chief Magistrate's Civil Suit No. 739 of 2011 in which the respondent is the plaintiff while the applicant is the defendant to Milimani Chief Magistrate's Court, Nairobi for hearing and disposal. The reason for the said application is indicated in the only ground therein and that is that the Chief Magistrate's Court at Bungoma has no jurisdiction to hear and determine the Civil Suit No. 739 of 2011

On being served with application the respondent filed both a replying affidavit and notice of grounds of objection. When the matter came up before me on **Mr Ojienda**, learned counsel for the respondent insisted on the preliminary objection being heard first. That objection is the subject of this ruling. In the said notice the respondent raises the following issues:

- 1. The Defendant said Notice of Motion incurably defective it contravenes the mandatory provisions of the Civil Procedure Act and Rules.**
- 2. Section 18 of the Civil Procedure Act envisages an application for transfer of suit when the same is pending before it. This is not the case in this application.**
- 3. The cause of action arose in Malaba which is within the jurisdiction of the Chief Magistrate's Court in Bungoma.**
- 4. There is no pending suit in Misc Application No. 298 of 2012 which is capable of being transferred.**
- 5. The Defendants said Notice of Motion is an abuse of the court process and should be struck out with costs.**

In his submissions **Mr Ojienda** contended that the application is based on speculative issues as to where the agreement was entered into. He submitted that the Amended Complaint does not indicate where the contract was entered into but rather where the wrong was committed which is Malaba. Since paragraph 3 of the supporting affidavit is speculative the same is scandalous and should be struck out under Order 19 rule 6 of the Civil Procedure Rules. It is further submitted the order which led to the release of the goods in question was in Bungoma case and therefore under sections 14 and 15 of the Civil Procedure Act the suit can be filed where the wrong was committed or in case of a corporation like in this case where it carries on business. Accordingly, it is submitted that the Court has jurisdiction and this application should be struck out.

On his part **Mr Owino**, learned counsel for the respondent opposed the said objections submitting the application is properly before the Court since section 18 of the Civil Procedure Act gives the Court jurisdiction to withdraw a suit from any subordinate Court and referred more specifically to section 18(1) (b)(i) and (ii) of the said Act. Counsel submitted that the Chief Magistrate's Court at Bungoma is not competent to try and dispose of the suit. In determining the preliminary objection, counsel submitted that the court must take the contents of the supporting affidavit as true that the cause of action was in respect of goods which were on transit from Kilindini in Mombasa to Juba in South Sudan. According to counsel the cause of action is the agreement for transportation of goods hence the suit must be instituted where the cause of action arises or where the defendant resides and in this case, both the defendant and the plaintiff, for the purposes of place of suing, reside in Nairobi. Citing the provisions of Article 165(6) and (7) the Constitution counsel submitted that this Court has jurisdiction to deal with the matter. On the authority of **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. [1969] EA 696** counsel is of the view that the objection is wrongly taken up since the objection challenges factual issues.

In its rejoinder **Mr Ojienda** contended that section 18 aforesaid should not be read in isolation since section 15 is the one that prescribes where suits are to be filed. The amended complaint, it is submitted, indicates where the wrong was committed and shows that the cause of action arose in Malaba within the jurisdiction of the Chief Magistrate's Court in Bungoma.

I have considered the objections and the submissions herein. The first issue for determination is the circumstances under which a preliminary objection can be entertained. In **Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. (Supra)** Law, JA was of the following view:

**“A preliminary objection consists of a point of law which has been pleaded, or which arises from a clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.**

As for **Newbold, P:**

**“A preliminary objection is in the nature of what used to be called a *demurrer*. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop”.**

The reason why it is necessary to plead a preliminary objection is to put the other side on notice. It is therefore, necessary that the particulars of the objection be stated in sufficient details to enable the other side properly comprehend the exact nature of the objection intended to be raised. Vague, hazy and generalised objections should therefore not be entertained.

In this case, the applicant's contention is that the Bungoma Court has no jurisdiction and the matter should be transferred to Nairobi. The respondent's contention on the other hand is that the cause of action arose in Malaba where the wrong was committed. Whichever way one looks at the matter it is clear that the arguments are based on disputed matters of fact as to where the cause of action arose; where the

breach was; where the agreement was entered into; the terms of the said agreement whether the goods were on transit to Juba *et cetera*. From the submissions counsel are clearly not agreed on these factual issues. Their positions are as at variance as the difference between chalk and cheese. In fact in purporting to argue the preliminary objection, counsel in my view, could not help but trespass into the merits of the application itself. Accordingly, it is my view and I so hold that the issues raised before me were not, properly, the issues that should have been raised by way of a preliminary objection. Parties should not argue an application under the guise of a preliminary objection as to do so, as was stated in **Mukisa Biscuits Case**, does nothing but unnecessarily increase costs, and on occasion confuse issues. In my view this is a clear example of what the East African Court of Appeal in that case had in mind when it warned that this improper practice should stop.

Having said that it is clear that the only ground for seeking to transfer the Bungoma suit is that that Court has no jurisdiction to determine the suit. The Court of Appeal in **Kenya Seed Co. Ltd vs. Joseph Bosire Civil Appeal No. 72 of 2002** held as follows:

**“In adversarial system governing civil matters the plaintiff as the *arbiter litis* or *dominus litis* has the right to choose any forum the law allows him to agitate his case and such right is only subject to the control provided in the Civil Procedure Rules for transfer of cases, otherwise the Courts would lightly interfere with it...The suit however must be filed in the first instance before a Court which has the jurisdiction to determine it and if it is incompetent in that respect it cannot even be transferred as the remedy is to withdraw it and file it before a Court which has jurisdiction. The other remedy, if the limit of the jurisdiction is monetary, is to limit the claim to the jurisdiction of the trial court”.**

Accordingly, while disallowing the grounds upon which the preliminary objections were hinged, it is clear that on the basis of the ground relied upon by the applicant even if the same were to be correct this Court would not have the jurisdiction to grant the orders sought. The only option available is for the defendant to apply for the said suit be struck out for want of jurisdiction. Having arrived at the said decision it is no use proceeding to entertain the application. In my view to do so would defeat the overriding objective. A court should not hear a matter simply because it is usual and fashionable to do so. To delay what is inevitable simply for the sake of complying with procedures is, in my considered view, unacceptable. In this case, having held even if the applicant’s position was correct the Court would still lack the jurisdiction to grant the orders sought, it would be a waste of precious judicial time to delay the matter further by entertaining an application whose fate is for all intents and purposes sealed. In arriving at my decision I associate myself with the decision in *Safaricom Limited vs. Ocean View Beach Hotel Limited & 2 Others* Civil Application No. 327 of 2009 in which the Court expressed itself thus:

**“Section 3A and 3B of the Appellate Jurisdiction Act gives the Court the freedom in the circumstances of this case to ensure that the matter is handled in accordance with the relevant provisions of the Arbitration Act because it is in doing so that justice will be done to the parties. That is what matters. The overriding objective is so called because depending on the facts of each case, and the circumstances, it overrides provisions and rules which might hinder its operation and therefore prevent the court from acting justly now and not tomorrow”.** (Emphasis mine).

Accordingly I come to the inevitable conclusion that the application dated 30<sup>th</sup> May 2012 is incompetent for want of jurisdiction to transfer a suit which is alleged to have been filed in a Court which lacks jurisdiction and hence a nullity and the same is struck out but with no order as to costs as that was not exactly the ground upon which the objections were pegged.

**Ruling read and delivered in court this 12<sup>th</sup> day of July 2012**

**G.V. ODUNGA**

**JUDGE**

**In the presence of:**

Mr Otieno for Mr Owino for the applicant

No appearance for the respondent