



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 141 of 2008

CHENGO KATANA KOI }

MUGANGA MWAYAYA KATANA}.....PLAINTIFFS

VERSUS

WEAVER CONSULTING LIMITED.....DEFENDANT

RULING

The applicant, Weaver Consulting Limited, the defendant herein seeks one primary order that this suit be struck out with costs. The application is expressed to be brought under the provisions of Order VI Rule 13 (1) (c) and (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. Section 3A, in my view, has inappropriately been invoked as there are relevant provisions covering the defendant's application.

The defendant has given two primary grounds for its application namely that the verifying affidavit is defective and further that the court has no jurisdiction to hear the matter on the basis that the subject matter of the suit is situated in Kilifi District which falls under the High Court at Malindi. The application is supported by an affidavit sworn by the defendant's advocate which affidavit is erroneously headed "affidavit of service". In the affidavit, it is deponed that the said advocate has visited the suit premises and knows that it is situated at Madeteni area of Kilifi District which falls under the jurisdiction of the High Court at Malindi. It is further deponed that the affidavit verifying the plaint is defective.

The application is opposed and there is a replying affidavit sworn by the 1st plaintiff although he erroneously describes himself as the 1st defendant. It is deponed in the affidavit, *inter alia*, that on information received from his advocates, Kilifi is between Malindi and Mombasa Districts and falls under the jurisdiction of both Malindi High Court and Mombasa High Court. It is further deponed, again on the same information of his advocates, that the said verifying affidavit is valid.

In his oral submissions in court counsel for the defendant recited the averments in his affidavit in support of the application. With regard to the affidavit verifying the plaint, counsel submitted that the same was defective on account of it having been sworn by both plaintiffs and the failure to disclose the deponents' residence.

On his part, counsel for the plaintiffs submitted that there was nothing wrong with both plaintiffs taking the oath before the same Commissioner for Oaths. With regard to the failure to disclose the deponents' residence, counsel submitted that they had duly disclosed their address for service and there was therefore

sufficient compliance with Order 18 of the Civil Procedure Rules and if there is a deficiency, the same can be ignored. Counsel took issue with the supporting affidavit which, he argued, is defective for failure to disclose on whose authority it was sworn. It was counsel's further submission that striking out a pleading is draconian and is inappropriate in this case as the plaintiffs' suit is not hopeless. Counsel reiterated his clients' position that the suit property is between Malindi and Mombasa and both courts in Malindi and Mombasa have jurisdiction to entertain the suit.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I think I should consider the objections raised against the affidavit verifying the plaint first as they are in the nature of objections preliminary to the other issues canvassed. Without taking much of judicial time, the objection raised on the basis that both plaintiffs took the oath at the same time, is without merit as the objection has no basis in Law. There is no rule against more than one deponent taking an oath together as the plaintiffs did in this case. In my view they were bound to swear the verifying affidavit as they did.

With regard to failure to disclose their residence, I agree with counsel for the defendant that the plaintiffs indeed offended the provisions of Order XVIII Rule 4 of the Civil Procedure Rules. However, in my view, such failure is not such a serious irregularity as to occasion prejudice to the defendant. The objection is on form and the affidavit in my view is receivable under Rule 7 of Order XVIII of the Civil Procedure Rules.

Counsel for the defendant further challenged the capacity of the plaintiffs to bring this action on the basis that they had not disclosed the cause in which they had been granted Letters of Administration. The plaintiffs have stated that they are personal representatives of the estate of their deceased brother and father respectively. In my view, their capacity to institute the suit is clearly disclosed. During discovery, the defendant will be entitled, if it so wishes, to have evidence of the cause in which a grant of representation was obtained. I do not think that failure to disclose the cause in the plaint invalidates the plaint.

Turning now to the defendant's main complaint that the subject matter of the suit is situate in Kilifi, which is within the jurisdiction of the High Court at Malindi, I have carefully considered the complaint and the relevant provisions of the Law including the relevant provisions of the Constitution of the Republic of Kenya. The High Court has unlimited, original criminal and civil jurisdiction all over the country. It further has such jurisdiction as may be conferred upon it by the Constitution. It sits at such places as the Chief Justice may appoint (See Section 60 of the Constitution). The High Court has power to direct where a trial may be held. (See Order XLVI Rule 5 (1) of the Civil Procedure Rules).

It is therefore not correct, as counsel for the defendant argued, to say that the court has no jurisdiction to entertain the plaintiff's claim merely because the subject matter of the suit is situate between Malindi and Mombasa. However, where should the trial be held? The defendant contends that the suit premises are situate at a place called Madeteni in Kilifi District and the location falls within the geographical area served by Malindi High Court. The plaintiffs do not seriously dispute that location but argue that the place falls under the area served by both Mombasa and Malindi courts. This court has a wide discretion under Order XLVI Rule 5 (2) in determining the place of trial. As both parties agree that the High Court sitting in Malindi serves the area where the subject matter is situated, I consider that having the trial at Malindi will be convenient for all the parties. So, whereas the defendant has not persuaded me that this suit should be struck out, it has emerged that a trial at the High Court at Malindi will be in the interests of both sides.

I will therefore refuse the application but order that this suit be tried by the High Court sitting at Malindi. Costs of the application will be in the cause.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mwakireti holding brief for Ongela Adembesa & Company Advocates for the plaintiffs.

F. AZANGALALA

JUDGE

7TH MAY 2009