

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Miscellaneous Civil Case 89 of 2009

FRACA SERVCOM ENTERPRISES LTD.....APPLICANT

- VERSUS-

MUNSHIRAM INTERNATIONAL BUSINESS

MACHINES LTD.....RESPONDENT

RULING

By notice of motion dated 16th February 2009, the applicant moved the court under the provisions of Sections 3A, 17 and 18 of the Civil Procedure Act seeking the transfer of Nairobi CMCCC No.1477 of 2008 from Nairobi to the Chief Magistrate's Court Eldoret for trial and final disposal. The applicant contends that the cause of action arose at Eldoret township and therefore the suit ought to have been filed in the jurisdiction of the Chief Magistrate's Court Eldoret. The applicant states that its business and registered offices are at Eldoret and therefore the court which the suit ought to have been filed is Eldoret. The applicant reiterates that the Chief Magistrate's Court at Nairobi did not have jurisdiction to hear and determine the dispute in view of the above provisions of the law. The application is supported by the annexed affidavit of Benjamin Shitsukane, the managing director of the defendant. The application is opposed. Nishant Aggarwal, a director of the respondent swore a replying affidavit in opposition to the application. He deponed that the cause of action arose in Nairobi on the basis of the fact that the applicant had ordered the goods from Nairobi and further on the account of the fact that payment for the said goods was made in Nairobi. The respondent attached copies of delivery note and courier services receipts in support of its argument that the contract was actually entered in Nairobi and not Eldoret. He urged the court to disallow the application.

At the hearing of the application, I heard rival submissions made by Mr. Omwenga for the applicant and by Mr. Mbaabu for the respondent. I have carefully considered the said submissions. I have also read the pleadings filed by the parties in support of their respective opposing positions. The issue for determination by this court is whether the applicant made a case to enable this court transfer the suit that is now pending before the subordinate court at Nairobi to the subordinate court at Eldoret. There is no dispute that the applicant carries on its business at Eldoret.

The respondent does not dispute that the registered offices of the applicant is at Eldoret. However, there is dispute between the applicant and the respondent in regard to where the cause of action arose. Whereas the applicant insists that the cause of action arose in Eldoret, the respondent is of the view that the cause of action occurred in Nairobi. Having perused the documents annexed to the replying affidavit of the respondent's director, it was clear to this court that the applicant ordered the goods from the respondent's premises at Nairobi. There is evidence that some of the goods were actually collected by the applicant's agents from the respondent's premises at Nairobi. Some of the goods were ordered by mail and were delivered to the applicant by courier services. The purchase consideration for the goods was paid in Nairobi.

Under Section 15 (c) explanation (3) of the Civil Procedure Act, in a suit arising out of a contract, the cause of action is said to have arisen at the place where the contract was made, or at the place where the contract was to be performed or where the performance will be completed and finally at the place where in performance of the contract any money to which the suit relates was expressly or impliedly payable. In

the present application, it is evident that the respondent had the choice of filing the suit at Eldoret where the applicant conducts its business or in Nairobi where the contract was substantially performed or where the purchase consideration was expressly or impliedly payable.

I do not subscribe to the argument advanced by the applicant that the Chief Magistrate's Court at Nairobi lacked the requisite jurisdiction to hear and determine the case. I hold that the respondent exercised its option of either filing the suit in Nairobi or in Eldoret. The respondent cannot thus be faulted for exercising its option of filing the suit at Nairobi. I was not persuaded by the applicant's argument that the only court where the suit should have been filed is Eldoret.

In the premises therefore, I find no merit with the applicant's application and proceed to dismiss it with costs. The suit before the Chief Magistrate's Court at Nairobi shall proceed to its conclusion. It is so ordered.

DATED AT NAIROBI THIS 1ST DAY OF JULY 2009

L. KIMARU

JUDGE