



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

MISCELLANEOUS APPLICATION NO E009 2021

SMART BRANDS LIMITED.....APPLICANT

VS

RAPHAEL MWAMIDI NDAU.....RESPONDENT

RULING

1. The Notice of Motion dated 4th February 2021 is brought by the Applicant, Smart Brands Limited, seeking transfer of *Mombasa CMELR Cause No 205 of 2020: Raphael Mwamidi Ndau v Smart Brands Limited* from the Chief Magistrate's Court at Mombasa to the Chief Magistrate's Court at Nairobi, for hearing and determination.

2. The Motion is supported by an affidavit sworn by the Applicant's Human Resource Manager, Hannah Kimani and is based on the following grounds:

a) The Respondent has filed a contract of employment dated 4th August 2018, between himself and the Applicant which indicates that the employment contract was entered into at Nairobi, Kenya;

b) The Respondent has filed a contract of employment dated 4th August 2018, between himself and the Applicant which indicates that the place of employment was Nairobi, Kenya;

c) The Respondent has filed a summary dismissal letter dated 20th January 2020, which indicates that the employment contract was terminated in Nairobi, Kenya;

d) The Respondent has filed a contract of employment dated 4th August 2018 and a summary dismissal letter 20th January 2020 which indicates that the Applicant's place of business is at Nairobi, Kenya;

e) The key witnesses and administrators of the Applicant work and reside in Nairobi; and

f) The transfer of the suit from the Chief Magistrate's Court at Mombasa to the Chief Magistrate's Court at Nairobi will cause no prejudice whatsoever to the parties but rather will enhance the timely hearing and determination of the suit.

3. The Respondent responded to the Applicant's Motion by his replying affidavit sworn on 16th February 2021.

4. The Respondent states that he was employed at Mombasa in the Applicant's branch office in Nyali, which is still open and running. The Respondent adds that he executed an employment contract on 25th September 2018, the said contract being on the Nairobi head office letter head.

5. The Respondent further states that after executing the employment contract at the Applicant's branch office in Mombasa, he was later transferred to Nairobi where he was dismissed on 20th January 2020.

6. The Respondent goes on to state that the Applicant has not shown any prejudice it will suffer if the application is not allowed.

7. The Respondent takes the view that if the application is allowed, it will amount to forum shopping.

8. The Respondent maintains that if the Respondent's application is allowed, he will suffer irreparable loss as he resides at Mishomoroni within Mombasa County and is unable to raise transport charges to Nairobi.

9. This is a single issue application, being whether the Applicant has made out a case for transfer of **Mombasa CMELRC No 205 of 2020: Raphael Mwamidi Ndau v Smart Brands Limited** from the Chief Magistrate's Court at Mombasa to the Chief Magistrate's Court at Nairobi.

10. The Applicant relies on Section 15 of the Civil Procedure Act, which provides as follows:

15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction-

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part arises.

11. Explanation (3) in Section 15 states:

Explanation (3)- In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely-

(i) The place where the contract was made;

(ii) The place where the contract was to be performed;

(iii) The place where in the performance of the contract any money to which the suit relates was expressly or impliedly payable.

12. The Respondent's employment contract issued on 25th September 2018 does not disclose the place where it was made. It however expressly states his place of work as Nairobi.

13. In his affidavit in opposition to the application, the Respondent states that he was initially employed at the Applicant's branch office in Mombasa and later transferred to Nairobi. This averment is however not supported by any documentary evidence nor was it part of the Respondent's pleadings before the trial court.

14. Based on the foregoing, it would appear that the only reason that motivated the Respondent to file his claim in Mombasa rather than Nairobi was his own convenience. However, the legal position is that the place for filing of a case cannot be determined merely on the basis of balance of convenience (see **Kithita Ngeana v Mwaniki Kisume [2018] eKLR** and **Grohe Dawn Watertech Pty Ltd v Ideal Ceramics [2018] eKLR**.)

15. Justice is a double edged sword; if it is inconvenient for the Respondent to travel from Mombasa to Nairobi it will be equally inconvenient for the Applicant's officers to travel from Nairobi to Mombasa.

16. I therefore direct that **Mombasa CMELRC No 205 of 2020: Raphael Mwamidi Ndau v Smart Brands Limited** be transferred from the Chief Magistrate's Court at Mombasa to the Chief Magistrate's Court at Nairobi, for hearing and determination.

17. The costs of this application will be in the cause.

18. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 13TH DAY OF MAY 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

Mr. Odipo for the Applicant

Mr. Anaya for the Respondent