



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO. 78 OF 2014**

**MICHAEL VINCENT CARNEVALE.....CLAIMANT**

**- VERSUS -**

**BALLOON SAFARIS LIMITED.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 16<sup>th</sup> May, 2014)**

**RULING**

The applicant **Balloon Safaris Limited** filed a notice of motion on 07.04.2014. The notice of motion was brought under section 3 & 12 (3) of the Industrial Court Act 2011, Rule 16(1) of the Industrial Court (Procedure) Rules 2010, section 3A and 18 of the Civil Procedure Act, Order 46 Rule 6 (2) of the Civil Procedure Rules, 2010 and Article 48 and 159 of the Constitution of Kenya 2010 and all the enabling provisions of law. The applicant prayed that the hounourable court be pleased to transfer the suit for full hearing and determination from the Industrial Court at Nakuru to the Industrial Court at Nairobi. The application was supported by the annexed affidavit of Adrian Luckhurst.

The applicant urged that its registered offices are in Nairobi and its principal place of business is in Nairobi at Lengai House, Wilson Airport; the contract in issue between the parties was concluded in Nairobi; under section 15(3) of the Civil Procedure Act, the sum payable and performance of contract is in Nairobi; and the respondent will be inconvenienced and its right to access of justice will be infringed if the orders sought are not granted. The applicant further urged that all its witnesses are based in Nairobi. Further, the applicant stated that it has several business interests including but not limited to Balloon Flights at Maasai Mara and all operations for these businesses are overseen from Nairobi. The applicant also urged that the claimant will not suffer any prejudice if the application is allowed because he will have an opportunity to be heard in Nairobi.

The claimant **Michael Vincent Carnevale** responded and opposed the application by filing his replying affidavit on 06.05.2014. The claimant urged he will be seriously prejudiced if the application is allowed because his witnesses are from Narok and he would incur higher costs if the suit was transferred from the court at Nakuru to the court at Nairobi. Further, the applicant's base administrator had sued him in High Court Civil Suit No. 25 of 2014 at Nakuru whose subject matter related to the present suit and it would be unfair to exercise selective convenience as prayed for by the applicant. The claimant further stated that the contract of employment was performed and executed at Maasai Mara Base near Telek and that fact was within the knowledge of the applicant. It was the claimant's case that allowing the application would derail the path of justice by occasioning delays and unnecessary costs. The claimant urged that under Article 50(1)(e) of the Constitution, he was entitled to fair and public hearing of the dispute and to have the trial begin and conclude without unreasonable delay. It was submitted for the claimant that the cause of action arose wholly in Narok and was performed and completed in Narok so that the proper venue for the hearing and determination was Nakuru as per section 15(1) (c) of the Civil Procedure Act. It was

further submitted for the claimant that the overriding objective of the civil procedures under sections 1A and 1B of the Act was to facilitate the just and expeditious, proportionate and affordable resolution of the disputes governed by the Act. It was also submitted for the claimant that section 3 of the Industrial Court Act, 2011 provides for the principal objective of the court to facilitate the just, expeditious and proportionate resolution of disputes.

The court has considered the parties' respective cases and submissions and makes the following findings:

1. Section 15 of the Civil Procedure Act provides for the place suits shall be instituted in situations whereby the Act has not otherwise provided for the limitations on the institution of the suit. Under Order 47 Rule 1, it is provided that a suit in the High Court may be instituted at the central office of that court situated in Nairobi or in a district registry. Under appendix G to the Rules, for the districts of Nakuru, Laikipia, Nyandarua, Samburu, Narok and Trans-Mara the prescribed place of the registry is Nakuru. Under Order 47 Rule 4, the suit will be filed at the registry in the area in which the defendant resides or carries on business. There is no dispute that in the instant case the claimant was deployed in Narok where the applicant, the respondent in the suit, carried on business. On that basis, the place of the registry for filing the suit was Nakuru. The court finds that the provisions are a good guide to all superior courts of first instance as established in the Constitution of Kenya, 2010 and finds that under that criterion, the suit was properly filed at the registry at Nakuru. There was no dispute between the parties as to the place of institution of the suit but the place of hearing of the suit. The court finds that the provisions of section 15 of the Act were therefore not relevant in resolving the dispute at hand. The court finds that in fact the suit was properly instituted in this court at Nakuru.

2. As for the place of hearing of the suit, Order 47 Rule 6 offers good guidance. The Rule provides as follows:

**“6. (1) Every suit whether instituted in the Central Office or in a District Registry of the High Court shall be tried in such place as the court may direct; and in the absence of any such direction a suit instituted in the Central Office shall be tried by the High Court sitting in the area of such Central Office and a suit instituted in a District Registry shall be tried by the High Court sitting in the area of such District Registry.**

**(2) The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:**

**Provided always that in appointing such particular place for trial, the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place, and all the other circumstances of the case.”**

The court finds that the rule provides for the guiding principles on the place of trial. Under the rule, the place of trial is the place the suit is instituted or the place the court may order taking into account convenience of the parties and their witnesses; the date for the trial; and all the circumstances of the case. In this case, the court has found that the suit was filed in the correct registry. The court has considered the prevailing practice that suits whose cause of action arises from Narok are heard and determined in Nakuru. Within the framework of devolution and judicial service delivery, Nakuru is the place the Judiciary has designated for accessing services of this court for the inhabitants of Narok and as envisaged under Article 6(3) of the Constitution. In the opinion of the court, that provision by the Judiciary for accessing judicial services should not be shifted without clear and compelling reasons. The court has considered that the court diary at Nairobi is full and, taking into account the constitutional and statutory provisions as cited for the claimant, the suit is more likely to be expeditiously determined by the court at Nakuru rather than Nairobi. As for balance of convenience between the parties and their respective witnesses, the court has considered that a related but different suit has been filed against the claimant at Nakuru. Taking all these circumstances into consideration, the court finds that the proper place for hearing the suit is Nakuru.

In conclusion, the application is dismissed with orders:

- a. **The applicant shall pay costs of the application.**
- b. **Parties are invited to take directions on further steps towards the hearing and determination of the suit.**

**Signed, dated and delivered** in court at **Nakuru** this **Friday 16<sup>th</sup> May, 2014.**

**BYRAM ONGAYA**

**JUDGE**