Hangzhou Agrochemical Industries Ltd v Panda Flowers Limited (Civil Suit 97 of 2009) [2012] KEHC 1937 (KLR) (Civ) (8 October 2012) (Ruling)

HANGZHOU AGROCHEMICAL INDUSTRIES LTD V PANDA FLOWERS LIMITED[2012]eKLR

Neutral citation: [2012] KEHC 1937 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL SUIT 97 OF 2009

GV ODUNGA, J

OCTOBER 8, 2012

BETWEEN

HANGZHOU AGROCHEMICAL INDUSTRIES LTD ..... PLAINTIFF

AND

PANDA FLOWERS LIMITED ..... DEFENDANT

Considerations to be had in determining the court station in which a dispute is to be determined

In a matter where an applicant was seeking the transfer of a suit from the High Court at Nairobi to the High Court at Nakuru after having filed both suits, the court held that all things being equal a party should as far as possible institute proceedings in a court where the cause of action arose and where the defendant resided. The applicant was successful in its application but was penalized with costs on grounds that his action of filing two suits with similar facts in different High Court Registries could have been avoided. Hence the instant matter was an exception to the rule that costs follow the event.

Reported by John Ribia

Civil Practice and Procedure *– institution of suits – considerations to be had when deciding on the jurisdiction in which to file a civil dispute – where a party had filed two similar suits in two different court registries – where a party had requested for a transfer of a suit from one court registry to another - whether a High Court in charge of a different registry had the power to order transfer of a High Court case from one High Court registry to another - whether the term transfer was the appropriate term for moving a file from one High Court Registry to another - what considerations were to be had in determining the court station in which a dispute was to be determined – sections 1A, 1B, 3A, 18, 12, 13, 14, 15, 17 and 18 ; order 47 rule 6; section 3A, 3B; article 165 (2), (3)(a)*

Civil Practice and Procedure *– costs – presumption that costs followed the event – exceptions – where an applicant was successful in its application but had filed multiple suits based on the similar facts in different court registries - under what circumstances would a successful party in litigation be penalized with costs - whether an*

applicant that abused the court process by filing the same suit in multiple high court registries was entitled to costs upon winning the suit.

Brief facts

The plaintiff/applicant sought orders that the instant suit be transferred to the High Court Nakuru for hearing and determination. There were two cases revolving around similar issues that were filed by the plaintiff/applicant in the High Court Registries of Nairobi (instant court) and Nakuru.

The defendant opposed the application on grounds that the determination of the Nakuru Case was likely to dispose of the instant suit hence the instant suit ought to be stayed.

Issues

i. Whether a High Court in charge of a different registry had the power to order transfer of a High Court case from one High Court registry to another.

ii. Whether the term transfer was the appropriate term for moving a file from one High Court Registry to another.

iii. What considerations were to be had in determining the court station in which a dispute was to be determined?

iv. Under what circumstances would a successful party in litigation be penalized with costs?

v. Whether an applicant that abused the court process by filing the same suit in multiple high court registries was entitled to costs upon winning the suit.

Held

1. Jurisdiction was everything. Without it, a court had no power to make one more step. The High Court no longer had original and unlimited jurisdiction in all matters as it used to have under the repealed constitution due to the creation of the specialized courts of equal status to the High Court. The jurisdiction of the High Court could only be limited as provided by the Constitution itself and any purported limitation not founded on the Constitution was null and void.
2. There was only one High Court in Kenya sitting in different stations. There being only one High Court the term transfer did not apply to one High Court registry to another. The High Court had no power to transfer a suit from one High Court to another High Court under section 18 of the
3. Sections 17 and 18 of the had nothing to do with transferring a case from one High Court to another High Court. Order 47 rule 6 of the did not give the High Court powers to transfer cases from one High Court to another but only provided that the High Court at the registry where a High Court case had been instituted can direct that it be heard at a particular place; it did not mean that a High Court in charge of a different registry would order transfer of a High Court case from one High Court registry to another.
4. Although the High Court had jurisdiction countrywide the execution of that jurisdiction was subject to the guidance of and to common sense. If a matter concerned a contract entered into at Nakuru where the defendant resided, it would be unfair to take that matter to Mombasa High Court as that would represent a choice of court to the disadvantage of the defendant in the suit. If the defendant was unable to travel, because of expenses resulting from the distance, then the matter may very well proceed *ex parte*. All things being equal a party should as far as possible institute proceedings in a court where the cause of action arose and where the defendant resided.
5. The overriding objective provided for under sections 1A and 1B of the was meant for the attainment of justice. The court was under a statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objective and in order to attain that objective the court had to strive towards ensuring the efficient disposal of the business of the court, the efficient use of the available judicial and administrative resources and the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties.

6. Efficient disposal of the business of the court and efficient use of available judicial and administrative resources demanded that as much as possible cases be filed within the jurisdiction of the subject matter so as not to clog other registries while others remained unutilised. It would be prudent that the cases which had been instituted and were already being processed should not be unduly interrupted. The need to have the cases disposed of at a cost affordable to the respective parties on the other hand would call for the court to examine the costs implications involved in carrying out the trial at one place and not another. It was a matter of balancing the interests of the parties with the ultimate aim of doing justice.
7. The High Court was perfectly entitled, where it so deemed appropriate, to direct that a matter filed in one place be heard by the same court sitting at a different place. The mere fact that the change of venue may involve the change in the presiding officers concerned did not derogate from the fact that it was still the same High Court hearing the matter. A Judge of the High Court was a Judge wherever he was and carried with him the jurisdiction of that court and mere posting to different stations was simply an administrative arrangement which did not deprive the Judge of his constitutional mandate.
8. The court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case were likely to incur in transporting and maintaining the witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship.
9. If the court was left in doubt as to whether under all the circumstances it was proper to order transfer, the application had to be refused. Being a discretionary power, the decision whether or not to exercise it depended largely on the facts and circumstances of a particular case. If the plaintiff, knowing that the defendant would not afford the cost of travelling all the way to defend a suit, decided to institute the same at a place farthest from where the defendant was with a view to either inflicting suffering on the defendant or forcing the defendant to settle, the court would be forced to intervene.
10. Since it was the plaintiff who had accused the defendant, the defendant should not be placed at the position of a disadvantage based on mere allegations. To the contrary, the plaintiff should institute the proceedings where the defendant was all factors being equal. Whereas the provisions of sections 12, 13, 14 and 15 were not be applicable to the High Court those provisions, though not binding, offered useful guidelines on whether or not the court should exercise its discretion one way or the other.
11. The defendant was not amenable to the consolidation of the instant suit with the Nakuru suit since the two suits were at different stages of proceeding and a consolidation would have the result of derailing the Nakuru matter. It was not contended that the parties were not within Nakuru since the replying affidavit was sworn by the advocate for the defendant and not by an officer of the defendant.
12. Both parties had offered very scanty material with respect to the nature of the two suits. The suits were not too dissimilar otherwise the issue of staying one as suggested by the respondent would not arise.
13. The plaintiff had not sought an order for consolidation. The plaintiff's conduct in filing two suits in different High Court registries could however not go without condemnation. A party who decided to take such course could not escape the imputation of bad faith on his part. The overriding objective enjoined the court to aim towards the efficient use of the available judicial and administrative resources. One could not be said to be achieving that when cases which ought to be dealt with by one High Court registry were scattered all over the High Court registries. When confronted with such a scenario the court would either stay some of the suits or house all the suits under one registry. Since the court was not seized of all the relevant facts in the two matters, it was only fair the two matters be dealt with by one High Court registry where the court would decide whether to consolidate both suits or stay one of the suits.
14. While not transferring the instant court to the High Court Nakuru as sought, the court directed that the instant suit be heard by the High Court sitting in Nakuru. The file would be transferred to Nakuru High Court registry where further proceedings would be undertaken.

15. Although the plaintiff was technically successful, the instant case was one which justified deviation from the general rule that costs followed the event. The court was entitled to deprive a successful party of costs even if successful and even penalise such successful party in costs if the party's conduct had led to litigation which would otherwise have been avoided. The plaintiff's conduct in instituting the instant suit in Nairobi had led to the instant proceedings which would have been avoided had the matter been filed in Nakuru in the first place.

Application allowed; the plaintiff would bear the costs of the application.

Citations

Cases

1. Fish and Meat Ltd And 2 Ors v Delphis Bank Ltd (Civil Case 136 of 1994) — Explained
2. Gakure, &John 148 others v Dawa Pharmaceutical Co Ltd. & 7 others (Civil Application 299 of 2007; [2010] KECA 447 (KLR)) — Explained
3. Geeta Bharat Shah & 4 others v Omar Said Mwatayari & another (Civil Appeal 46 of 2008; [2009] KECA 126 (KLR)) — Mentioned
4. Guardian Bank Limited v Norlake Investments Limited (Miscellaneous Application 40 of 2000) — Explained
5. Harit Sheth T/A Harit Sheth Advocate v Shamas Charania (Civil Application 68 of 2008; [2010] KECA 376 (KLR)) — Explained
6. Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited (Civil Appeal 50 of 1989; [1989] eKLR; [1989] KLR 1) — Followed
7. Pacific Frontier Seas Limited vs IRMARD Beig & Security Group Limited (Civil Case 60 of 2003; [2013] KEHC 5986 (KLR)) — Explained
8. Rapid Kate Services Limited v Freight Forwarders Kenya Limited & 2 others (Civil Case 802 of 2003; [2005] eKLR; [2005] 1 KLR 292) — Explained
9. Tai Jeans Garments Company Limited v Vijay Morjaria (Civil Case 131 of 1999)
10. David Kabungu v Zikarenga & 4 others (Kampala HCCS No 36 of 1995) — Explained

Statutes

1. Appellate Jurisdiction Act (cap 9) — Section 3A, 3B — Interpreted
2. Civil Procedure Act (cap 21) — Section 1A, 1B, 3A, 18 — Interpreted
3. Civil Procedure Rules, 2010 (cap 21 Sub Leg) — Order 47; Rule 6 — Interpreted
4. Constitution of Kenya, 2010 — Article 165 (2), (3)(a) — Interpreted

Advocates

Mr. Mutula Kilonzo Jnr for Mr. Gitau for Defendant

RULING

1. By its application dated July 3, 2012 filed the following day July 4, 2012, the Plaintiff/Applicant seeks orders that this suit be transferred to the High Court Nakuru for hearing and determination. There is also the usual prayer for provision for costs.

2. The application is supported by an affidavit sworn by Xiao Qun Liu, the plaintiff's director. The said affidavit is a 5 paragraph affidavit in the deposes that it is the considered view of both parties that the decision of this case will have a direct bearing on Nakuru HCCC No 63 of 2009 – Hangzhou Agrochemical Industries Ltd v Panda Flowers Ltd and hence this suit ought to be transferred to Nakuru for hearing and determination. It is further deposed that both parties carry their businesses in Nakuru County and therefore Nakuru High Court would be most convenient and appropriate for the case to be heard.

3. In opposition to the application the Defendant filed the following grounds of opposition:

    1. The application is incurably defective and an abuse of due process of the court.

    2. The issues in this suit can only be raise after the determination of the Nakuru case but not simultaneously.

    3. It this is not the right jurisdiction to determine the case as now claimed, then the suit was defective ab initio.

4. It also filed a replying affidavit sworn by Gachiengo Gitau, its advocate on July 27, 2012(sic). According to the deponent there is no evidence that the deponent of the supporting affidavit is authorised by a co-director to swear the said affidavit hence the same is incompetent. Further, there is a difference between having two matters having a bearing on one another and actually their consolidation being desirable. According to him, the causes of action are very vastly different and that the defendant's instructions has always been that the Nakuru Case be heard and disposed of, and a negative judgement against the plaintiff would militate against hearing the Nairobi case whatsoever. On convenience, it is deposed that the plaintiff ought to have taken that into consideration when filing this suit. The deponent therefore opines that this suit should be stayed pending the final determination of the Nakuru case.

5. The application was prosecuted by way of written submissions. On the plaintiff's part, it is submitted that the Nakuru case is in respect of damages for default of payment of goods delivered to the defendant in Nakuru while this suit is for damages for defamation arising from allegation of delivery of goods of bad quality. In order that the Courts do not arrive at conflicting determinations and to avoid movement of parties from Nakuru to Nairobi the application ought to be allowed. As the defendant's replying affidavit is sworn by the advocate instead of the defendant, it is submitted the same is irregular and improper and ought to be struck out. The case of *Geeta Bharat Shah & 4 others v Omar Said Mwatayari & Another* Civil Appeal No 46 of 2008.

6. On the part of the defendant it is submitted that the application is clearly misguided and an abuse of the due process, brought in bad faith with no law to back it since the High Court can only transfer a matter from one lower court to another or from itself to a subordinate court but not from High Court to another High Court. With respect to the invocation of the Court's inherent jurisdiction reserved under section 3A of the *Civil Procedure Act*, it is submitted that the Court ought to unmask the motive behind such transfer and confirm the bona fides of the applicant. It is submitted that these two cases were instituted by the same plaintiff through the same law firm and the Nakuru Case is more complex and is in an advance stage of hearing and its consolidation with this case will have the effect of derailing the determination of the said case. It is further submitted that the filing of witness statement in this suit is presumptuous since this suit which is based on defamation has nothing to do with the two witnesses. In the defendant's view saving time is not the only consideration that the court ought to take into account since justice to the parties must also be considered. If the plaintiff loses the Nakuru case there can be no defamation whatsoever hence this suit ought to be stayed. As the plaintiff's pleadings strongly defend the Nairobi forum as the more appropriate, it is submitted that it beats logic why a party with such strong convictions can suddenly mellow and adopt an exactly opposite position unless the court is being taken for a ride for purely selfish reasons. It is submitted that maters cannot be consolidated merely because the parties are the same but the matters must be essentially intertwined as to render separate hearings unnecessary which is not the scenario in the present case. On the competency of the replying affidavit, it is submitted that the law does not bar a lawyer from swearing an affidavit but discourages lawyers from averring to matters of fact that should be in the exclusive knowledge of the client. In this case, it is submitted, the advocate has largely dwelt on areas of law, matters not really in contention and those that can be judicially noticed by the court of its own motion. As there are valid

grounds of opposition, this ground has no meaningful impact and the authority of *Pacific Frontier Seas Ltd v Irmgard Beig aka Irmgard Deis Security Group Ltd* Mombasa HCCC No 60 of 2003. In conclusion it is submitted that the application is unmerited, mischievous and an abuse of the due process warranting dismissal with costs.

7. The law, as was stated by Nyarangi, JA in The *Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* (1989) KLR 1, is:

> Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".

8. I therefore have to deal first with the issue of jurisdiction of the High Court to transfer a suit from itself to another High Court and vice versa. Article 165(3)(a) of the *Constitution* provides that subject to clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters. Clause (5) of the said Article provides that the High Court shall not have jurisdiction in respect of matters

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

Article 162(2) on the other hand provides that Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

It is therefore clear that the High Court nolonger has original and unlimited jurisdiction in all matters as it used to have in the old Constitution. However, it is my view that the jurisdiction of the High Court can only be limited as provided by the Constitution itself and any purported limitation not founded on the Constitution is null and void.

9. I agree that there is only one High Court in the Republic of Kenya sitting in different stations. I also agree that there being only one High Court the term "transfer" does not apply to one High Court Registry to another. I concur with the decision of Tanui, J in *Fish and Meat Ltd And 2 Ors v Delphis Bank Ltd* Kakamega High Court Civil Case No 136 of 1994 the High court has no power to transfer a suit from one High Court to another High Court under section 18 of the *Civil Procedure Act.* In *Guardian Bank Limited v Norlake Investments Limited* Nairobi (Milimani) HCMA No 40 of 2000 Onyango Otieno, J (as he then was) was of the view that section sections 17 and 18 of the *Civil Procedure Act* have nothing to do with transferring a case from one High Court to another High Court. According to the learned Judge Order 46 Rule 5 (now order 47 rule 6) of the *Civil Procedure Rules* does not give the High Court powers to transfer cases from one High Court to another but only provides that the High Court at the registry where a High Court case has been instituted can direct that it be heard at a particular place; it does not mean that a High Court in charge of a different Registry would order transfer of a High Court case from one High Court Registry to another. The same judge in *Tai Jeans Garments Company Limited v Vijay Morjaria* Nairobi HCCC No 131 of 1999 held that although the High Court has jurisdiction countrywide the execution of that jurisdiction is subject to the guidance of *Civil Procedure Act* and to common sense. If a matter concerns a contract entered into at Nakuru where the defendant resides, the Judge held, it would be unfair to take that matter to Mombasa High Court as that would represent a choice of court to the disadvantage of the Defendant

in the suit if the defendant is unable to travel, because of expenses resulting from the distance, then the matter may very well proceed ex parte. It was thus held that all things being equal a party should as far as possible institute proceedings in a Court where the cause of action arose and where the defendant resides.

10. In the case of *David Kabungu v Zikarenga & 4 others* Kampala HCCS No 36 of 1995 Okello, J stated as follows:

> Section 18(1)(b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even *suo moto* by the court without application by any party. The burden lies on the applicant to make out a strong case for the transfer. A mere balance of convenience in favour of the proceedings in another court is not sufficient ground though it is a relevant consideration. As a general rule, the court should not interfere unless the expense and difficulties of the trial would be so great as to lead to injustice or the suit has been filed in a particular court for the purpose of working injustice. What the court has to consider is whether the applicant has made out a case to justify it in closing the doors of the court in which the suit is brought to the plaintiff and leaving him to seek his remedy in another jurisdiction...It is well established principle of law that the onus is upon the party applying for a case to be transferred from one court to another for due trial to make out a strong case to the satisfaction of the court that the application ought to be granted. There are also authorities that the principal matters to be taken into consideration are, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship, and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused...Want of jurisdiction of the court from which the transfer is sought is no ground for ordering transfer because where the court from which transfer is sought has no jurisdiction to try the case, transfer would be refused...Since the expense which the plaintiff/applicant in this case is likely to incur in transporting and maintaining the numerous various senior public officers from Kampala to Kabale to attend and give evidence in court in this case is bound to be so prohibitive as to deny the applicants justice and the plaintiff/applicant has the right to choose his court, he should not be denied justice by forcing him to have his case heard in a court to which he would not by reason of expense produce his witnesses to prove his case".

11. The matter was dealt with in extenso by Emukule, J in *Rapid Kate Services Limited v Freight Forwarders Kenya Limited & 2 others* [2005] 1 KLR 292 where he expressed himself thus:

> Whereas under rule 5(2) of Order 46 the Court has a wide and flexible discretion to order that a case be tried in a particular place, that discretion may however be exercised upon cause being shown, and that cause shall have regard to the convenience of the parties, and of the witnesses, the date of when the trial shall take place, and the circumstances of the case. The Court's power to transfer proceedings from one Court to another is a useful corrective to ensure that proceedings wherever began or whatever forum the plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings. When making or refusing an order for transfer the Court will have regard to the nature and character of the proceedings the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power of the Court under section 3A of he Civil Procedure Act...Although there is only one High Court in Kenya which sits in different areas as directed by the Chief Justice (as opposed to subordinate courts established under various laws) it is not forbidden for a Kenyan High Court sitting in one location to order a transmission or allocation of a case

file before him to another judge sitting in another location. It must be a matter of discretion for the judge and it must be for compelling reasons which would be for the purposes of ensuring justice and this is all within the inherent power of the Court under section 3A of the Civil Procedure Act...Whereas there is no express provision in the Civil Procedure Act Cap 21 for transfer of cases from one High Court to another, it does not mean that in a proper case the Court cannot transfer a case before it to another registry of the High Court. The fact that there is no provision on the matter cannot prevent the High Court from deciding it, if by doing so, it will be able to deliver justice. In doing so the Court will employ its unlimited and inherent jurisdiction...There is no such express provision for intra-High Court transfer of cases from one civil registry to another. In addition to the Court's inherent power under section 3A to make orders to meet the ends of justice, there are provisions of order 46 rule 5(2) which expressly empower the High Court to order that a case be tried in a particular place to be appointed by the Court. The language in this rule is deliberately guarded that the suit be "tried" not transferred" in a particular place appointed by the Court...This power is clearly unlike that under section 18 of the Civil Procedure Act where the High Court may order the transfer of a case to a subordinate court or withdraw the case, try and dispose it itself or order on how such suit shall be disposed. The power of the High Court under order 46 rule 5(2) is to order for the place where the suit shall be tried and for that purpose achieve the horizontal movement of intra High Court cases from one registry to another. In this way, the High Court ensures that proceedings wherever began or whatever forum the plaintiff has initially chosen should be dealt with or heard or determined by the Court most appropriate or suitable for those proceedings. When making or refusing an order of transfer the Court will have regard to the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice. It is a discretionary power, which will be exercised having regard to all the circumstances of the case".

12. Order 47 rule 6 of the *Civil Procedure Rules* provides as follows:

> (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.

13. We also now have sections 1A and 1B of the *Civil Procedure Act* which are expressed in the following terms:

> 1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

The overriding objective provided for under sections 1A and 1B is meant for the attainment of justice. In the case of *John Gakure & 148 others v Dawa Pharmaceutical Co Ltd & 7 others* Civil Application No 299 of 2007, where Waki, JA expressed himself thus:

> Jurisdiction of the Court has been enhanced and its latitude expanded in order for the court to drive the civil process and to hold firmly the steering wheel of the process in order to attain the overriding objective and its principal aims. In the court's view, dealing with a case justly includes inter alia, reducing delay, and costs, expenses at the same time acting expeditiously and fairly. To operationalise or implement the overriding objective calls for a new thinking and innovation and actively managing the cases before the court, including the granting of appropriate interim relief in deserving cases".

14. In the case of *Harit Sheth T/A Harit Sheth Advocate v Shamascharania* Civil Application No Nai 68 of 2008 the Court of Appeal held inter alia that the principal aims of the provisions of sections 1A and 1B of the *Civil Procedure Act* and sections 3A and 3B of the *Appellate Jurisdiction Act* include

> "the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing".

15. The Court is therefore under a statutory obligation while interpreting the provisions of the Act or exercising the powers conferred upon it thereunder to give effect to the overriding objectiveand in order to attain this objective the court must strive towards ensuring the efficient disposal of the business of the Court, the efficient use of the available judicial and administrative resources and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties.

16. Efficient disposal of the business of the court and efficient use of available judicial and administrative resources would necessary demand that as much as possible cases be filed within the jurisdiction of the subject matter so as not to clog other registries while others remain unutilised. As for the timely disposal of the proceedings, again it would be prudent that the cases which have been instituted and are already being processed should not be unduly interrupted. The need to have the cases disposed of

at a cost affordable to the respective parties on the other hand would call for the court to examine the costs implications involved in carrying out the trial at one place and not another. It is clear therefore that it is a matter of balancing the interests of the parties with the ultimate aim of doing justice.

17. In my view therefore, the High Court is perfectly entitled, where it so deems appropriate, to direct that a matter filed in one place be heard by the same Court sitting at a different place. The mere fact that the change of venue may involve the change in the presiding officers concerned does not derogate from the fact that it is still the same High Court hearing the matter. A Judge of the High Court is a Judge wherever he is and carries with him the jurisdiction of that court and mere posting to different stations is, in my view, simply an administrative arrangement which does not deprive the Judge of his Constitutional mandate.

18. That then brings me to the issue of the circumstances under which the court may direct that a matter filed in a particular High Court registry be heard in a different place. In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and maintaining the witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case. If for example, the plaintiff, knowing that the defendant will not afford the cost of travelling all the way to defend a suit, decides to institute the same at a place farthest from where the defendant is with a view to either inflicting suffering on the defendant or forcing the defendant to settle, the court would be forced to intervene. In my view, since it is the plaintiff who has accused the defendant, the defendant should not be placed at the position of a disadvantage based on mere allegations. To the contrary, the plaintiff should institute the proceedings where the defendant is all factors being equal. It is my view that whereas the provisions of Sections 12, 13, 14 and 15 are not be applicable to the High Court those provisions, though not binding, offer useful guidelines on whether or not the court should exercise its discretion one way orthe other.

19. In the present case, it is not disputed that there are two cases revolving around similar issues. It is the defendant's position that the determination of the Nakuru Case is likely to dispose of the present suit hence the present suit ought to be stayed. What the defendant is not amenable to is the consolidation of this suit with the Nakuru suit since the two suits are at different stages of proceeding and a consolidation would have the result of derailing the Nakuru matter. It is not contended that the parties are not within Nakuru since the replying affidavit is sworn by the advocate for the defendant and not by an officer of the defendant. I must state that both parties have offered very scanty material with respect to the nature of the two suits. It is however agreed that the said suits are not too dissimilar otherwise the issue of staying one as suggested by the respondent would not arise. Based on the material placed before me I cannot decide one way or the other whether consolidation would be appropriate in the circumstances. From the application, the plaintiff has not sought an order for consolidation. The plaintiff's conduct in filing two suits in different High Court registries cannot, however go uncondemned. A party who decides to take such course cannot escape the imputation of bad faith on his part. Bad faith or no bad faith the overriding objective aforesaid enjoins the Court to aim towards the efficient use of the available judicial and administrative resources. One cannot be said to be achieving this when cases which ought to be dealt with by one High Court registry are scattered all over the High Court registries. When confronted with such a scenario the Court would either stay some of the suits or "house" all the suits under one registry. Since I am not seized of all the relevant

facts in these two matters it is only fair these two matters be dealt with by one High Court Registry where the Court will decide whether to consolidate both suits or stay one of the suits.

20. In the premises while not transferring this Court to the High Court Nakuru as sought, I direct that this Suit be heard by the High Court sitting in Nakuru. Accordingly, this file will be transferred to Nakuru High Court Registry where further proceedings will be undertaken.

21. Although the plaintiff is technically successful, this, in my view, is case which justifies deviation from the general rule that costs follow the event. The Court is entitled to deprive a successful party of costs even if successful and even penalise such successful party in costs if the party's conduct has led to litigation which would otherwise have been avoided. The plaintiff's conduct in instituting this suit in Nairobi has led to the present proceedings which would have been avoided had the matter been filed in Nakuru in the first place. Accordingly, the plaintiff will bear the costs of this application.

DATED AT NAIROBI THIS 8TH DAY OF OCTOBER, 2012.

G V ODUNGA

JUDGE

Delivered in the presence of Mr. Mutula Kilonzo Jnr for Mr. Gitau for the Defendant