



REPUBLIC OF KENYA



**KENYA LAW**  
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**Uneco Paper Products Limited v Print Fast Kenya Limited (Insolvency Cause 20 of 2020) [2023] KEHC 20802 (KLR) (18 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20802 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
INSOLVENCY CAUSE 20 OF 2020**

**OA SEWE, J  
JULY 18, 2023**

**BETWEEN**

**UNEECO PAPER PRODUCTS LIMITED ..... PETITIONER**

**AND**

**PRINT FAST KENYA LIMITED ..... DEBTOR**

**RULING**

1. Before the Court for determination is the Notice of Motion dated May 13, 2021. It was filed by the debtor, Print Fast Kenya Limited pursuant to Sections 1A, 1B, 3A and 18 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 51 Rule 1 of the Civil Procedure Rules for orders that the Court be pleased to transfer this suit and all proceedings herein to the Commercial & Tax Division of the High Court at Nairobi for trial and disposal; and that costs of the application be provided for.
2. The application was premised on the grounds that the applicant's principal place of business is in Nairobi; and that the advocates for both the applicant and the petitioner are also based in Nairobi. It was therefore the contention of the applicant that it would cause further inconvenience to the parties and their advocates if the suit was to continue to be handled in Mombasa taking into account the travel restrictions introduced by the Ministry of Health because of Covid 19 pandemic. These grounds were explicated in the Supporting Affidavit sworn by a director of the applicant, Mr. Ajay Kiritkumar Shah, sworn on May 13, 2021 and the documents annexed thereto.
3. The application was however resisted by the petitioner/respondent. In a Replying Affidavit sworn by Ebrahim Jagani and filed on June 10, 2021, the respondent averred that its Head Office is based in Mombasa at Pamba Road, off Refinery Road in Changamwe; and that its postal address is P.O. Box 81522-80100 Mombasa. Mr. Jagani further averred that the respondent's advocates have their main office in Mombasa, situate at Ralli House, North Wing on Nyerere Avenue; and that the transaction giving rise to this suit arose in Mombasa and therefore that it is best placed managing the suit at Mombasa.



4. In addition to the foregoing, Mr. Jagani pointed out that the Judiciary has since implemented and installed an effective e-filing system and online platforms for virtual hearing; and therefore the parties do not need to physically file pleadings or attend court proceedings in person. Thus, according to Mr. Jagani, the applicant has not shown any cogent prejudice it has suffered or stands to suffer if the matter is heard and concluded in the current court. He added that the matter is at an advanced stage and the only remaining part is for the parties to file their written submissions with regard to the main Petition as the parties do not intend to call any witnesses. Thus, the respondent prayed that the application be dismissed with costs.
5. A similar application was filed in Mombasa High Court Insolvency Cause No. E003 of 2020 involving the same parties; in which the applicant herein is the respondent and Uneeco Paper Products Ltd, is the Petitioner. The parties were in agreement that the two matters be handled simultaneously. Hence the two applications were disposed of by way of written submissions, pursuant to the directions given herein on July 8, 2021. Accordingly, Mr. Olwande for the applicant relied on his written submissions dated September 20, 2021. He proposed one issue for determination; namely, whether the application is merited. He submitted that the application is indeed merited and was filed without any delay for sufficient grounds. He relied on Section 18 of the *Civil Procedure Act* and the cases of David Kabungu v Zikarenga & 4 Others, Kampala HCCS No. 36 of 1995 and Hangzhou Agrochemical Industries Ltd v Panda Flowers Ltd [2012] eKLR for the factors to take into consideration in an application of this nature, namely: the motive 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, the expense which the parties in the case are likely to incur in transporting and preparing witnesses as well as the overall interests of justice.
6. On her part, Ms. Njagi for the respondent relied on her written submissions filed on May 10, 2022. She submitted that since the High Court has unlimited jurisdiction over civil matters, Section 18 of the Civil Procedure Rules is inapplicable to the circumstances of the case. She pointed out that Section 18 of the *Civil Procedure Act* only applies in connection with matters pending before the subordinate courts; and therefore that it is an absurdity to have a matter pending before the High Court transferred to a Court of concurrent jurisdiction.
7. Ms. Njagi further pointed out that the parties have another similar matter, namely Mombasa High Court Insolvency Cause No. E003 of 2020 filed by the applicant which has been prosecuted alongside this Petition. She therefore argued that the reason proffered by the applicant for transfer is equally available to the respondent as the petitioner in Insolvency Cause No. E003 of 2020. In her submission, the applicant stands to suffer no prejudice whatsoever if both matters were to be heard and determined in Mombasa High Court granted that court proceedings have now been digitized. She therefore prayed for the dismissal of the application.
8. I have given due consideration to the applications in the light of the averments set out in the parties' respective affidavits and written submissions. The two issues arising therefrom for determination are whether the Court has the jurisdiction to transfer this suit to Milimani Commercial and Tax Division, High Court in Nairobi; and if so, whether sufficient cause has been shown for such transfer.
9. The applications were anchored on Section 18 of the *Civil Procedure Act*, which provides:
  - (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—



- (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
  - (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—
    - i. try or dispose of the same; or
    - (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or
    - (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.
- (2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.
10. From the above, it is plain that Section 18 of the *Civil Procedure Act* does not make provision for the transfer of a suit from one High Court station to another. The question to pose then is whether there indeed exists jurisdiction for such transfer, and my answer is that such an application can only be entertained in the interest of justice pursuant to the Court's inherent jurisdiction. In this regard I am in agreement with the position taken in *Hangzhou Agrochemical Industries Ltd (supra)* by Hon. Odunga, J (as he then was) when he held: -

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. vs. 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 vs. 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 vs. 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.



11. Further, Hon. Ngugi, J. (as he then was) in the case of Daniel Kimani Moseka v Japheth Arthur Mwangi Kiurire (2012) eKLR, stated: -

“Suffice it to say that I agree with the holding and reasoning of justice Waweru in Kenya Tea Development Agency Vs Thomas Mboya Oguttu T/A Ms Oguttu Mboya & and Co. Advocates & another (Nairobi High court case No. 6/2004) (unreported). In that case, Justice Waweru said that there is only one High Court in Kenya which sits at various locations as the Chief justice may appoint. That High Court ... has a central office in Nairobi and various district registries. Machakos is one such registry. It is the same High Court that sits in Nairobi and all the various registries. It is not different High Courts. As such, a High Court judge may, in good faith, direct that a case be heard at a different registry If it would be more convenient for the parties or the court or for some other just cause. This is not “transfer” from one High Court to another High Court but a transfer from one registry to another. I am therefore of the opinion that, in an appropriate case, a High Court judge can invoke its inherent jurisdiction or the powers donated in order 47 rule 6 to transfer a case from one registry to another even if those registries are manned by different judges”.

12. Similarly, in Rapid Kate Services Limited v Freight Forwarders Kenya Limited & 2 Others [2005] 1 KLR 292, Hon. Emukule, J. held:

“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 the 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”.

13. It is, therefore, my finding that under its inherent jurisdiction and where sufficient cause has been shown, the Court has the power to transfer a suit from one registry of the High Court to another if the interests of justice so dictate.
14. In the instant matter the justification given for the transfer is convenience of the parties and to this end counsel relied on the *Hanzhou Agrochemicals Industries Ltd v Panda Flowers Limited* (supra) for the holding that:

“...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...”

15. While it is true that the applicant and its advocates are based in Nairobi, that is not necessarily the case with the respondent and its advocates. The pleadings show that both the respondent and his advocates have their principal offices in Mombasa. This is significant because the parties have two matters running simultaneously in which their roles have been interchanged. I therefore find merit in the respondent’s argument that if the applicant’s and its advocate’s principal place of business is the ground for transfer, then the same would also work in favour of the respondent herein as the respondent in *Insolvency Cause No. E003 of 2020*. Thus, having taken all the relevant factors into account, it is my finding that, given the circumstances of the two petitions and principle of equality of arms, no justification has been made for the transfer; and that it is in the interest of justice that the two matters be proceeded with to conclusion in Mombasa.
16. The other concern raised by the applicant, namely, the inconveniences to do with Covid 19 have since been overtaken by events with the implementation of e-filing system and virtual court sessions. A perusal of the proceedings show that the matters have hitherto proceeded virtually and therefore entailing no particular need for travel or physical attendance.
17. Thus, having put all these factors into consideration, I am far from persuaded that a plausible justification has been given by the applicant to warrant the transfer of the two suits to the High Court at Nairobi. Accordingly, the two applications dated May 13, 2021 filed herein and in *Insolvency Cause No. E003 of 2020* are hereby dismissed with an order that the costs thereof be in the causes.



It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18<sup>TH</sup> DAY OF JULY 2023

**OLGA SEWE**

**JUDGE**

INSOLVENCY CAUSE NO. 18 OF 2020 RULING 3

