



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MIGORI

CIVIL APPEAL NO. 14 OF 2020

STANLEY KOECH.....1ST APPELLANT

TRANSMARA SUGAR CO. LTD.....2ND APPELLANT

-VERSUS-

CHARLES GIBSON OMBASA.....RESPONDENT

(An Appeal from the Order of Hon. M. Obiero Principal Magistrate (PM))

0oissued on 28/4/2020 in Migori CMCC No. 187 of 2016)

JUDGMENT

This appeal was triggered by the order of Hon. M. Obiero Principal Magistrate (PM) issued on 28/4/2020 in CMCC No. 187 of 2016.

The appellants filed an application dated 29/10/2019. They sought for orders that the trial court strike out/dismiss the suit filed before the Migori Chief Magistrate's Court being Civil Suit No. 187 of 2016 for being a duplicate of Kilgoris Principal Magistrate's Court being Civil Suit No. 239 of 2015. The appellants also asked for costs of both the suit and the application.

The appellants in their application relied on three grounds in support of their application the main one being that the suit filed in the trial court (Migori CMCC No. 187 of 2016) was sub-judice as it involves the same parties and is the same cause of action as the suit filed in Kilgoris Civil Suit No. 239 of 2015.

Both parties defended their respective positions in the trial court. The Magistrate dismissed the appellants' application for lack of merit.

Being dissatisfied by the order, the appellants filed a memorandum of appeal dated 4/5/2020 and preferred seven (7) grounds of appeal which can be summarized in the following four (4) grounds: -

- i. That the learned trial magistrate erred and misdirected himself in law and in fact in misapplying the law as regards the striking out of suits on account of duplicity;**
- ii. That the trial court erred in law and in fact in venturing into the arena of litigants by considering issues that were not captured in the affidavits in support of the application and in opposition thereto;**
- iii. That the learned Magistrate erred in law and in fact in issuing a ruling that was self - contradictory in finding on one part that the subject suit were founded on one cause of action and by the same parties and (sic) proceeded to dismiss the application dated 29/10/2019;**
- iv. That the trial court erred in law and in fact in placing a higher standard of proof on the appellants and seemingly exempted the respondent from the same.**

The appellants prayed: -

- i. That the order of the court of 28/4/2020 be quashed, reviewed and/or set aside in entirety.**
- ii. That the court does allow the applicants' application dated 29/10/2019 and proceed to dismiss the respondent's suit with**

costs to the appellant.

iii. That the costs of this appeal be borne by the respondent.

Directions on the appeal were taken and both parties were directed to file their submissions. Both parties complied.

The respondent submitted that the main issue in contention is that the respondent's suit is an abuse of the court process as it is contrary to Section 6 of the Civil Procedure Act. It was further submitted that the trial court reached a proper conclusion after being satisfied that the appellants did not discharge the burden of proving the allegations raised in their application. The respondent relied on the case of **Chege Gitahi v Maboko Distributors Ltd & Another Civil Appeal No. 65 of 2005 (2005) 1 EA 65**.

On the allegations of duplicity, the respondent submitted that the trial court found that there was no evidence that the firm of Nyambati & Co. Advocates had instructions to file the Kilgoris case. This was the averment of the respondent in his replying affidavit and if the appellants had evidence to the contrary, then they should have sought leave to file a further affidavit to rebut the averments of the respondent.

In rebuttal, the appellants submitted that the suit filed in the Migori Law Courts is sub judice as it is a duplicate of the suit filed in Kilgoris Law Courts. The appellants relied on the findings in the case of **Republic vs Paul Kihara & 2 Others ex parte Law Society of Kenya (2020) eKLR**.

On whether the respondent had instructed the firm of A. Nyambati & Co. Advocates to file the Kilgoris suit, the appellants submitted that it was erroneous for the court to sit in adjudication on the validity or regularity of proceedings before a court of equal status and jurisdiction. It would have been prudent to challenge the same before the court seized of the matter in Kilgoris. Further, it was submitted that the instruction note is a private and privileged document as provided for under Section 134 of the Evidence Act.

This being the first appellate court, the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions. It has to establish whether the decision of the lower court was well founded. The court is guided by the decision in **Selle & Another vs Associated Motor Boat Co. Ltd (1968) EA 123**.

The main issue for determination is **whether the suit filed in the Migori CMCC No. 187 of 2016 is sub - judice for being a duplicate of Kilgoris Civil Suit No. 239 of 2015**.

The main controversy in the appellants' application dated 29/9/2019 was that the suit filed in the Migori Chief Magistrate's Court was a duplicate to the suit filed in Kilgoris Principal Magistrate's Court, hence it was an abuse of the court process. The appellants further contended that the suit in Kilgoris was filed earlier in the year 2015 and it had substantially proceeded.

The learned Magistrate in the impugned ruling, noted that the facts pleaded and the names of both plaintiffs in the suits filed in Migori and Kilgoris are the same. He opined that the issues for determination were whether the plaintiffs are the same and whether the plaintiff in the Migori suit gave instructions to file the suit in Kilgoris.

The suit filed in the Kilgoris Principal Magistrate's Court was **Civil Suit No. 239 of 2015 - Charles Gibson Ombasa -vs- Transmara Sugar Co. Ltd**. The suit filed in the Migori court was **Civil Suit No. 187 of 2016 - Charles Gibson Ombasa -vs- Transmara Sugar Co. Ltd**. I have taken time to peruse the pleadings in both suits filed in Migori and Kilgoris. The facts pleaded in both suits are similar. There was no question or controversy on the true identity of the plaintiff in the lower court. Having observed that the plaintiffs in both suits are one and the same, and one common defendant, Trans Mara Sugar Co Ltd. The trial Magistrate respectfully erred in finding that it was an issue for determination although he did not proceed to make a pronouncement on it.

Section 11 of the Civil Procedure Act provides that every suit is to be filed in the court of the lowest competent grade to try it. Section 15 of the same Act provides that suits can be filed where the defendant resides or where the cause of action took place wholly or in part.

The cause of action in the suits filed in Migori and Kilgoris is an alleged road traffic accident which occurred along the Enosaen Mapash road. The police abstract and the P3 form were taken from the Trans Mara Police Station in Kilgoris.

There is a reason why litigants are encouraged to file suits where the cause of action arose. In the event there are some key witnesses who may be needed to attend court to produce documents like a police officer or where the court may be forced to make site visits to the scene of the accident. It does not make sense to expect the police officer to travel from Kilgoris to Migori to produce a document or the trial court sitting in Migori to travel to Kilgoris to solve a dispute whereas there is a court of competent jurisdiction situated in Kilgoris. This will not be in line with the overriding objectives of the Civil Procedure Act as envisaged under Sections 1A & 1B which implores the courts to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed under the Civil Procedure Act.

Further, in the spirit of devolution, Article 6 (3) of the Constitution advocates that all State Organs (the judiciary being one of them) to ensure that there is reasonable access of its services to all members of the public. The judiciary under its transformation agenda and ease of access of service to members of the public, established the Kilgoris Law Courts to handle all disputes arising within its surrounding areas to prevent members from travelling far to seek justice. This effort cannot be overlooked by a litigant who chooses to file a suit in an unreasonably far place. In any event, if the case was that there was no court in Kilgoris, the respondent still had the option to file the case in Narok or in the alternative in Kisii where he is a resident.

The principle of sub-judice is codified under Section 6 of the Civil Procedure Act which provides: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation -The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.”

The import of the above provision was expounded in the Court of Appeal in **Civil Appeal No. 83 of 2017 Joel Kenduiywo vs District Criminal Investigation Officer Nandi & 4 Others (2019) eKLR** where the court held as follows:-

“Section 6 of the Civil Procedure Act is meant to prevent abuse of the court of process where parallel proceedings are held before two different courts with concurrent jurisdictions or before the same court at different times. This is to obviate a situation where two courts of concurrent jurisdiction arrive at different decisions on the same facts, evidence and cause of action.”

Similarly, in **HCCC No. E111 of 2018 ASL Credit Limited vs Abdi Basid Sheikh Ali & Another (2019) eKLR** the court quoted with approval the holding in **Kampala High Court Civil Suit No. 450 Of 1993 - Nyanza Garage vs. Attorney General** in which the Court held that: -

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

I do not see how the suit filed in the Migori Court is different from the suit filed in the Kilgoris Court. They are substantially the same. Since the suit in Kilgoris was filed first and the cause of action arose within Kilgoris, it takes precedence.

On the issue of instruction note, I agree with the appellant that if there is an issue of representation, it is best placed to be raised before the trial court. A Magistrate’s court has no supervisory jurisdiction over another Magistrate’s court of concurrent jurisdiction. Besides, I am yet to come across a mandatory provision in the law which requires litigants to attach instructions notes as part of their court documents.

From the foregone, this appeal succeeds and I make the following orders: -

- i. The ruling and order of Hon. Obiero dated and delivered on 28/4/2020 is hereby set aside.**
- ii. The suit filed in Migori being Civil Suit No. 187 of 2016 be and is hereby struck out.**
- iii. The suit filed in Kilgoris being Civil Suit No. 239 of 2015 shall be the suit to proceed.**
- iv. Costs of this Appeal and in the lower court to the appellant.**

Dated, Delivered and Singed at Migori this 28th day of April, 2022.

R. WENDOH

JUDGE

Judgment delivered in the presence of:

No appearance for the Appellants.

Ms. Okota for the Respondent.

Nyauke Court Assistant.