



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MIGORI
CIVIL APPEAL NO. 13 OF 2020

STANLEY KOSGEI.....1ST APPELLANT

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

-VERSUS-

CHARLES KAMBI.....RESPONDENT

(An Appeal from the Order of Hon. M. Obiero Principal Magistrate (PM) issued on 28/4/2020 in CMCC No. 188 of 2016 dismissing the applicant's application dated 29/10/2019)

JUDGMENT

This appeal was triggered by the order of Hon. M. Obiero Principal Magistrate (PM) issued on 28/4/2020 in CMCC No. 188 of 2016.

The appellants filed an application dated 29/10/2019, seeking orders that the trial court strike out/dismiss the suit filed before the Migori Chief Magistrate's Court being Civil Suit No. 188 of 2016 for being a duplicate of Kilgoris Principal Magistrate's Court Civil Suit No. 72 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. 188 of 2016) was sub-judice as it involves the same parties and the same cause of action which had substantially proceeded in Kilgoris Civil Suit No. 72 of 2015.

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

Being dissatisfied with the order, the appellant filed a memorandum of appeal dated 4/5/2020 and preferred six (6) grounds of appeal which can be summarized in the following three (3) 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 trial court erred in law and in fact in placing a higher standard of proof on the appellants and seemingly exempting 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 its entirety.

ii. That the court do allow the 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. The appellants did not file any submissions. In opposing the appeal, the respondent filed his submissions dated 17/11/2020 on 6/12/2021.

The respondent submitted that the main issue in contention was that the respondent's suit was an abuse of the court process as it was 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**.

Further, 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 their replying affidavit and if the appellants had evidence to the contrary, then they would have sought leave to file a further affidavit to rebut the averments of the respondent.

This being the first appeal the court has a duty to re-evaluate and analyse all the evidence tendered in the lower court and arrive at its own conclusions but bearing in mind that it neither saw nor heard the witnesses testify. 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 Chief Magistrate's Court is sub - judice for being a duplicate of Kilgoris Civil Suit No. 72 of 2015**.

I have considered the complaints filed in the Principal Magistrate's Court in Kilgoris and in the Chief Magistrate's Court in Migori. The suit filed in the Kilgoris court was **Civil Suit No. 72 of 2015 - Charles Kambi Nyakweba -vs- Transmara Sugar Co. Ltd**. The suit filed in the Migori court was **Civil Suit No. 188 of 2016 - Charles Kambi vs Stanley Kosgei & Transmara Sugar Company Limited**.

The issue is whether these two suits involve the same parties and have the same cause of action. The suit in Kilgoris was filed in the year 2015 and it had substantially proceeded. In their submissions filed in the lower court, the appellants submitted that both suits involved the same parties and the same cause of action. On the allegations that the respondent had never instructed the firm of Ben K. Gichana & Company Advocates, the appellants faulted the respondent for not taking the initiative of reporting the said firm for instituting a suit without his consent. The Respondents excuse was without basis.

In his ruling of 28/4/2010, the learned Magistrate observed that the appellants did not sufficiently discharge the burden of proving that the plaintiffs in both suits are one and the same persons. The plaintiff named in the Migori Suit is Charles Kambi while the plaintiff in the Kilgoris suit is Charles Kambi Nyakweba. The learned Magistrate further observed that it is not uncommon for two people to share names. In addition, the learned Magistrate observed that the appellants did not rebut the averments by the respondent that he did not instruct the firm of Ben K. Gichana to file any suit on his behalf.

On the issue of identity, it is trite law that he who alleges must prove. Sections 107 & 108 of the Evidence

Act provides that any person who wishes to have the court to give judgement based on the existence of facts which he asserts, must prove.

It is common knowledge that persons of 18 years and above, are best identified using their identity cards. It is also not uncommon as was observed by the trial Magistrate to find two persons with similar names but it is not necessary that those persons have any relationship.

If indeed the claim by the appellants is that the plaintiffs in both suits are one and the same person, it would have been necessary on their part, to write to the Registrar of persons to get a confirmation to establish that the said Charles Kambi and Charles Kambi Nyakweba are one and the same person. Further, the appellants did not attempt to ask that both persons produce their respective identity cards for the trial court to have an opportunity to examine them. See my findings in the case of **South Nyanza Sugar Company vs Geroje Omolo Ngeso (2021) eKLR**.

In any event, if the claim by the respondent is that he is not the same person as the plaintiff in the Kilgoris case, he was best placed to produce his national identification card in court to prove he is a different person since he is the holder of that document and not the appellants.

I have also taken time to consider the complaints filed in both cases. Both suits are centered around an alleged road traffic accident. In the Kilgoris case, the alleged accident occurred along the Magenche - Ekona road on or about 3/12/2014 involving motor vehicle registration number KBU 136A. On the other hand, in the Migori case, the alleged accident happened along the Enosaen - Mapasha road on 16/9/2015 involving motor vehicle registration number KBU 176A.

On the face of the pleadings, it is obvious that the accidents did not happen at the same place, , they did not involve the same motor vehicles and they did not occur on the same date. Therefore, the question of whether the firm of Ben K. Gichana was instructed to file the suit in Kilgoris was neither here nor there. The facts in both pleadings are different.

From the facts in both pleadings, I find that the suit filed in Migori is not sub-judice and neither is it a duplicate of the suit in Kilgoris.

Perhaps the question to be considered is whether it makes sense for the Respondent to file a suit outside the local jurisdiction of where the cause of action arose. As observed above, the suit filed in Migori was a result of a road traffic accident which occurred along the Enosaen - Mapash Road. A quick search shows that road is within Kilgoris, a town within Narok County. The police abstract and the P3 Form confirm as much.

Section 11 of the Civil Procedure Act provides that every suit should 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.

There is a reason why litigants are encouraged to file suits where the cause of action arose. Witnesses in the case should not be inconvenienced by being expected to travel long distances. 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 accord 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 out of its surrounding areas to

prevent members from travelling far to seek for 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.

Article 165 (6) of the Constitution empowers the High Court to have supervisory jurisdiction over the subordinate court and other quasi – tribunals. Sub-section 7 of the aforementioned Article, also gives the High Court powers to make any orders or directions over its supervisory courts to ensure fair administration of justice.

It is difficult at this point to establish whether the suits filed in Migori and Kilgoris are similar, I shall invoke and exercise my supervisory jurisdiction and transfer **Migori Civil Suit No. 188 of 2016 Charles Kambi -vs- Stanley Kosgei & Another** to Kilgoris Law Courts for hearing and determination because that is the court clothed with jurisdiction to hear and determine the said matter, the cause of action having arisen in Kilgoris Area.

The results is that I quash the decision of the trial court dated 28th April, 2020 and the same is set aside. There shall be no order as to costs as none of the parties succeeded.

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.