



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 4 OF 2013

IN THE MATTER OF: AN APPLICATION BY WYCLIFFE SAYIA

OKUNGU FOR LEAVE TO ISSUE OF ORDERS OF MANDAMUS

AND

IN THE MATTER OF: EXECUTIVE PROCEEDINGS IN THE COURT OF APPEAL OF KENYA AT KISUMU

AND

IN THE MATTER OF: (1) PERMANENT SECRETARY OFFICE

OF THE PRESIDENT PROVINCIAL ADMINISTRATION & INTERNAL SECURITY

(2) ATTORNEY-GENERAL

BETWEEN

1. WYCLIFFE SAYIA OKUNGU.....APPLICANT

VERSUS

1. JOEL KAYERI RISAMIRA

2. NELSON RAVAZA KINYANGI

3. DISTRICT LAND SURVEYOR - VIHIGA

4. THE ATTORNEY GENERAL.....RESPONDENTS

RULING

1. The Attorney General has filed an application dated 2/11/2020 seeking orders that:

a) Spent

b) There be stay of Execution and/or committal proceedings against the Inspector General Police pending hearing and determination of this application inter-partes.

c) This Honourable court do transfer this matter to the High Court Judicial Review Division at Kisumu for final hearing and final determination.

d) In the alternative the trial court do order the Deputy Registrar, High Court of Kenya, Kisumu to avail the original file in Kisumu High Court Civil Suit No. 342 of 2000, REUBEN UGUNGU KIGANANE VERSUS JOEL KAYERA RISAMIRA, NELSON RAVAZA KINYANGI, DISTRICT LAND SURVEYOR AND THE ATTORNEY GENERAL before the High Court in Mombasa.

2. The application is premised on the grounds set out therein and those in the affidavit sworn on 2/11/2020 by **Martin Mwadeje**, a Senior State Counsel in the Office of the Attorney General. The deponent avers that the cause of action arose in Vihiga, which is under the territorial jurisdiction of the High Court in Kisumu where the matter was heard at the **Kisumu High Court Civil Suit No. 342 Of 2000, Reuben Ugunu Kiganane Versus Joel Kayera Risamira, Nelson Ravaza Kinyangi, District Land Surveyor And The Attorney General** and a favourable appeal was awarded in favour of the Applicant/1st Respondent in **Civil Appeal No. 25/06** at Kisumu in **Wycliffe Sayia Okungu versus Joel Risamira & 4 others**. Therefore, a judicial review application seeking enforcement of a decree in **Civil Appeal No. 25/06 Kisumu in Wycliffe Sayia Okungu versus Joel Risamira & 4 others** ought to be filed in Kisumu where the subject matter is situate rather than in Mombasa.

The Response

3. The Application was opposed by the Ex-parte Applicant vide Replying Affidavit sworn on 16/12/2020 and Grounds of Opposition dated 9/12/2020. The Ex-parte Applicant avers that the Court of Appeal in **Civil Appeal No. 25/06** at Kisumu in **Wycliffe Sayia Okungu versus Joel Risamira & 4 others** awarded him a sum of Kshs. 515,840/= and on 17/08/2012, the court issued a decree and order and copies of the same was served upon the litigating counsel for the Attorney General; on 7/11/2012, the court issued certificate of costs and certificate of order against the Government under Order 29 rule 3 of the Civil Procedure Rules 2010 and Section 21 of the Government Proceedings Act; on 15/01/2013 leave was sought and granted for an application for judicial review orders of mandamus directing the accounting controller, Permanent Secretary in the office of the President to effect payment of the decretal sum together with costs and interests as per the judgment delivered by the Court of Appeal; hearing proceeded inter-parte via written submission and on 25/4/2014, the court the delivered its ruling allowing the application for orders of mandamus as prayed.

4. The Ex-parte Applicant avers that the principal secretary office of the president was on 9/05/2014 served with a court order issued on 6/05/2014 directing him to effect payment of the decretal sum together with costs and interest. However, the said court order was not complied with, and on 24/6/2014 the court issued a notice to show cause why Execution should not issue and the same was addressed to the Principal Secretary in the office of the President Provisional Administration and Internal Security. The Ex-parte Applicant further avers that a warrant of arrest order was made and issued by the court on 15/05/2015 against the Principal Secretary in the office of the President Provisional Administration and Internal Security, addressed and dispatched to the Inspector General's Police Headquarters for Execution vide registered post under cover letter dated 3/06/2015.

5. The Ex-parte Applicant further avers that the Inspector General failed to comply with the orders of the court issued on 15/05/2015 by failing to Execute the warrant of arrest issued and on 22/07/2015 despite being given a notice to comply with the court order issued on 15/05/2015 and being warned that failure to which contempt proceedings would be commenced against him by the advocate for the Ex-parte Applicant.

6. The Ex-parte Applicant avers that sometime in October 2016, the Applicant, /Respondent through the office of the Attorney General paid a sum of Kshs. 872,912/= leaving a balance of Kshs. 111,117.80/= which remained unpaid prompting the deponent to file an application seeking the Inspector General be committed to jail for contempt of court for failure to enforce the warrant of arrest in Execution of the order issued on 15/05/2015.

7. The Ex-parte Applicant avers that sometime in February 2020 the court issued a notice to show cause why Execution should not be issued against the Inspector General to be heard on 28/09/2020. However, before the notice to show cause could proceed, **Mr. Mkok** learned state counsel for the Attorney General vide letter dated 15/11/2020 addressed to the Ex-parte Applicant's advocate confirmed that the payment of the balance of the outstanding amount was being processed, only for the Ex-parte Applicant's advocate to be served with the instant application on 25/11/2020.

8. It is the Ex-parte Applicant's case that he resides in Mombasa and that Section 12(e) of the Civil Procedure Act only refers to a place where a suit is to be instituted and not where action to enforce award was to be filed. Further, the defendant in Kisumu High Court Civil Suit 342 of 2000 were government officers and the offices of the Attorney General are found countrywide, and that the High Court has jurisdiction throughout the country.

The Determination

9. The instant application was canvassed by written submissions. The Applicant/1st Respondent filed submissions dated 25/01/2021 while the Ex-parte Applicant filed submissions dated 18/01/2021. Arising from the pleadings and submissions filed, the sole issue for determination is:

Whether the present suit should be transferred to Kisumu for final hearing and determination.

10. It is trite that the transfer of suit from courts of concurrent jurisdiction is discretionary. The principles to be considered by a court while Exercising its discretion to transfer cases is laid out in **Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd (2012) eKLR** where Odunga J had this to say in relation to the conditions to be considered in determining whether to transfer a suit:

“...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 interest 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 marinating 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.”

11. In the present case, the nature of the relief sought are judicial review orders of *mandamus* to compel a public officer to facilitate settlement of a decree issued by the Court of Appeal in Kisumu Civil Appeal 25 of 2006. The Ex-parte Applicant avers that he resides in

Mombasa and it is convenient for him to institute judicial review proceeding against the Applicant herein since the Attorney General who is representing the Principal Secretary in the office of the President Provisional Administration and Internal Security, and the Inspector General of Police have offices across the country, and therefore, no prejudice will be suffered by the Applicant herein. The Applicant on the other hand has averred that the Ex-parte Applicant ought to have instituted judicial review proceeding at the High Court in Kisumu, since it is the High Court station close to where the cause of action arose, and the same has territorial jurisdiction over the said judicial review proceedings.

12. Taking into consideration the principles laid out in **Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd (supra)** I find that the Applicant has failed to demonstrate what prejudice the Attorney General will suffer if the judicial review proceeding are allowed to proceed in Mombasa. Furthermore, it is noteworthy that during the pendency of the instant judicial review Application, the Applicant has partially complied with the Court Order issued on the 15/05/2015 and therefore, presently there are no good grounds to justify orders for the transfer of this case from Mombasa to Kisumu.

13. In the circumstances, I find no merit in the Application dated 2/11/2020 and the same is dismissed with costs to the Ex-parte Applicant/1st Respondent.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2021.

E. K. OGOLA

JUDGE

Ruling delivered via MS Teams in the presence of:

Mr. Mkok for Respondent

Ms. Arika for Ex parte Applicant

Ms. Peris Court Assistant