



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT HOMA BAY

CIVIL APPEAL NO.30 OF 2020

[Formerly Migori High Court HCCA No. 32 of 2020]

BETWEEN

SIMBIRI NAN-BELL COMMUNITY HEALTH CENTRE LTD.....APPELLANT

AND

1. ERIC ODEDE..... 1ST RESPONDENT

2. ELIJAH MIRUKA 2ND RESPONDENT

3. SPENCER OTIENO.....3RD RESPONDENT

4. EQUITY BANK LIMITED (OYUGIS BRANCH).....4TH RESPONDENT

5. THOMAS OLUOCH NYAKADO.....5TH RESPONDENT

(Being an Appeal from the Ruling and Order in Oyugis Principal Magistrate's PMCC No. 23 of 2019 by Hon. J.P. Nandi –Principal Magistrate).

JUDGMENT

1. Simbiri Nan-Bell Community Health Centre Ltd, the appellant herein was the plaintiff in Oyugis Principal Magistrate's PMCC No. 23 of 2019. She had sued the respondents and was seeking the following orders:

a) An injunction order be issued permanently restraining the 1st, 2nd, 3rd, 4th and 5th defendants herein either by themselves, servants, agents and/or any other person claiming authority under any of them from operating, managing and/or accessing Equity Bank account No.1500xxxx and/or any other Bank account plaintiff opened anywhere within the Republic of Kenya and all the funds received by the Defendants and still held in the afore stated fraudulent account be transferred back to the plaintiff's official Bank Account number 0119xxxx – Cooperative Bank Oyugis branch, and National Hospital Insurance Fund (Homa Bay Branch) to re-direct all payments due and payable to the plaintiff to the 0119xxxx – Co-operative Bank Oyugis Branch.

b) The plaintiff also seek for an order directing the Defendants to render accounts and refund reimburse and/or pay to the Plaintiff all the money they (Defendants) have received through the Bank account number 1500xxxx, on behalf of and account of the Plaintiff failure to which the Plaintiff be at liberty to levy execution against the Defendants personally, jointly and severally for the deposits received on account of the Plaintiff.

c) An injunction order be issued permanently restraining the 1st, 2nd and 3rd defendants herein, either by themselves, servants, agents and/or any other person claiming authority under any of them from wrongfully and or lawfully interfering with the customers, employees, hospital property and/or Health Facility of the plaintiff and her hospital situated at Simbiri village near Kosele Township on parcel Numbers Central Kasipul/Kawere/Kamagak/2041 & 2043, and the OCS Kosele Police Station to oversee and implement eviction and enforce and/or ensure compliance with the directions of this court.

d) Costs of the incidentals to this suit.

2. By an application dated 10th May, 2019 the applicant was seeking for an injunction among other orders directed at the respondents herein. The application was declined.

3. The appellant was aggrieved by the said ruling and order and filed this appeal. She was represented by the firm of O. M. Otieno & Company Advocates. the following grounds of appeal were raised:

a) The trial magistrate erred in law by failing to grant prayers 2, 3, 4, 5, 6, 7, 8, and 9 of the application dated the 10th day of May 2019, or the application under consideration, notwithstanding the clear evidence that the appellant and its directors were the sole and absolute owners of Land parcel number Central Kasipul/Kawere/Kamagak/2041 & 2043, together with developments thereon, with superior and indefeasible rights.

b) The learned trial magistrate erred in law by failing to exercise his discretion in favour of the appellant notwithstanding strong, compelling and prima-facie case established and demonstrated by the appellant which called for the grant of mandatory injunction besides other orders sought by the appellant in the application.

c) The learned trial magistrate erred in law by declining to grant the application and condoning, furthering and perpetuating criminal and illegal activities of the respondents which are expressly prohibited by the Mandatory provisions of Sections 13 & 22(1) of the Medical Practitioners and Dentist Act.

d) The learned trial magistrate erred in law when he unreasonably withheld the exercise of his discretion thereby exposing the public to risks and great danger by authorizing strangers and unlicensed amorphous group to take up the appellant's property and assumed management and misappropriation of funds contrary to law.

e) The decision of the learned trial magistrate is contrary to law and rights to property as coded by the law and the constitution.

f) That the learned trial magistrate erred in law when he misapprehended the principle applicable in grant of injunctions thereby occasioning miscarriage of justice.

4. The 1st, 2nd 3rd and 5th respondents were represented by the firm of H. Obach & Partners, Advocates who raised an issue of jurisdiction to transfer this matter to this court.

5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

6. I have looked at the pleadings and though in the lower court this matter was described as a land matter, the pleadings are clear that this was not a land matter. It was therefore wrongly filed in the Environment and Land Court at Migori. In **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR** Kasango J held:

.....An incompetent suit cannot be transferred because to transfer it would be to transfer that which lacks life. Thus far I am in agreement with the respondent's authorities.

Earlier the Court of Appeal in the case Joseph Muthee Kamau & Another vs. David Mwangi Gichuru & Another [2013] eKLR stated:

When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being the case of Kagenyi v. Musirambo [1968] EA 43. The same would apply to pecuniary jurisdiction in a claim of special damages where the liquidated sum claimed exceeds the court's pecuniary jurisdiction. However, this does not apply to the present case in a claim for general damages where it is the respondents who appointed, through their own assessment, what the amount of damages they would claim. The respondents are permitted to limit the amount of general and special damages they would like to claim in order to bring themselves within the pecuniary jurisdiction of a particular court.

7. I therefore find that the Environment and Land Court lacked jurisdiction to transfer this matter to this court. The appeal is therefore struck out with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 16TH DAY OF DECEMBER, 2021

KIARIE WAWERU KIARIE

JUDGE