



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISCELLANEOUS CIVIL CASE NUMBER 154 OF 2019

ANTHONY MUCHEMI JUMA.....1ST APPLICANT/PLAINTIFF

ANN WANJIKU MUCHEMI.....2ND APPLICANT/APPLICANT

LUCY WANGOI JUMA.....3RD APPLICANT/PLAINTIFF

FRANCIS KARANJA MUCHEMI.....4TH APPLICANT/PLAINTIFF

MERCY WANGECHI MUCHEMI.....5TH APPLICANT/PLAINTIFF

VERSUS

MARY WANJIKU.....1ST RESPONDENT/DEFENDANT

MARK WANGAI MUCHEMI.....2ND RESPONDENT/DEFENDANT

RULING

1. On the 7th January, 2019 the applicants herein filed Notice of Motion under the provisions of the **Public Health Act Section 146(1) and (4), Order 51 Rule 1 of the Civil Procedure rules, Section 3, 3(a) and 63(c) and (e) of the Civil Procedure Act and all other relevant and enabling provisions of the Laws of Kenya.**

2. They sought the following orders;

(a) THAT this application be certified as urgent and be heard in the 1st instance.

(b) THAT the Honourable court does forthwith order a stay of all ongoing proceedings in Nakuru Chief Magistrate's Courts, Civil Suit Number 3 of 2019.

(c) THAT the Honourable Court does call for the record of the above proceedings which are in the subordinate courts precisely the Chief Magistrate's Court at Nakuru and make an order as to its transfer to itself.

(d) THAT the Honourable Court does exercise its supervisory role as enshrined in the Constitution and ensure that the above proceedings are heard without delay and that justice is dispensed to the parties herein.

(e) THAT the costs of this application be in the cause.

3. The application was heard by my brother *Ndung'u J* and he delivered a ruling dated 4th April, 2019 in which he declined the application.

4. The applicants filed another application, Notice of Motion dated 1st July 2019 brought under **Article 50 (2) (e) of the Constitution, Order 45, Order 51 of the Civil Procedure Rules, Section 1A, 1B, 3A and 80 of the Civil Procedure Rules and all enabling Laws of Kenya.** They seek orders;

1. ***THAT this application be certified as urgent and be heard in the first instance.***

2. THAT the Honourable Court be and is hereby pleased to review the orders as issued contained in the Ruling dated 4th April 2019 delivered by the Honourable Judge A. K. Ndung'u pursuant to the Applicants/Plaintiffs Notice of Motion application dated 15th February, 2019.

3. THAT the costs of this application be in the cause.

5. The application is supported by the affidavit of Francis Karanja Muchemi, grounds on the face of the application and the written submissions, authorities cited by counsel.

6. In the submissions filed on 27th August, 2019 Ms. Badia framed two (2) issues for determination.

1. Whether the Plaintiffs/Applicants application under Certificate of Urgency via Notice of Motion supported by supporting affidavits of Anthony Muchemi Juma, Ann Wanjiku Muchemi, Lucy Wangoi Juma, Francis Karanja Muchemi and Mercy Wangechi Muchemi all dated 7th January 2019 and filed in Court on an even date; was filed at the Chief Magistrate's Court at Nakuru (CMCC 3/19) without jurisdiction.

2. Whether the High Court has power to withdraw Nakuru Chief Magistrates Court CMCC 3/19 and transfer the same to the High Court for hearing and disposal.

She submitted extensively on both issues on the first issues she concluded;

"It is the applicants/plaintiffs submissions that it was rather erroneous for the Honourable Judge A. K. Ndung'u to arrive at a finding that the Applicants/Plaintiffs suit was filed at the Nakuru Chief Magistrate's Courts as Nakuru CMCC 3/19 without jurisdiction when in essence the Courts has all along been seized of the requisite jurisdiction by virtue of Section 146 of the Public Health Act ."

And on the 2nd issue she concluded;

"The impugned ruling dated 4th April 2019 delivered by the Honourable Judge A. K. Ndung'u is an error apparent of the face of the record in that; in this instance since the suit as filed was dealing with 2 issues mainly seeking exhumation orders of the body of the deceased the subject matter of the suit for purposes of conducting an autopsy/post mortem examination to determine the cause of death of the deceased on 8th December 2018 and subsequent reburial; both the Chief Magistrates Courts and High Court had concurrent jurisdiction to entertain the suit.

Since the High Court is statutorily clothed with original unlimited jurisdiction both in Civil and Criminal matters the Applicants/Plaintiffs application was not only properly before the court but also statutorily warranted the orders sought therein and as such the court was too harsh to the Applicants/Plaintiffs considering the sentiments contained in paragraphs 13,14, 15 and 16 of the impugned ruling dated 4th April, 2019."

The applicants urge the court to find that the judge's ruling has an error on its face and that the matter before the Chief Magistrate's court it ought to be transferred to this court.

7. The application before me is for review as provided for by **Section 80 of the Civil Procedure Act and Order 45 Civil Procedure Rules.**

8. From what I gather from the submissions, the application is premised on the ground that Ndung'u J **erred** in his findings and not that there is an error on the face of *Ndung'u J's* ruling.

9. The tone of the counsels submissions is heard from the issues as framed. From what I hear, the applicants are arguing their applications a fresh before me. That is not the purpose of an application for review. An application to review seeks;

i) To point out the specific error

ii) Produce the new evidence/material that the applicant could not by exercise of due diligence have obtained before the 1st hearing.

10. Be that as it may, in arguing the 1st ground the counsel for the applicant submits that the error on the face of the record is that *Ndung'u J* made a finding that the Chief Magistrate's Court had no jurisdiction to hear the matter before it.

11. My reading of *Ndung'u J's* ruling bears no such finding. The judge states that it is the applicants who came before the court with the claim that after their counsel had filed the suit before the Chief Magistrate's Court, she came across some authority stating that that court had no jurisdiction, and on that ground, was seeking the transfer of the case to the High Court. My understanding of the ruling as delivered, the Judge found, framed one issue whether the applicant's had met the threshold for the transfer of the suit from the Chief Magistrate's Court to the High Court.

He stated;

“It is the plaintiffs who filed the suit at the Nakuru Chief Magistrate’s Court. A belated realization that a party has filed a suit in a court without jurisdiction is not a ground to transfer a matter to another court, be it of concurrent jurisdiction or otherwise. In any event, a suit filed without jurisdiction is not transferrable as it is incompetent.”

12. That in my view does not say that the Chief Magistrate’s Court has no jurisdiction to hear the matter. On this one, it is the applicants who misapprehended the ruling.

13. On the 2nd issue, the judge did not find any reason to transfer the matter. There was no allegation of error/misconduct on the part of the trial court to warrant the exercise of the High Court’s supervisory powers. Where is the error with that finding?

14. Finally the applicant submits that in fact both the Chief Magistrate’s Court and the High Court have concurrent jurisdiction to hear and determine the applicant’s suit dated 7th November, 2019 but would prefer the High Court to hear the matter. That is not a proper ground for review of the orders issued by *Ndung’u J* on 4th April, 2019.

15. Clearly therefore application does not meet the threshold of the requirements of **Section 80 of Civil Procedure Act and Order 45 of the Civil Procedure Rules.**

16. The application is accordingly denied.

Dated, delivered and signed at Nakuru this 27th day of February, 2020.

Mumbua T. Matheka

Judge

In the presence of:

C/A Edna

Ms Badia for applicant

Mr. Mbabu holding brief for Mr. Muma for defendant/respondent