



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

MISCELLANEOUS CASE NO. 4 OF 2020

ELIZABETH ALEYO MARARU.....APPLICANT

VERSUS

MICHAEL MUSAMBAYI.....RESPONDENT

RULING

1. The cause herein was initiated at the Chief Magistrate's Court as Kakamega CMCCC No. 255 of 2019 (OS). The applicant then moved the Chief Magistrate's court, through a certificate of urgency, dated 15th January 2020, which was, curiously, not founded on any interlocutory application, seeking that a date be given for the hearing of the originating summons.

2. The matter was placed before Hon. Hazel Wandere, Senior Principal Magistrate, where the advocate for the applicant asked the court allot the matter a date in the High Court. The court certified the matter urgent, and directed that the file be placed before the High Court on 29th January 2020, for directions on the originating summons dated 9th October 2019. The court file in Kakamega CMCCC No. 255 of 2019 (OS) was forwarded to the High Court, vide a letter from the Chief Magistrate's Court, dated 17th January 2020. Upon being received at the High Court registry, it was assigned its current number, Kakamega HC Misc. Case No. 4 of 2020.

3. The Deputy Registrar of this court had the matter placed before me on 25th February 2020, for directions. The directions that Mr. Robi, the advocate for the applicant, sought, was for the originating summons to be deemed as properly filed and served. Ms. Rauto, for the respondent, raised a number of issues on the matter. She observed that the matter had been filed at the lower court, and then the lower court purported to order its transfer to the High Court, at the High Court it was registered as a miscellaneous cause and the originating summons had been amended without leave of court. She submitted that the Chief Magistrate's court lacked jurisdiction to order transfer of a matter to the High Court, and, therefore, the matter was improperly before the court. Secondly, she submitted that the same cannot be treated as a miscellaneous cause. Finally, she submitted that the originating summons was amended without leave of court, and should be struck out. She urged that the matter be sent back to the lower court.

4. In reply, Mr. Robi argued that the matter was properly before the court, as the Deputy Registrar had placed it before me for directions. On the question of it being classified as a miscellaneous cause, he argued that that was an error by the registry. He stated that the matter was originally to be filed at the High Court, but his staff erroneously had it filed at the Chief Magistrate's court. He asserted that the court had jurisdiction over the matter. He stated that he had sought for leave for the amendment. Finally, he said that no one was prejudiced by the transfer.

5. Just so that there is clarity, this is how the Certificate of Urgency, dated 15th January 2020, was framed:

“I, PHILIP RODI OYOO an Advocate of the High Court of Kenya do hereby certify that the originating document before the court be certified urgent and a hearing date be fixed on priority basis for reasons that:

- a. The Respondent intends to sale (sic) the matrimonial home on Plot No. ISUKHA/MUKHONJE/1210.
- b. The Applicant's belongings have been held by the Respondent who has refused to release her clothes, shoes and personal effects;
- c. The Respondent keeps stalking the Applicant with a view to harm her and/or eliminate the applicant who now fears for her life.
- d. Delay in hearing the matter shall prejudice the applicant's case.

DATED at KISUMU this 5th day of January 2020...”

6. The record of 15th January 2010 captured the proceedings as follows:

“15.1.2020

Before Hon. Hazel Wandere SPM

Court Assistant; - Isindu

Mr. RODI for the applicant present

RODI; - We filed a certificate of urgency matter. We ask for a new date in the High Court to enable us argue this application.

H. WANDERE SPM

COURT;

I have considered submissions by counsel. I have perused the court file. This matter is certified urgent.

ORDER; File placed before high Court on 29.1.2020 for direction on the originating summons dated 9.10.2019. Applicant to serve respondent

H. WANDERE SPM

15.1.2020”

7. The most critical issue relates to the transfer of the matter from the lower court to the High Court. In the first place, there was no formal application for transfer of the matter to the High Court. The basis upon which the matter was placed before Hon. Wandere, on 15th January 2020, was a certificate of urgency, dated 15th January 2020. The certificate said nothing about transfer, since it principally sought fixing of a hearing date on priority for disposal of the suit. The matter of the transfer to the High Court was raised orally by the advocate for the applicant.

8. A certificate of urgency is not an application. It is a court filing that merely facilitates the placing of a matter before a judicial officer so that the judicial officer can assess whether or not to certify the matter urgent. It has no life of its own, it must be anchored on an application. The material that brings out the urgency of the matter should be set out in an averment on oath and not on the certificate itself, since it is the material in the averments under oath that forms the basis for the certification. It is for that reason that there should be an interlocutory application, which is then supported by the certificate of urgency. The certificate is the licence for the placing of the application before the judge or magistrate. I must repeat that the certificate of urgency has no life of its own. It should be an appendage to an interlocutory application. So, in this case, the lower court entertained a certificate of urgency that was floating in the air, not anchored on any application that would have given the basis or foundation for the court to assess the urgency of the matter. There was, therefore, no foundation at all for the lower court to make the orders that it made.

9. It would appear that the applicant entertained the notion that the originating was an interlocutory application, which could then be certified as urgent. An originating summons is not an interlocutory application, but a substantive pleading, in the same footing with a plaint, petition or defence. There is no moment for filing of certificates of urgency to support plaints or petitions or defences, the certificate can only be filed with respect to an interlocutory application. Why? The certificate of urgency enables a party to have its application placed before the Judge or magistrate for consideration as to whether certain orders or directions ought to be given on priority basis. The plaint or petition or originating summons is the basis of a suit, and only final orders or decrees can be given on such pleading. For that reason temporary relief cannot be obtained on the basis of the principal pleading, a party seeking temporary relief, prior to the disposal of the main suit, must file an interlocutory application. That should include a situation where the party seeks that the main suit be heard on priority basis, file an interlocutory application, under certificate of urgency, seeking to convince the court that it should dispose of the suit as a matter of priority. For that reason, no certificate of urgency should be entertained if it is not riding on the back of an interlocutory application.

10. The other issue is that the advocate asked the lower court to give him a date in the High Court, for the purpose of arguing of the application before the High court. In the first place, it is not clear which application it was that he sought to argue before the High Court. The originating summons, as stated above, is a principal pleading, it is not an application. It initiates a suit, and, therefore, there was no application before the lower court but a suit. Secondly, a certificate of urgency is not an application. The lower court had no application before it for which it could assign a date for it to be argued. Secondly, the suit was before the lower court. It was the court that was seized of the matter. The High Court was not seized of it, and there could not have been any basis for the lower court to allocate a date at the High Court for directions, with regard to a matter that the lower court was seized of. Directions on the disposal of an originating summons are given by the court seized of the matter. Hon. Wandere was not sitting as a Deputy Registrar of the High Court, and the matter before her was not even a High Court matter.

11. Although, Ms Rauto submitted on the issue of transfer of the matter to the High Court by the lower court, the record of the lower does not have any order on transfer. The order was for the placing of the matter before the High Court for directions. It is not clear from the order the nature of the directions that Hon. Wandere envisaged. Indeed, the registry properly acted in opening a miscellaneous file because the suit had not been transferred, it was merely being placed before the High Court for directions, an exercise that could, quite properly, be handled

through a miscellaneous file. That would mean that the High Court was not taking over the matter, it was to give directions to the lower court on how the lower court was to dispose of the matter that was before it, and thereafter return the file to the lower court. In any case, if the directions that the applicant was seeking were on how to have the matter disposed of expeditiously, the lower court could still give those directions. It did not need to have the matter placed before the Judge, for the High Court to direct it, the lower court, on how to handle the matter on priority basis.

12. However, Mr. Rodi, on his part, interpreted that order to mean that the matter had been transferred to the High Court, so that when the matter was placed before me, he submitted that I should deem the same as properly filed and served, so that I could then clear it for fixing of hearing dates before the High Court.

13. If the order by Hon. Wandere was intended to be for transfer of the matter to the High Court, which I believe it was not the intent, from the language of the order, then Hon. Wandere exercised a power that she did not have, and the purported transfer was, therefore, a nullity, and the matter was improperly placed before the High Court. The suit in Kakamega CMCCC No. 255 of 2019 (OS) was a civil action, commenced by way of originating summons, which is a mode of commencing suits governed by the Civil Procedure Act, Cap. 21, Laws of Kenya. Under sections 17 and 18 of the Civil Procedure Act, only the High Court has jurisdiction to transfer suits from one court to another.

14. This is what the two provisions say:

“17. Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.

18. (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage –

(a) transfer any suit, appeal or other proceedings pending before it for trial or disposal to any other court subordinate to it and competent to try or dispose of the same ; or

(b) withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter –

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any other court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the court from which it was withdrawn;

(2)...”

15. If it was intended that Kakamega CMCCC No. 255 of 2019 (OS) was to be a transferred, no reason was given by the lower court for the transfer, at the time the order was made.

16. Jurisdiction looms large over transfer of suits. If a suit is filed in a court that has no jurisdiction, then that anomaly cannot be cured by simply having the suit transferred from that court, which has no jurisdiction, to the court with jurisdiction. If that is what was sought in this case, then the transfer was a non-starter. Jurisdiction is at the heart of any proceedings, and a court should be sensitive to it. Without jurisdiction, nothing moves. The Court of Appeal said so, in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, in these words:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. Specific to the exercise of the power to transfer suits, the Court of Appeal stated, in *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, as follows:

“In numerous decided cases, courts, including this Court, have held that it would be illegal for the High Court in exercise of its powers under S. 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled law that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.”

18. In a more recent decision, *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR, it said:

“... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction upon itself ...”

19. On the matter of amendment of pleadings, I agree with Ms. Rauto. The amended originating summons is dated 29th January 2020. It was filed on even date, which was long after the respondent had entered appearance on 31st October 2019, and responded to the originating summons by way of the affidavit sworn on 13th November 2019, filed at the lower court on 14th November 2019. Pleadings had, therefore, closed, as at 29th January 2020, and what remained was directions on the disposal of the suit. The originating summons could not, therefore, be amended without leave of court and notice to the respondent. Mr. Rodi submitted that such leave had been obtained, I have found no support for that submission in the record of the lower court.

20. From what I have said so far, it should be clear to the applicant that Kakamega CMCCC No. 255 of 2019 (OS) found its way to the High Court improperly. My understanding of Hon. Wandere’s order was that I was to give directions on the disposal of the matter that was before her. As said before, there is no clarity of the exact nature of the directions that I was expected to give, the document that Hon. Wandere acted upon was that certificate of urgency that talks about certifying the originating summons as urgent and allocating it a date for hearing on priority basis. The High Court does not have to give directions of that nature. Hon. Wandere could give those directions, and it was unnecessary for the lower court, in the circumstances, to have ordered that the matter to be placed before the High Court for the giving of such directions.

21. I shall, accordingly, direct that the file, in respect of Kakamega CMCCC No. 255 of 2019 (OS), be returned to the Chief Magistrate’s Court, at Kakamega, for that is where it properly belongs, for the directions sought, in the certificate of urgency, dated 15th January 2020, to be given by that court.

22. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 9TH DAY OF MARCH, 2020

W. MUSYOKA

JUDGE