



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MAKUENI**

**HC.MISC.APP CIVIL CASE NO. 89 OF 2018**

**APA INSURANCE LIMITED.....APPLICANT**

**-VERSUS-**

**MAGDALENE SIVINA MUTUNGI.....1<sup>ST</sup> RESPONDENT**

**DOROTHY MUTANU MUTE.....2<sup>ND</sup> RESPONDENT**

**AGNES MBULA NDUNDA.....3<sup>RD</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. By a notice of motion dated 27/06/2018, the Applicant seeks the orders:-

- 1) **THAT** this Honourable Court be pleased to direct that the suit herein Makueni CMCC no, 71 of 2017 be transferred from the Makueni Chief Magistrate's courts to the Chief Magistrates Court at Milimani Commercial Courts Nairobi for hearing and quick disposal.
- 2) **THAT** in the alternative the Court give any orders or directions to the Magistrates Court Makueni for hearing and final disposal of CMCC NO. 71 OF 2017.
- 3) **THAT** the costs of this application be in the cause.

2. The same is premised on the grounds that:-

- a) **THAT** the suit herein is a declaratory suit against the 1<sup>st</sup> Respondent emanating from an accident that emanated along Wote-Makindu road within the jurisdiction of Makueni Chief Magistrate Courts.
- b) **THAT** however the 1<sup>st</sup> Respondent subsequently also filed a declaratory suit against the Applicant herein being CMCC no.3593 of 2017 at Nairobi Chief Magistrate Courts.
- c) **THAT** the parties in Makueni CMCC no. 71 of 2017 are the same parties and it would therefore be expeditious to have the two suit determined contemporaneously.
- d) **THAT** it is therefore necessary to transfer this suit to Nairobi Chief Magistrate Courts.

3. The application is supported by the affidavit of Christine T. Wanjiru sworn on 27/06/2018.

4. The same is opposed by the Respondent No. 1 via grounds of opposition dated 23/01/2019 namely:-

- 1) **The Plaintiff/Applicant is frivolous, incompetent, an abuse of court's process as the application has no foundation to stand on.**
- 2) **The Defendant in the suit resides in Makueni and the cause of action arose along Wote-Makindu road.**

**3) The Plaintiff/Applicant's application herein offends the provisions of the civil procedure act and rules, specifically Section 11 and 12 which expressly provide that a suit should be instituted where the defendant or defendants reside or where the cause of action arose.**

5) The court notes that the core issues arise from the road traffic accident which occurred on 25/05/2014 along Wote –Makindu road giving rise to a declaratory suit no. Makueni CC 71 of 2017.

6. The Respondent filed appearance and defense. But instead of waiting to defend the above suit, the respondent lodged Nairobi CC 3593 of 2017 seeking declaratory orders over the same accident.

7. Of course this ought to have been filed as a counter claim in Makueni suit.

8. The multiplicity of suit over the same subject matter is a clear abuse of the court process.

9. The principles of *res judice* under Section 6 of Civil Procedure Act Cap 21 were violated in any event. Section CPA cap 21 states that;

**“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”**

10. Section 8 of CPA further states that;

**“Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action”**

11. The provisions of Section 15 and 21 Civil Procedure Act were also violated as the cause of action arose in Makueni County not Nairobi. Further the defendant in Nairobi case resides in Makueni. Section 15 aforesaid states that;

**“.....every suit shall be instituted in a court within the local limits of whose jurisdiction—**

**a) The defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain;**

**or**

**b) Any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or**

**c) The cause of action, wholly or in part, arises.**

12. Thus the court makes the following orders:-

**1) Nairobi 3593 of 2017 be transferred to Makueni SPM's court and consolidated with Makueni CC 71 of 2017 for hearing and determination in law courts at Makueni SPM's court.**

**2) Costs to the Applicant in any event.**

**SIGNED, DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF JANUARY, 2019, IN AN OPEN COURT.**

.....

**HON.C.KARIUKI**

**JUDGE.**