



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

MISCELLANEOUS APPLICATION NO. 8 OF 2019

ABDULRAHMAN MOHAMED AGIL.....APPLICANT

VERSUS

KATANA KASUMBE KALU.....RESPONDENT

RULING

The applicant vide a notice of motion dated 11th February, 2018 seeks orders that civil suit number 4957 of 1994 be transferred from Mombasa Chief Magistrate Court to Malindi subordinate court for purposes of completing execution of the decree therein. There is also the issue that the court provides for costs or makes any other orders fit in the circumstances of this case.

The application so expressed in terms of **Article 165 (6) (7) of the constitution section 1A, 1B, 3 and 3A** of the Civil Procedure Act, and also **order 22** and **order 51 Rule 1** of the Civil Procedure Rules. It is supported by the grounds on the face of the motion and an affidavit sworn by the applicant Abdulrahman Mohamed Agil.

The respondent filed a replying affidavit sworn by **Katana Kasumbe Kalu** dated 1st April, 2019.

According to the respondent there is no iota of evidence on the averments contained in the supporting affidavit by the applicant. Further the respondent averred and annexed documentary evidence marked KKK-1 being the primary Judgment of the court. The subsequent action taken by the court in the said execution proceedings marked as annexures KKK2, KKK3 and KKK-4 on status of enforcement of the decree. It is also deponed by the respondent that the court on 30th April, 1998 ruled on the same application dismissing the application for transfer of RMCC 4937 of 1994 from Mombasa to Malindi. The respondent further stated that the suit sought to be transferred falls within the plea of limitation of actions Act **cap 22** of the laws of Kenya. In conclusion the respondent urged this court to find that the application is un-merited and an abuse of the court process; warranting dismissal.

The Legal Framework and case commentaries

Having reviewed the notice of motion and the affidavit evidence for and against the orders sought by the applicant, this court identifies the following issues for determination;

- (1) Whether this Court has the jurisdiction to transfer RMCC 4937 of 1994 from Mombasa to Malindi Court.***
- (2) Whether the application runs contrary to the provisions in terms of section 1A and 1B of the Civil Procedure Act.***
- (3) Whether the plea of res judicata applies to the facts of this motion.***

On the first issue **section 18** of the Civil Procedure Act provides as follows;

- (1) On the application of any of the parties an after notice to the parties and after hearing such of them as desire to be heard or of its own motion wither such notice the High Court may at any stage;***
 - (a) Transfer any suit appeals or other pending proceedings before court for trial or disposal to any court subordinate to it and competent to try or dispose of the same or withdraw any suit or other proceedings, pending in any court subordinate to court and thereafter try or dispose of the same or transfer the same for trial to any court. Subordinate to court and***

competent to try or dispose of the same or re transfer the same for trial or disposal to the court from which it was withdrawn.

On the other hand while exercising such jurisdiction the High Court is required to be satisfied of the threshold expressed in terms of section 1A and 1B of the Civil Procedure Act on the overriding objective; therefore section 17 and 18 of the Civil Procedure Act on transfer of suits must be weighed against section 1A and 1B of the Act requiring compliance “for the court to facilitate the just, expeditious, proportionate and affordable resolution of the court disputes governed by the Act.”

That even where the criteria in section 17 and 18 of the Civil Procedure Act are met the court has to consider the aims in respect of Furthering the overriding objective as the one in section 1B of the Civil Procedure Act.

The golden thread under section 1B of the Act is in regard to the just determination of the proceedings.

(b) The efficient use of the available judicial and administrative resources.

(c) The efficient disposal of the business of the court.

(d) The timely disposal of the proceedings in the court at a cost affordable by the respective parties.

The fulcrum of the application was the transfer of suit currently domiciled at Mombasa Chief Magistrate registry to Malindi Chiefs Magistrate Court for purposes of completing execution process. From the reading of **Article 165 (6) and (7)** of the constitution the High Court sitting in exercise of the supervisory jurisdiction has to purposely ponder whether it can usurp the jurisdiction of another High Court on transferring a suit from a subordinate court not within its supervisory jurisdiction.

Secondly, given the fact that the Chief Justice through a gazette notice has addressed the core mandate on supervisory jurisdiction to various High Courts over subordinate courts throughout the country under their respective Administrative devolved units.

There is no dispute that under **section 17 and 18** of the civil procedure Act this Court has the jurisdiction to determine the application. However, the existence of **Article 165 (6) and 7** of the constitution is exercised within the statutory provisions and the High court Organization administration Act.

In the case of **Peter Ochara Anam & 3 others v Constituencies Development Fund Board and others** EKLK 2010 the court held.

“Jurisdiction was everything and where the law established a procedure for resolving a dispute, that procedure had to be followed. While the court had jurisdiction under the constitution that did not take away the obligation to ensure that procedure was followed.”

The decision in owners of Motor Vessel Lilian S v Caltex Oil (K) 1989 KLRI is to the effect that jurisdiction of the court is everything .without which a court has no power to make one more step, where a court of law has no jurisdiction. There would be no basis for continuing of proceedings pending other evidence.

The law envisions a system in which an objective of territoriality jurisdiction is observed to avoid any drawbacks which may be exploited by litigants bend on forum shopping. Thus in jurisdiction it's the claim of the plaintiff and not the defence which must be considered whether in transferring proceedings to that other court it would be seized of jurisdiction.

The transfer by the applicant was premised on the grounds of addressing enforcement and execution of Judgment delivered in 1998 by Resident Magistrate Mombasa. The validity of the notice of motion has been challenged on various points one of which is whether this Court possesses the requisite jurisdiction.

From the brief facts contained in the affidavit evidence the issue raised fell outside the court's territorial and subject matter jurisdiction. The applicant raised issues and facts of the whole judgment duly determined by Mombasa Resident Magistrate Court. It is my conceded view that an application for transfer of suit as asserted by the applicant from Mombasa Resident Magistrate to Malindi Chief Magistrate should have been filed before the High Court at Mombasa. This court has not been told that the subject matter of the case is within Malindi a feature which prevents chief magistrate Mombasa from proceeding with execution.

It would be contrary to **Article 165 (6) and 7** of the constitution for this Court to purport to call for the record of a subordinate court under the supervisory jurisdiction of Mombasa High Court to query the proceedings and remove from that court the suit to Malindi subordinate court. As it stands on this ground alone the application is not justified or sustainable.

Secondly in determining this application the court has to consider the provisions of **section 1A and 1B** of the Civil Procedure Act on overriding objective which is at the heart of administration of civil justice, when the court interprets any rules in the court processes and procedure. It is worth noting that under **Article 159 (20 (d))** of the constitution the ultimate objection of any administration of justice is to adjudicate disputes on the merits in order to confer substantive justice. The same constitution also abhors delay of justice under the maxim that justice delayed is justice denied. It is therefore the intention of parliament that by enacting **section 1A and 1B** on overriding objective the courts have to determine dispute resolution of cases speedily and expeditiously by using no more than proportionate resources.

In my view where a party to the litigation fails to comply with **section 1A and 1B** of the Civil Procedure Act to further the administration of

justice it may render his application incompetent. In the assessment of the facts and circumstances of this application the court takes cognizance that the applicant has not acted honestly and endeavored to ensure the legal costs incurred in connection with the proceedings are proportionate to the claim.

Further the applicant in discharging his responsibility of filing the application against the respondent failed to act promptly without undue delay from the date of the last order of the court at Mombasa. He is therefore guilty of laches. We are not told why the mechanisms of execution process cannot be redressed before the court which framed and determined the dispute. Striking the balance between the two compelling interest of justice in this motion, CMCC 4937/94 shall be dispensed justly proportionately and within reasonable time at Mombasa than Malindi Court.

(b) Thirdly whether the application is res judicata

The respondent in his replying affidavit deponed that execution proceedings were commenced by the Applicant way back on 13th March 1997.

In support of this contention the respondent relied on annexure marked KKK-Z; KKK3 and KKK-4, it was also averred in the same affidavit that on 30th April, 1998 a ruling was made by the court dismissing the transfer of suit from Mombasa, vide referenced annexure KKK-5. Reference was also made to an application dated 18th June 1998 on stay of execution which was also dismissed marked as annexure KKK-6. The applicant herein traversed the respondents replying affidavit in whole. The doctrine of *res judicata* is expressly provided for under **section 7** of the Court Procedure Act. Among the provisions of the Act are as follows;

“No court shall try any suit or issues in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title in a court competent to try such subsequent suit on the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.”

The importance of the elements of *res judicata* was propounded in the case of the **Independence Electoral and Boundaries Commission v Maina Kiai & 5 others** 2017 EKLK where the Court of Appeal held as follows;

“Thus for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive been conjunctive terms;

(a) The suit in issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which, the issue is raised.”

The underlying principle on the doctrine of *res judicata* is that there should be an end to litigation on the basis of the same set of facts to a claim. The significance and role of *res judicata* under **section 7** of the Civil Procedure Act is to prohibit parties whose rights have been ascertained from re-opening the case and litigating on the facts which the court decided with finality.

In the present case both the applicants and respondent affidavits provide the much clarity as to how the suit was adjudicated at the trial court. As indicated in the replying affidavit to this application the cause of action which led to the Judgment and subsequently proceedings involved the same parties and identical issues. Thereafter the applicant applied for execution proceedings in existence of the Judgment to enforce the decree. The trial court possessed of the proceedings delivered a final and conclusive decision on transfer of suit in a ruling dated 30th April, 1998. On the other hand the trial court exercising original jurisdiction determined that the execution proceedings were completed in copy of the ruling dated 18th June, 1998.

In this context there is no question which arises for this court to transfer the matter to the Chief Magistrate at Malindi, for a new trial on execution of the Judgment if there was a mistake made by the trial court the applicant had a recourse on appeal. He cannot order for a transfer of suit to commence execution proceedings deemed to have been completed.

In light of this there is no doubt that exactly the same question on execution of the decree is again purposed to be in issue in the event this court orders for transfer of suit from Mombasa to Malindi Court.

Accordingly I am satisfied that the court is barred by the doctrine of *res judicata* to re-open the proceedings on account of transfer of CMCC 4937/1994 to Malindi as urged by the applicant.

For the foregoing reasons am satisfied that the applicant has failed to fulfill the conditions precedent for this court to exercise jurisdiction under **section 18, 1(A) and (B) or section 7** of the civil procedure Act.

In the result the notice of motion dated 11th December 2018 is lost with costs to the respondents.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 28TH DAY OF MAY, 2019.

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R. NYAKUNDI

JUDGE

Representation:

Ms. Aoko holding brief for Mr.

Binyenya for the Applicant.