



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. APPLICATION NO.34 OF 2018

JULIUS LEKURUITO

NICKSON LOLGOSOI.....APPLICANTS

(Suing as the Legal Representative of the Estate of

MARTHA NULKIPU LEKURUITO (Deceased)

-VERSUS-

NOTTINGHAM MWANGI.....1ST RESPONDENT

MOSES MWANGI.....2ND RESPONDENT

RULING

1. The applicants/plaintiffs in **Nakuru CMCC No. 252 of 2012** filed the said suit following a fatal road accident that claimed the lives of mother and wife of the plaintiff.

The Accident occurred along Nyahururu Ol Kalau road thus the court with territorial jurisdiction would have been the chief Magistrate's court at Nyahururu.

For some reason, the suit was filed at Nakuru Chief Magistrate's Court.

2. By an application the applicants sought an order of transfer of the suit to the Nyahururu law courts but by its order dated **3rd December 2015**, the court dismissed the suit on grounds of lack of territorial jurisdiction.

3. It has been submitted that when the ruling was delivered, the applicant was not represented in court in court as counsel who was instructed to hold bring to take the ruling failed to attend. It is submitted that thereafter, the court file went missing and was never traced and by a letter written by the executive officer of the court 20th July 2016 dated, it was certified that the file could not be traced in the court registry.

4. The applicant was thus authorized to apply for reconstruction of the court file which was done vide a Misc. Civil application no 120/2016 on the 2nd November 2016. Surprisingly, the original court file then resurfaced on the 24th July 2018.

5. Upon the above background the plaintiffs by an **application dated 13th February 2018** sought for leave to appeal out of time from the chief magistrates ruling dismissing the suit on the 3rd December 2015 and to stay proceedings in CMCC 252/2012 Nakuru pending hearing of the application.

6. The plaintiff swore the affidavit in support of the application on grounds stated at the face of the application, in summary, that as the court file went missing, the appeal could not be filed within the statutory period, that the appeal has high chances of success and a denial of the said orders would cause the plaintiff to suffer prejudice.

7. The application is opposed by a Replying Affidavit sworn by the 2nd Respondent. Main grounds of opposition are that they did not know that the trial court file was missing nor were they privy to the reconstruction for a skeleton file; and that there are no chances of succeeds of the intended appeal.

I have considered counsel submissions the pleadings and proceedings at the Chief Magistrates court and the rival submissions.

The issues that arise for determination are two forth:

1. Whether the applicant has made out case for grant of leave to file an appeal out of time from the Magistrate's order dated the 3rd December 2015 in Nakuru CMCC No. 252 of 2012.
2. Whether proceedings in Nakuru CMCC No.252/2012 should be stayed pending hearing and determination of the intended appeal, if the answer to I above is in the affirmative.

9. Jurisdiction of a court is everything and once a court realises that it has no jurisdiction, it has to lay down its tools, because anything done without the requisite jurisdiction which ordinarily is conferred by statute legislation, is a nullity – **Owners of the Motor Vessel Lillian “S” Caltex Oil (K) Limited (1989) I KLR 1.**

The above is in respect of general jurisdiction of courts. The question in this application is on the **court's territorial jurisdiction** which is of utmost importance and cannot be taken lightly.

10. In the case of a magistrate's court, a suit ought to be filed at the competent court capable of trying it within its territory – **Section 11 of the Civil Procedure Act. Section 12** thereof states that a suit ought to be filed where the subject matter is situated. In the present application, where the accident occurred. **Proviso to Section 12** is to the effect that a suit can be instituted within the local limits whose the defendant voluntarily resides or does business or works for gain.

11. In respect to suits for compensation for wrong to the person, **Section 14 of the Movable Property Act**, allows such suits to be filed within the local limits where the defendant carries on business or resides. **Section 15** emphasizes the above limits.

Under **Section 17 and 18** of the Act upon an application by a party, or on its own motion, the High Court may transfer the suit to another subordinate court with territorial jurisdiction, when justice of the case demands such action. It is also instructive that if no objection as to place of suing is raised in the subordinate court in the first instance, it cannot be raised on appeal unless **there has been a consequent failure of justice** (emphasis mine) – **Section 16.**

12. Upon the above legal provisions, was the trial magistrate in order to deny the applicant request for return of the plaint for filing in the court with territorial jurisdiction? I have considered the Chief Magistrate's ruling pursuant to **Order 4 rule 9(1) (2) Civil Procedure Rules.**

An appeal arising therefrom is as of right. See also Section 79G of the Civil Procedure Act.

It is submitted by the applicant that the ruling subject of the appeal raises grave issues touching on jurisdiction that can only be conversed on appeal having been first raised before the trial court.

13. The respondent is of a different opinion, that no chances of success are likely and invokes provisions of **Section 11 of the Act and Order 4 Rule 9 of Civil Procedure Rules** that I have cited above, and submits that a magistrate cannot return a plaint initially filed in a court without territorial jurisdiction and that it is only the High Court that has that authority.

14. In the new justice dispensation under the 2010 Kenya Constitution, the court is enjoined to dispense justice fairly to all parties through a fair hearing – **Article 50 and 159 2(d)**-and without regard to technical and procedural flaws that do not go into the merits of the suit.

The matter of jurisdiction is central to litigation in all courts. Would it be in the interest of justice if the applicant is denied to exercise its right to a fair hearing by allowing it to appeal from the offending ruling that in effect terminated the case?

15. In **HC Mis. Civil Appl. No.357 of 2010, Waweru J**, faced with similar circumstances rendered:

“if a suit finds itself in the wrong court, surely it is in the interest of justice of all concerned that the suit be properly and finally adjudicated.

What prejudice would any party suffer in that event? After all, that overriding objective of the Civil Procedure Act and rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (Section 1A (1)).”

16. Being persuaded by the above authority among others I too find no prejudice to the respondent if the applicant is granted leave to file his appeal out of time for the High Court to render itself on the matter of jurisdiction.

Shutting out a litigant out of the seat of justice (the courts) is not only draconian but outdated and out of place in view of constitutional imperatives. See also the **Nairobi Imaging Centre Ltd -vs- Kenya Medical Association & 2 Others (2013) e KLR.**

17. As to be reasons advanced for not filing the appeal within time, I am persuaded without any submission to the contrary by the respondent that the court file went missing from the court registry hence the appeal could not have been filed within time. I am not about to accept submissions by the respondent that the Executive officer of the court could have been coerced to certify the court file as missing without any evidence to that effect.

Whether the applicant attended court to take the ruling or not, it was delivered, and the applicant was aggrieved.

18. The question is whether the court file was available thereafter to facilitate obtaining proceedings and documents therefrom to facilitate filing of the appeal within time. Procedural technicalities that do not go into the fundamental dispute before the court should not cause a court to sacrifice substantive justice to the detriment of litigants so as to undermine the cause of justice. The court is under an obligation, upon circumstances of each case to exercise its discretion in such matters – **Supreme Court decision in Hon.Lemanken Aramat -vs- Mann Maitamei Lempaka & 2 Others (2014) e KLR.**

19. In its totality, I find merit in the application dated 13th February 2018. It is allowed in term of prayers 3 and 4. To that end the applicant shall file the Memorandum of Appeal within 7 days of this order, and the Record of Appeal within 90 days thereafter failing which these orders shall lapse unless otherwise extended by lawful court orders.

20. Each party shall bear own costs of the application.

Dated, signed and delivered this 29th Day of November 2018

J.N. MULWA

JUDGE