



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO 561 OF 2010

FAMILY HEALTH OPTIONS KENYA.....PLAINTIFF

VERSUS

URBANUS MUTUNGA MUTHAMA.....1ST DEFENDANT

HARRISON MASAWI MKONJI.....2ND DEFENDANT

RULING

INTRODUCTION

1. A brief background of this matter was that on 9th March 2013, Mutava J found that the Plaintiff had shown sufficient cause for its suit not to be dismissed. On 26th March 2013, the said learned allowed the Plaintiff's *Ex parte* Chamber Summons application dated 22nd March 2012 and filed on 23rd March 2012 and directed that the Summons to Enter Appearance be extended for a further twelve (12) months and that the same be served upon the Defendants by way of substituted service by advertisement in a local newspaper with nationwide circulation.

2. Summons to Enter Appearance appear to have been successfully served upon the Defendants as they filed their Memorandum of Appearance and Statement of Defence on 24th July 2012. Although the said Statement of Defence was also dated 24th July 2012, the Memorandum of Appearance was not dated.

3. Subsequently, on 16th April 2013, the Plaintiff filed its Notice of Motion application dated 10th January 2013. The same was brought under the provisions of Order 2 Rule 15 (1) (b), (c) (d), Order 51 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law. It sought the following orders:-

a. THAT the 1st and 2nd Defendants'/Respondents' Defence dated 24th July 2012 and filed on the same day be struck out;

b. Judgment in the sum of Kshs 1,634,276.00 be entered in favour of the Applicant against the 1st and 2nd Respondents jointly and severally;

c. Costs of this application be awarded to the Applicant.

4. On 31st March 2014, this court directed that parties file their respective written submissions and thereafter take a date for highlighting of the said written submissions at the registry. The matter did not come up in court again until 24th September 2014 when the court reserved its ruling in this matter.

5. After a careful analysis of the affidavit evidence and the prayers that had been sought in the Plaintiff's application, it was evident that the Plaintiff had sought entry of judgment against the Defendants, jointly and severally, in the sum of 1,634,276/=. It was clear that this is a matter that should have been filed at the subordinate court in the first instance as it has pecuniary jurisdiction to the tune of Kshs 7,000,000/=.

6. The **Practise Directions Relating To The Filing Of Suits, Applications and Reference in Proper Court, 2009 Gazette Notice No 1756** clearly stipulate as follows:-

1. The place of suing is to be determined in accordance with the provisions of Section 11 and 18 of the Civil Procedure Act and not according to the preference or convenience of the plaintiff...

2. Where suits have already been filed in the wrong court, the Court should exercise its authority ...to return the plaint to be presented to the court in which suit should have been instituted, without prejudice to any other powers that it may possess under the law to strike out the pleadings as an abuse of the court process.

7. Parties ought not to file matters in courts which are convenient to them but rather they must follow the clearly laid down procedures for the sake of good order with a view to avoiding forum shopping. Despite the fact that Mutava J had granted certain orders in this matter, the same were not substantive in nature as they never went to the merits of the case herein that would compromise this matter were it to be heard by the proper court.

8. For the foregoing reasons, this court declined to consider the merits of the Plaintiff's present application as it was of the firm view that making a determination would in effect be encroaching on the had jurisdiction of the court that ought to deal with the same.

DISPOSITION

9. Accordingly, it is hereby directed that this file be and is hereby transferred to the Chief Magistrate's Court Milimani Commercial Courts Nairobi for the determination of the Plaintiff's Notice of Motion application dated 10th January 2013 and filed on 16th April 2013.

10. The matter shall be mentioned before the Chief Magistrate on 26th January 2015 for his or further orders and/or directions.

11. There will be no order as to costs as the court did not determine the substantive issues herein.

12. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of January 2015

J. KAMAU

JUDGE