



No. 320/2014

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 33 OF 2011

KUBER ENTERPRISES.....1ST APPELLANT
ALEXANDER MUTISYA2ND APPELLANT
JOSEPH MUIMI MWIKYA3RD APPELLANT

VERSUS

DAVID KILUTU KISENGU.....RESPONDENT

(Being an appeal from the original Ruling in Kitui Principal Magistrate's Court Civil Case No. 37 of 2004 by Hon. A.G. Kibiru ,PM on 22/2/10

JUDGMENT

1. **David Kilutu Kisengu** the Respondent herein filed a plaint on **3rd January, 2004** against the applicants claiming general and special damages following an accident that occurred on the **27th March, 2002** in which he sustained injuries. The matter was set down for hearing. PW1 testified partly on the **3rd June, 2008**. He was stood down in order to avail some treatment notes.
2. On the **2nd February, 2013**, **Mr. Musyoki**, counsel for the appellants sought directions from the court on **Order 11** of the **Civil Procedure Rules**.
3. **Mr. Mulu**, counsel for the respondents argued that the matter was exempted from the provisions of **Order 11 Civil Procedure Rules** as it was filed in **2004**. He noted that the matter having been in court for **eight (8) years**, complying with **Order 11** of the **Civil Procedure Rules** would delay the matter further.
4. In his ruling the learned trial magistrate, **A.G. Kibiru, PM** stated thus :-

“Order 11 is meant to deal with preliminary issues well in advance before the trial commences. Trial in the present case started long before the new provisions came into force. The provisions does not apply retrospectively. I therefore find that this case does not fall within the ambit of Order 11 and the same should proceed to further hearing.”

5. Being aggrieved by the ruling of the court, the appellants appealed against the decision. In the memorandum of appeal The appellants rely on the following grounds:-
 - i. The learned trial magistrate erred in law when he held that the provisions of **Order 11** of the **Civil Procedure Rules, 2010** did not apply to the case before him, which holding is contrary to the

- express provisions of **Order 54 Rule 2** of the **Civil Procedure Rules, 2010**.
- ii. The learned trial magistrate erred in law when he exempted the suit from the procedure provided under **Order 11** of the **Civil Procedure Rules, 2010** even when the respondent had not proved the conditions set out in the provisions of **Order 54** to warrant the exemption.
 - iii. The learned trial magistrate erred in law when he based his decision on an oral application.
6. The issue of determination is whether **Order 11** of the **Civil Procedure Rules** is applicable in the instant case.
 7. Order 11 of the Civil Procedure Rules provide as follows:-

“1. This Order shall apply to all suits except small claims or such other suits as the court may by order exempt from this requirement.

2. After the close of the pleadings parties shall within ten days complete, file and serve the pre-trial questionnaire as provided in Appendix B.

3. (1) With a view to furthering expeditious disposal of cases and case management the court shall within thirty days after the close of pleadings convene a Case Conference in which it shall—

- a. **consider compliance with Order 3 rule 2 and Order 7 rule 5;**
- b. **identify contested and uncontested issues;**
- c. **explore methods to resolve the contested issues;**
- d. **where possible secure parties’ agreement on a specific schedule of events in the proceedings;**
- e. **narrow or resolve outstanding issues;**
- f. **create a timetable for the proceedings;**
- g. **change the track of a case;**
- h. **consider consolidation of suits;**
- i. **Identify a test suit and order stay of other suits.**

8. **Order 11, rules 1** gives the court hearing the matter the discretion to exempt a suit from strict adherence to the order. Small claims suit would fall in such a category. The court can also accept other suits from the requirement.
9. This is a case that was filed in the **year 2004**, the subject matter having occurred in the **year 2002**. Pleadings in the matter were closed. Hearing commenced on **3rd June, 2008**. PW1 testified. He was stepped down because there was need to refer to treatment notes.
10. The issue of pre-trial questionnaire being filed and served; and the case conference being convened cannot apply.
11. The transitional provision applied without prejudice to the validity of anything previously done. The matter being partly heard, subjecting it to the requirement of **Order 11** of the **Civil Procedure Rules** will defeat justice and definitely cause more delay of the hearing of the matter than has already occurred. This will be prejudicial to the respondent. It will be in the interest of justice to have the matter resolved as fast as possible. The matter should proceed pursuant to the provisions of the **old Civil Procedure Act**.
12. It is important to note that the overriding objective of the **Civil Procedure Act** is to ensure any dispute is resolved expeditiously, proportionately and in a just manner. (**See Section 1A, 1B, 3A** after **Civil Procedure Act**).
13. Consequently, it is apparent that the learned trial magistrate rightly exempted this suit from observing the provisions of Order 11 Civil Procedure Rules. Accordingly the appeal is dismissed.
14. The file shall be placed before the **Chief Magistrate Kitui** for further directions on the **30th June, 2014**.
15. It is so ordered.

DATED, SIGNED and DELIVERED at MACHAKOS this 24TH day of JUNE, 2014.

L.N. MUTENDE

JUDGE