



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 375 OF 2012

JOSEPHINE NYONGESA PLAINTIFF

VERSUS

NAFAS WORLD AUTO & ANOTHERDEFENDANTS

RULING

By an application in the form of Notice of Motion dated 13th June 2014 the plaintiff Josephine Nyongesa seeks from this court an order that this suit be transferred to Milimani Nairobi Commercial Courts for hearing and final determination.

The grounds upon which the said orders re sought are that the Chief Magistrate's court has jurisdiction to hear and determine the claim as its jurisdiction to hear and determine the claim was enhanced vide Statute Law Miscellaneous Amendment Act, 2012 as attached to the supporting affidavit; That this court has the power to order for such transfer of suits to facilitate convenient disposal of this suit and to correct any error in place of filing (sic); and that the Chief Magistrate's court's diary may be flexible to accommodate the plaintiff's suit and to fix a suitable hearing date for the expedient disposal of the suit.

The application is supported by the annexed sworn affidavit of Jane Njeri Onyango advocate for the plaintiff sworn on 24th June 2014 reiterating what is contained in the grounds in support of the application.

The defendants Nafas World Auto and Jackton Ouma Odinga are represented by the law firm of Kairu & McCourt Advocates.

When the notice of motion came up for hearing on 24th October 2014, Mr. Otuke argued the application on behalf of the plaintiff whereas Mr. Ligunya held brief for Mrs Ngare advocate for the defendants.

The application was not opposed as there is no replying affidavit filed by the defendants and neither did they raise any objection to the orders sought being granted.

Mr Otuke submitted that they have been unable to get an early hearing date in this matter in the High Court and as the Chief Magistrate court's jurisdiction is enhanced, it is more convenient to have the suit transferred to Milimani Chief Magistrate Court which has a more flexible diary to accommodate them with an early hearing date. He reiterated the power of this court to transfer suits from itself to the Subordinate Court and that the court could as well on its own discretion grant an early hearing date for justice to be met.

I have carefully considered the application herein and submissions by counsel for the plaintiff in support thereof.

The suit herein was instituted on 23rd July 2012. The cause of action arose on 13th March 2010 along Kisumu – Busia road – an accident involving motor vehicle registration No. KAY 389D wherein it is alleged the plaintiff was travelling as a fare-paying passenger and got injured seriously when the said motor vehicle was involved in an accident whose occurrence is blamed on the defendants.

The injuries sustained by the plaintiff as described in the plaint were to say the least, serious. They involved:-

- i) Compressed fracture dislocation at T₆ L₁
- ii) Loss of power in both lower limbs
- iii) Cut wounds and bruises on the forehead and right hand
- iv) Loss of urine and stool control.

The plaintiff claims from the defendant's general damages for pain, suffering and loss of amenities, damages in respect of provisions for paraplegic equipment, future medical and nursing care, hospitalization and drugs as set out at paragraphs 6 and 8 of the plaint; special damages and damages for loss of earnings and diminished earning capacity, costs and interest and any other or further relief as the court may deem fit to grant.

Paragraph 2 of the plaint pleads that the 1st defendant's abode is in Mombasa, whereas paragraph 3 avers that the 2nd defendant works for gain in Siaya and that his address is Matayos which is in Busia County.

Ordinarily, therefore, pursuant to the provisions of Section 15 of the Civil Procedure Act, the suit herein was expected to have been filed either in Mombasa or Busia or even Siaya courts, where the defendants as described in the plaint reside or carry on business or personally works for gain and or where the cause of action, wholly or in part, arose.

That notwithstanding, as the High Court of Kenya has unlimited jurisdiction to hear cases arising from any part of the Republic, the suit herein was filed in Nairobi High Court and the only reason I can give is that the plaintiff's advocate who ordinarily practices in Nairobi found it convenient to file it here. If that were not the case, nothing prevented them from filing in the other courts outside of Nairobi as I have stated above.

The above notwithstanding, Section 11 of the Civil Procedure Act provides that,

“Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more Subordinate Courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts.”

The proviso (ii) thereof states

“Nothing in this Section shall limit or affect the power of the High Court to direct the distribution of business where is more than one Subordinate Court in the same District.”

In other words, the suit herein could still have been instituted in a Subordinate Court with jurisdiction to hear and determine the claim.

However, it appears to me that the plaintiff sustained severe and debilitating injuries and therefore that could also have influenced the filing of suit in the High Court. But as I have stated, there being a High Court in Busia and Kisumu and Mombasa, the suit was no doubt filed in Nairobi for convenience to the plaintiff's advocates.

Section 18 of the Civil Procedure Act is the enactment that gives the High Court the power to transfer suits from one court to another court. Section 18 (1) thereof provides that: on the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage

- (a) transfer any suit, appeal or other proceeding before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same.”

That is the relevant provision of law as far as this application is concerned.

Case law has determined that the test to be applied in exercising the power under Section 18 is whether the court to which transfer is sought has the necessary jurisdiction, both pecuniary, geographical or other jurisdiction to hear and determine the dispute.

The well known Ugandan case of **Kagenyi – Vs – Musiramo & Another [1968] EA 43** where it was held that whereas Section 18 of the Ugandan Civil Procedure Act which is identical to Section 18 of the Kenyan Civil Procedure Act gives the High Court a general power of transfer of all suits, which power may be exercised at any stage of the proceedings, even *suo moto*, by the court, an order for transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. The Court of Appeal of Kenya in **Kenya Seed Co. Ltd – Vs – Joseph Bosire – NRB CA 72/2002 (UR)** also approved the above principle. Many judges of this court, except **Hon. Hatari Waweru in John Mwangi Karanja – Vs – Alfred Ndirangu [2011] eKLR** have also cited with approval the principles espoused in **Kagenyi – Vs – Musiramo**. See also **Linda Alal Ochieng & Another – Vs – Moses Maina & Another Milimani High Court Misc. Application 1088/2005 (UR)**.

I subscribe to the above principles in so far as they relate to pecuniary jurisdiction and other jurisdiction conferred by statute and or the Constitution. In the case of geographical jurisdiction of Subordinate Courts, the applicable law is the Magistrate's Courts Act which confers nationwide jurisdiction on the said courts by virtue of Section 3(2) which provides that; a Resident Magistrate's court shall be duly constituted when held by a Chief Magistrate, Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate. Subsection 3(2) is the one that confers jurisdiction on the Resident Magistrate's Court which is throughout Kenya.

It therefore becomes a matter of procedure in cases where a transfer being sought of a case from one Subordinate Court to another Subordinate Court, or from the High Court to a Subordinate Court, as long as that Subordinate Court has the necessary pecuniary or other jurisdiction as conferred by Section 5 of Cap 10, any other written law or the Constitution.

In the instant case, the applicant suffered severe injuries and according to her, the Chief Magistrate's Court pecuniary jurisdiction having been enhanced to 7 million as per the attached Miscellaneous Statute Law Amendment Act, the said court can determine the suit herein. It is not for this court, however, to determine whether the Chief Magistrate's Court has jurisdiction to determine the pecuniary claim, as the claim is clear that the plaintiff seeks both general damages which can only be quantified by the court, and the special damages as specifically pleaded in the plaint herein.

The only issue is, supposing the Chief Magistrate's Court, upon hearing the parties, finds that the general damages and special damages exceed the pecuniary limits conferred by the Statute, what happens to the plaintiff's claim? It would, in my view, be denying the plaintiff her rightful entitlement. The attached gazette notice in my view is not new. The enhanced jurisdiction of the magistrate's court has not been shown that it was done after the filing of this suit as there is no date on the same.

That notwithstanding, it is submitted that the other main reason for seeking a transfer of this suit to the Chief Magistrate's Court diary is flexible. That may be so because of the heavy workload in the High Court.

However, for reasons that the pecuniary jurisdiction of the Chief Magistrate's Court to hear this matter has not been ascertained with precision, I hesitate to grant the orders sought as it is likely to affect the just determination of the suit. On the other hand, Section 1B of the Civil Procedure Act imposes a duty on this court, in the furtherance of the overriding objective under Section 1A of the same Act, to ensure the timely disposal of the proceedings and all other proceedings in the court at a cost affordable by the respective parties.

A perusal of the court file herein shows that the plaintiff acted with speed, upon filing suit on 23rd July 2012, they also filed statement of issues on 20th November 2012 which statement is undated. On the same day, they also filed a completed pre-trial questionnaire which is dated 1st October 2012 and on 30th November 2012 they sought a date for pre-trial directions which was given as 6th November 2013. On the said 6th November 2013, before Hon. Ougo J, the defendants counsel asked for 15 days to enable them file statements of witnesses and the parties were advised to take a hearing date in the registry. It took the plaintiff's advocates from 6th November 2013 to 3rd July 2014 – 8 months in between to move this court by way of an application herein to seeking for a transfer of the suit. The said application was prepared and signed and dated 13th June 2014 – another nearly one month before it was filed in court.

With the scenario above, can this court be faulted for not having a flexible diary? I disagree. It is my view that it is the plaintiff's advocates who have not been vigilant and or keen in prosecuting the suit herein otherwise by now they would no doubt have been heard, had they moved the court as appropriate, thereby losing not only judicial time and opportunities but also delaying the plaintiff's claim by filing this application for transfer.

For the reasons that I have given above, I do not find the plaintiff's application dated 13th June 2014 merited and I accordingly dismiss the same. I make no orders as to costs and direct that the parties herein to comply with all the pre-trial requirements within 30 days from the date of this ruling and a hearing date be fixed in the registry on priority basis.

Orders accordingly.

Dated, signed and delivered at Nairobi this 17th Day of November, 2014.

R.E. ABURILI

JUDGE