REPUBLIC OF KENYA

High Court at Eldoret

Civil Suit 2 of 1988

GEORGE FRANCIS SIMIYU ….. PLAINTIFF

VERSUS

GEORGE OMUROKA …... 1ST DEFENDANT

REV. JOHN GATU (Respectively the General Secretary and

Chairman for and on behalf of themselves and other members

of the Protestant Churches Medical Association) **…......2ND DEFENDANT**

SAMUEL M. MUTAI ….. 3RD DEFENDANT

CHRISTOPHER WANJALA ….. 4TH DEFENDANT

JOHN E. THUKU ….. 5TH DEFENDANT

JAMES I. MUINDIA …... 6TH DEFENDANT

THE PROTESTANT CHURCHES MEDICAL

ASSOCIATION, REGISTERED TRUSTEE

FOR AND ON BEHALF OF THE PROTESTANT

CHURCHES MEDICAL ASSOCIATION .... 7TH DEFENDANT

RULING

The application is brought by the 2nd and 7th Defendants/Applicants by way of Notice of Motion dated 4th October, 2011 brought under Sections 1A, 1B, 3A and 18 of the Civil Procedure Act, Orders 45 Rule 1 and 51 of the Civil Procedure Rules and all enabling provisions of he law in which the main prayer is:-

- **That the Honourable Court be pleased to review, vary and or set aside its order made on 23rd July, 2007 and have Nairobi HCCC. No. 122 of 1987 transferred to the High Court of Kenya,**

Nairobi for hearing and final determination.

The prayer is premised on four grounds made thereunder and is supported by the affidavit of Retired Reverend Doctor John Gatu sworn on 3rd October, 2012 and Dr. Samuel Mwenda sworn of 3rd October, 2011.

Basically it is deponed in the two affidavits that the High Court in Nairobi ordered that Nairobi **HCCC. No. 122 of 1987** be consolidated with this matter and the same be heard and disposed of by the High Court in Eldoret. That issues for determination in each of the files are different and should be tried separately. That moreso, the 2nd Applicant is now very old, aged 86 years and is confined to a wheelchair and the movements to Eldoret will greatly disadvantage him.

In opposing the application the Respondent (Plaintiff) has filed a Replying Affidavit sworn by himself on 13th February, 2013. He depones that the causes of action in the two cases arose from the same transaction and that the Applicants should have filed an appeal against the order transferring **HCCC. No. 122 of 1987** to Eldoret High Court and consolidating it with this file. He further states that the matter involves many parties and the two Applicants should not be singled out as beneficiaries of the order sought and further that the orders sought are a waste of time and gross abuse of court process.

The application was canvassed before me on 20th February, 2013. Miss Maina, State Counsel, was present for the 1st Defendant, the Attorney General and she did not oppose the application. Oral submissions were made by both Mr. Luta and Mr. Omusundi advocates acting for the Applicants and Respondent respectively.

According to Mr. Luta his clients or their counsel were not served with the application that gave rise to the order transferring Nairobi **HCCC. No. 122 of 1987** to this Court. They were neither notified of the hearing date of the application by way of a Hearing Notice. That the Judge who heard the application on 23rd July, 2007 was not aware of this matter, but the 1st Defendant had no objection to the application. That further, the Plaintiff should have moved the court on the application in Nairobi **HCCC. No. 122 of 1987**.

Further, according to Mr. Luta, causes of action in the two matters are totally different. In respect of Nairobi **HCCC. No. 122 of 1987**, he submitted that the cause of action is about wrongful dismissal and for a restoration of a motor vehicle. But that in this file the cause of action is about malicious prosecution and claim of damages arising therefrom.

It was also his contention that the consolidation of the two matters amount to an unfair burden to the Defendants and the Attorney General and in particular the latter who has nothing to do with the case after the amendment of pleadings.

He also submitted that under Section 15 of the Civil Procedure Act, a cause of action should be filed where a party resides or does business. That the order transferring Nairobi **HCCC. No. 122 of 1987** to Eldoret was based on false allegations to the effect that the General Manager of the 7th Defendant lives in Western Kenya as opposed to Nairobi. That in any event, the further amendment to the Plaint does not include the Attorney General's claim and so the Attorney General is not a party in this file (HCCC. 2/88).

Finally, he urged the court to hold for the Applicants in that Reverend Gatu (1st Applicant) is now aged 87 years and confined to a wheelchair and it would be difficult for him to be travelling to Eldoret.

On his part, Mr. Omusundi argued that the application has been brought to Court as an afterthought, the order for consolidation having been made over six (6) years ago. That upon consolidation the Attorney General automatically becomes a party to the consolidated file, that the advocates for the Defendants were served with the application, that the issues raised in both matters are almost similar although they were filed at different times, that the Plaintiff resides within the jurisdiction of this court and in any event no prejudice would be suffered if orders sought are granted.

I have appraised myself with contents of the application, the affidavits in support and opposition thereof and the oral submissions made respectively.

Under Order 45 Rule 1 of the Civil Procedure Rules, a party may seek a review of an order or decree ***upon discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or, could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason***.

So then, do the issues raised by Mr. Luta fall under this provision?

Court attendance

On service of the application and/or Hearing Notice upon the Defendant, I have perused the court record. I have noted that no orders were given on 23rd July, 2007 . The application giving rise to the order that is subject of this application is Chamber Summons dated 15th November, 1997 whose main prayer was that **NAIROBI HCCC. NO. 122 OF 1987** be consolidated with **ELDORET HCCC NO. 2 OF 1988 and be heard and disposed at Eldoret High Court.**

This application was canvassed before Hon. Justice Ibrahim, now serving at the Supreme Court on the 25th July, 2007. He gave the Orders in the following terms:-

"**Application dated 15th November, 1995 is hereby allowed. Costs in the cause."**

The Coram shows that in attendance was the Plaintiff in person (his counsel was not ed absent) and a Mr. Makongo. Nothing seems to have been argued before the Judge save that Mr. Makongo indicated that he had no objection as a result of which orders were granted.

I opine that Mr. Makongo was acting for the Attorney General as both Counsel on record in this application agree that the Attorney General did not object to the application and was represented.

Effectively, the orders sought to be reviewed were issued on 25th July, 2007 and not 23rd July, 2007. However, this discrepancy is immaterial as the orders emanate from the application seeking the transfer of Nairobi **HCCC No. 122/1987** to Eldoret High Court and its consolidation with this file.

The Plaintiff was the Applicant in that application. I have not seen on record any Hearing Notice notifying the Defendants of the hearing date of the application or Affidavit of Service as prove that the application was served upon the Defendants. Further, it is clear though, the date was taken in the registry on 27th June, 2007 by the Plaintiff in the absence of the Defendants. Therefore, service of a Hearing Notice upon the absent parties was not negotiable.

Be that as it may, I am of the view, the failure by the Plaintiff to notify the Defendants of the hearing date cannot mitigate the case for the Applicants herein. First, because they are guilty of indolence, having come to court close to six years down the time. Second, such an omission would not, of its own, be a material error on the face of the record, or a new discovery of facts or evidence unless it is the gist of the issues to be canvassed in the main suit.

Causes of action and parties to the suit

In this file, the claim is one of **exemplary and punitive damages for wrongful arrest, unlawful remand or confinement and malicious prosecution, assault, trespass and defamation of character**.

In Nairobi **HCCC. No. 122 of 1987** there are several prayers as per amended Plaint dated 4th February, 1987, to wit:-

- **Restoration to the Plaintiff of the motor vehicles and in the alternative their reasonable**

values. Alternatively a declaration that the plaintiff is entitled to the property known as LR. 209/399/6 and that the 7th Defendant is registered as proprietor thereof on trust for the benefit of the Plaintiff and an order that the property be transferred by the 7th Defendant to the Plaintiff.

- **Profits and incomes from the motor vehicles and tractor from the date of the wrongful and unlawful detinue and conversion to the date of restoration of the motor vehicles to the Plaintiff.**

- **General damages for wrongful and unlawful convention.**

- **Damages for wrongful land unlawful dismissal.**

- **Costs and interest.**

In the original plaint in this file only the Attorney General is named as the Defendant. Upon consolidation the plaint has twice been amended with latest being a Further Amended plaint dated 22nd July, 2008. In this plaint the Attorney is not a party to the suit, neither is he in Nairobi **HCCC. No. 122 of 1987**. Unfortunately, he is named as the 1st Defendant in documents filed subsequent to the Further Amended plaint.

Moreso, the two suits being world apart in the prayers sought, it is impossible to merge them and have a meaningful trial. I believe this is an issue that was not brought to the attention of the Judge then. Had this been done, for certain, a totally different scenario would obtain and orders for the consolidation would not have issued.

I believe the claims presented by the two suits justifies the order of 25th July, 2007 to be reviewed. It amounts to an error on the face of the record that no doubt would render the trial to near impossible and possibly occasion prejudice to the parties.

Place of suing

The determinant party as to jurisdiction of court in instituting a suit is the Defendant. A suit should also be filed where the cause of action arose. This is clearly spelt out under **Section 15 of the Civil Procedure Act** which provides as under:-

"Section 15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction -

(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or

(b) any of he defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution.

Suffice it to say is that the two suits are not subject of limitations governed by Sections 12 – 14 of the Act.

It is trite the Defendants in **Nairobi HCCC. No. 122 of 1987** as submitted by Mr. Luta, and not disputed by Mr. Omusundi, reside in Nairobi. Under paragraph 3 of the Amended plaint thereof, it is clear that the cause of action arose in Nairobi. Ultimately the place where suit should have been filed was Nairobi. I accordingly hold that to try the matter in Eldoret would be a grave mistake and would greatly prejudice the Defendants. This again is an error apparent on the face of the record that warrants the court to hold for the Applicant.

Appropriateness of the application in this file

The application was filed in this file whereas orders sought affected **Nairobi HCCC. No. 122 of 1987**. The varied facts between the two files were not brought to the attention of the court. Moreso, the Applicant in that application is also the Plaintiff in **Nairobi HCCC. No. 122 of 1987**. It was erroneous of him to present a case of **Nairobi HCCC. No. 122 of 1987** in another file. This is a grave procedural error that was avoidable. Although it does not affect the substance of the issues subject of the trial, it nonetheless amounts to an error on the face of the record, which, when combined with my observations above, dictates that the orders sought be granted.

Health of the 1st Applicant

It is undoubted that the 1st Applicant is old, aged 87 years and is confined to a wheelchair. Definitely his occasional movements to Eldoret would be an issue. However, save that other factors mitigate that orders be granted, his illness would, on its own, not warrant the transfer of **Nairobi HCCC. No. 122 of 1987** back to Nairobi, as it does not amount to a discovery of new facts. Growing old is a natural process.

Prejudice to cause of justice

Undoubtedly, this and **Nairobi HCCC. No. 122 of 1987** are old files and dispensation of justice demands that old matters be heard as soon as possible. But, since the transfer of the latter file, not much action has been done on it. The urgency to hear the matter as soon as possible cannot be necessitated by not transferring the file back to Nairobi. The process of doing so would only take days. Any court would be moved to hear the case on a priority basis. It is up to the parties to do their part.

Case Law

An avalanche of decided case law exists in this area of jurisprudence. Most focus on satisfying the court on requirement(s) set out under Order 45 Rule 1 of the Civil Procedure Rules (Previously Order 44 Rule 1). I think I have well considered each of the issues raised by the respective counsel. Although none of the counsel cited any case law, it is trite that an error sought to be corrected on record through an application of this nature must be evident on the face of it and should not be sought through a jagon of lengthy explanation.

In **HOUSING FINACNE COMPANY LIMITED -VS- FAITH W. KIMERIAH AND ANOTHER NAIROBI CIVIL APPEAL (CA) NO. 214 OF 1996,** the court held:-

> **"A review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should not require an elaborate argument to be established."**

From the record it is clear that this principle enunciated therein is good law and relevant to the instant case.

Conclusion

I am satisfied that the transfer of **Nairobi HCCC. No. 122 of 1987** and its consolidation with this file was in error. Each of the files should be tried separately. No appeal has been preferred against the older transferring and consolidating it with this file and ultimately this application is property before the Court.

I accordingly grant prayer one (1) of the application. In the result, **Nairobi HCCC No. 122 of 1987** is deconsolidated with this file so as to facilitate its transfer to Nairobi High Court. I make no orders as to costs.

DATED and **DELIVERED** at **ELDORET** this 18th day of April, 2013.

G. W. NGENYE – MACHARIA

JUDGE

Mr. Ngigi holding brief for Luta Advocate for the Applicants

No appearance for Omusundi Advocate for Respondent