



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 224 of 2012

BETTY ONGAYO MUHEHE.....PLAINTIFF

VERSUS

LUCAS OTTERSPEER.....DEFENDANT

RULING

By way of the chamber summons dated 27th December, 2012 the applicant seeks the following orders:

“(a) THAT leave be granted to the plaintiff/applicant to commence this cause outside the time limitation set by law.

(b) THAT upon grant of prayer (a) above, the court be pleased to issue a warrant of arrest requiring the defendant to appear and show cause why he should not furnish security for his appearance.

(c) THAT the costs of this application be in the cause.”

The application was supported by the affidavit of **BETTY ONGAYO MUHEHE** the applicant, which was sworn on 27th December, 2012. The respondent **LUCAS OTTERSPEER** opposed the application by way of a replying affidavit sworn on 10th January, 2013. The application was heard on 1st February, 2013 with **MR. AKANGA** for the applicant and **MR. OBARA** for the respondent making oral submissions before the court.

The backdrop of the case is that the applicant and the respondent met in Ukunda in 2002 and commenced a friendship. The applicant later visited the respondent in the Netherlands which was his country of origin. Between June, 2003 to September, 2003 the couple visited Spain. The applicant alleges that in the course of lighting a fire in the residence in Spain, the respondent threw an inflammable bottle at her which bottle exploded in her face causing severe injuries. The applicant was admitted in hospital initially for a period of three (3) months. She continued to access treatment even after returning to Kenya and the respondent made contribution to her treatment. The applicant took no legal action in respect of this incident until December, 2012 when she brought this application.

I have carefully considered the submissions made by both counsel in the matter. The prayer to file suit out of time was already granted by the Hon. Justice Muya on 31st December, 2012. As such the only remaining issue for determination is prayer (b) which seeks that the court do direct the respondent to file security for his appearance in court. The question of jurisdiction was raised by Mr. Obara for the respondent. Once a question of jurisdiction is raised then it must be decided upon because jurisdiction as they say is everything. The question of where to file a suit is pertinent because the incident complained of

occurred in a foreign county – in Spain to be precise. That being the case then this suit filed for a claim for negligence ought to have been filed either in Spain where the injury is alleged to have occurred or in the Netherlands where the respondent ordinarily resides. This is what the law provides viz section 14 of the Civil Procedure Code:

“Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts.”

Therefore going by this provision of law the applicant was at liberty to file suit either in Spain – where the wrong was allegedly committed or in the Netherlands where the defendant ordinarily resides.

Further in determining whether the suit is properly filed before this court, the court must take into account issues of convenience and expense such a trial would necessitate. The incident complained of having occurred in Spain and the applicant by her own admission having been treated initially overseas, it is to be expected that most of the key witnesses reside abroad. It would involve great inconvenience and/or expense to require that such witnesses travel to Kenya in order to testify. This court must also bear in mind the question of what jurisdiction Kenyan courts would have over a foreign defendant. If per chance the suit having been heard in Kenya is determined in favour of the applicant, how then will such a judgment be enforced and/or executed. How feasible would it be to seek to execute warrants or to attach properties located abroad (there is no indication that the defendant owns any attachable property in Kenya). The court will not embark on a journey in futility and courts cannot make orders in vain.

On the whole, I find that a suit filed in Kenya based on these circumstances is untenable. As such I find no merit in the present application. The same is hereby dismissed with no orders on costs.

Dated and delivered in Mombasa this 12th day of April, 2013.

M. ODERO

JUDGE

In the presence of:

Ms. Ogombe h/b Mr. Akanga for Plaintiff/Applicant

Mr. Odhiambo h/b Mr. Obura

Court Clerk Mutisya