REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL APPEAL NO. 267 OF 2013

JOSEPH MURAGE WERU……..……..….APPELLANT

VERSUS

STEPHEN KARIUKI KAHUBI……...……..…RESPONDENT

RULING

The appellant filed a Notice of Motion dated 22nd November, 2013 seeking, in the main, stay of proceedings in ten different suits filed against him by different plaintiffs initially pending the hearing and the determination of the motion and ultimately pending the hearing and the determination of the appeal he has filed against the ruling delivered by the subordinate court on 5th November, 2013.

The motion was filed under **Order 42 rule 6(1) and Order 51rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act.**

In order to appreciate the appellant's motion it is necessary to consider at this stage the genesis of his appeal.

On 30th April, 2009, the appellant's private car registration number **KBA 202Y** was involved in a road traffic accident with motor vehicle registration number **KBB 108 L** which, at the material time, was a public service vehicle. As at the time of the accident, several persons who were travelling in the public service vehicle as passengers are said to have sustained bodily injuries and thereby suffered loss and damage.

Of all the passengers who are said to have been injured, ten of them filed separate suits against the appellant in Kigumo and Kandara Resident Magistrates' courts claiming compensation for the loss and damage they suffered as a result of the road traffic accident. These suits are civil suit numbers, **191 of 2009, 192 of 2009, 193 of 2009,194 of 2009,195 of 2009, 196 of 2009, 197 of 2009, 198 of 2009, 216 of 2009, 247 of 2009 and 248 of 2009.**

By an application dated 25th July, 2013, filed in civil suit number 247 of 2009, the appellant sought to have that particular suit selected as a test suit for purposes of determining liability as between the plaintiff and the defendants. I wonder how useful this was going to be to the applicant's course because from what I gather in the materials before me, the plaintiffs were mere passengers in the public service vehicle and if there was any liability to be determined, it should be between the owners of the two vehicles involved in the accident.

Be that as it may, in a ruling delivered in court on 5th November, 2013, the court declined to grant the application for a different reason; it held that the issue of liability had already been determined and was

therefore *res judicata*. It is against this ruling that the appellant has appealed and he wants this court to stay the proceedings in the suits cited hereinbefore until this appeal has been heard and determined.

The respondent opposed the applicant's application and to this end he filed a replying affidavit sworn on 6th December, 2013.

When the application came up for hearing counsel for the applicant faulted the learned magistrate arguing that the issue of liability has never been determined and therefore cannot be *res judicata*. According to counsel the consequence of the learned magistrate's decision is that the rest of the suits against the appellant will proceed as if on formal proof only as liability will no longer be deemed to be an issue for determination.

Counsel for the respondent argued in opposition to the application and reiterated that the issue of liability has already been determined and that the only pending issue left for determination is the issue of quantum of damages in all the suits.

I have perused the documents filed by counsel for the applicant and the respondent; I have gathered that **Kandara Senior Resident Magistrates Court Civil Suit No. 247 of 2010** in which the application for selection of a test suit was made was initially filed in Kigumo Resident magistrate's Court as civil case number **221 of 2009.** It is apparent from paragraph 5 of the applicant's supporting affidavit that this suit was transferred from Kigumo to Kandara at the instance of the applicant. The application for the transfer of the suit was made on 19th August, 2010 and the order for the transfer was given by the High Court (Warsame J, as he then was) on 23rd August 2010. This information is found on the order issued by the High Court on 24th August, 2010 and which order is also annexed to the appellant's affidavit and marked **JWM 2.**

In the replying affidavit filed by the respondent he stated in paragraph 4 thereof that **Civil Suit No. 247 of 2010** had been finalised and as a proof of this deposition, he annexed to his affidavit a copy of the court decree issued on 23rd April, 2010. The decree which is marked as exhibit **SKK1** on the respondent's affidavit is said to be based on a judgment dated 29th March, 2010.

If this is the position, it would mean that as at 19th August, 2010 when the High Court issued an order transferring this suit to Kandara from Kigumo, the suit had already been concluded and all that was pending was execution of the decree. It is not clear whether this information was brought to the attention of the judge before he granted the orders he made on 19th August, 2010.

For purposes of determination of this application I can only note that the contention by the respondent that the **Kandara Senior Resident Magistrates Court Civil Suit No. 247 of 2010** which was initially **Kigumo Resident Magistrates Court Civil Suit No. 221 of 2010** had been determined was not controverted by any means; either by way of a supplementary or a further affidavit. Neither did I hear counsel for the applicant mention anything about the decree extracted from the judgment entered in that particular suit in her submissions.

If the decree in **Civil Suit No. 247 of 2010** is a valid decree and has neither been set aside or varied it would follow that as far as that case was concerned the magistrate's court was *functus officio;* I am unable to picture the circumstances under which that court would entertain the same matter except in limited instances where the judgment debtor would be applying for stay of execution of the decree under **Order 42 of the Civil Procedure Rules** or review under **Order 44** of the same rules or an application to set aside the judgment under **Order 10 Rule 11** of those rules. The magistrate's court could not deal with that case as if there is a pending dispute either on liability or on quantum of damages because the existence of a judgment and a decree would presuppose that as between the parties in that particular suit those issues have been determined.

Looked at from this perspective, one would ask, and legitimately so, whether an application for selection of a test suit can be made in an already determined suit and whether such an application would be

considered a competent application. The answer to this question lies in the relevant rule pertaining to selection of test suits. This is **Order 38 Rule 1** of the Civil Procedure Rules which states:-

> ***Where two or more persons have instituted suits against the same defendant and such persons under rule 1 of Order 1 could have been joined as co-plaintiffs in one suit, upon application of any of the parties with notice to all the affected parties, the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues.***

According to this rule, as I understand it, an application for selection of a test suit presupposes that there are pending issues for determination in the suits out of which one is sought to be selected as a test suit. Where a suit has been determined it can certainly not be selected as a test suit and neither can it be a subject of an application for selection of a test suit. The reason is fairly simple to see from this rule; there are no pending issues to be tried in such a suit.

In view of the provisions of **Order 38 rule 1**, an application made for selection of a test suit in an already concluded suit would appear to me to be misconceived.

Reference was made by both parties to the ruling this court delivered in **High Court Civil Appeal Case No. 6 of 2012** where the series of cases against the appellant listed hereinbefore featured. As far as selection of a test suit amongst these suits is concerned this is what this court said:

> ***Although it is clear that the Applicant combined the Application for leave to issue third party notices with the application for consolidation, it is not so clear whether an application for test case was made. While the application for consolidation could even be made orally in court, the selection of a test suit does not afford such latitude; the court has to be moved through a formal application. Such an application does not seem to have been filed even though parties are at consensus that at test suit was, nevertheless, selected.***

If a test suit was to be selected it would only be for the purpose of determining the issue of liability and this determination would, as a matter of law, apply to the rest of suits which have not been determined. Having held in that ruling that no test suit had been selected there is no way that the magistrate's court would have found that a determination on liability binding all the pending suits had been made. Such a finding would not only lack any basis but would also be contrary to the ruling of this court on that particular issue.

For avoidance of doubt, it would be wrong for the magistrate's court to proceed in any of the cases that are yet to be determined on the presumption that liability has been determined. It will be up to the parties themselves to ventilate the issue of liability in each of those cases or properly invoke **Order 38 rule 1** of the **Civil Procedure Rules** and apply to select a test suit to determine this issue. The court will obviously grant or reject that sort of an application based on the arguments that will be presented before it.

Having found that the attempt to apply for selection of a test suit was made in a suit which had been concluded contrary to the rule 1 of **Order 38** of the **Civil Procedure Rules**, I am inclined to find that there is little likelihood that the applicant's appeal will succeed and it may not be in the interest of justice to halt the hearing and determination of the pending cases in the magistrate's court on the ground that there is a pending appeal whose success is in doubt. For this reason the applicant's application dated 22nd November, 2013 is rejected. Costs will abide the outcome of the appeal.

Dated, signed and delivered in open court this 23rd May 2013

Ngaah Jairus

JUDGE