



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MERU**

Civil Appeal 18 of 2008

MICHAEL WACHIRA APPELLANT

VERSUS

KURIA WANG'ONDU RESPONDENT

RULING

This appeal was preferred to this court from the decision of Ndung'u, H.N. (Miss) Ag. SPM delivered at Nanyuki law courts. Subsequently, the appellant brought an application for stay of execution of the decree. When the application came up for hearing learned counsel for the respondent raised two preliminary points of objection, namely,

- (i) that this court lacked territorial jurisdiction to entertain both the appeal and application as the same arose from a decision of a court at Nanyuki under Nyeri High Court and therefore outside this court's jurisdiction, and
- (ii) that the supplementary affidavit dated 11th July 2008 and filed on 31st July 2008 was filed out of time allowed by the court without leave and ought to be struck out.

Learned counsel relied, in support of the two grounds, on several authorities, namely the **Kenya Gazette Notice** No. 300 of 2007, **Agnes Ndinda Matheka V. Carnation Plants Ltd**, H.C. Misc. Application No. 163 of 2006, **Adero & Another V. Ulinzi Sacco Society Ltd**, Nbi HCCC No. 1879 of 1999, **Omwoyo V. African Highlands & Produce Co. Ltd**, (2002) IKLR 698.

In reply counsel for the applicant conceded that the supplementary affidavit was filed outside the time permitted by the court but explained that that was due to the fact that he was unable to trace his client in time. That the delay of 16 days was not inordinate, neither has it caused any prejudice to the respondent as the affidavit was served in good time. Regarding jurisdiction counsel submitted that an appeal cannot be struck out merely because it has been filed in a different court. That section 60 of the Constitution is clear on the issue of jurisdiction of the High Court.

I will only consider the first ground and leave out the second one for reasons I will give shortly. In arguing that this court lacks jurisdiction to entertain both the appeal and the instant application, counsel for the respondent relied on, first the Gazette Notice No. 300 of 2007, an administrative practice and the authorities enumerated in the previous paragraph. All the authorities cited deal with the powers of the High Court to transfer suits between subordinate courts.

The jurisdiction of a court is a donation of the law and cannot be conferred by the parties or an administrative notice. The High Court, in particular, derives its jurisdiction first and foremost from the

Constitution and then from any other written law. Conversely the jurisdiction of the High Court may only be limited or altogether ousted by the law. Unlike the subordinate courts whose territorial jurisdiction is defined by sections 11, 12, 13, 14 and 15 of the Civil Procedure Act, there are no similar substantive provisions in respect of the High Court. See **Riddlesburger and Another, V. Robison & others** (1958) EA 375 which was cited with approval in **Francis Ndichu Gathongo V. Evans Kitazi Ondansa & Another**, Civil Appeal No. 287 of 2002.

The High Court must, however, ensure an orderly conduct of litigation before it and prevent abuse of its process by forum shoppers. To achieve the orderly conduct of litigation, Order 46 of the Civil Procedure Rules establishes the Central Registry and various other District Registries of the High Court and provides that every suit in the High Court may be instituted in the Central Registry at Nairobi or in the District Registries. The Chief Justice may by notice in the Gazette amend the schedule listing the District Registries. Pursuant to that, the Chief Justice amended the schedule vide Gazette Notice No. 299 of 10th January 2007. Under that Gazette Notice, matters from Laikipia District under which Nanyuki falls are to be filed at Nakuru High Court. However, in Gazette Notice No. 300 of 2007 which was clearly intended for the magistrates' courts matters from Nanyuki are to be filed in Nyeri. I cannot provide any explanation for this anomaly. What is, however, clear to me is that matters from Nanyuki are not expected to be filed in Meru High Court. Similarly, Order 46 rule 9 of the Civil Procedure Rules provides that an appeal from a decree or order of a subordinate court to the High Court may be filed in the District Registry within the area of which such subordinate court is situated.

I reiterate that these provisions being subsidiary legislation do not take away the unlimited jurisdiction of the High Court. Indeed the use of the word, "*may*" in both rules 1 and 9 confirms the High Court's unlimited jurisdiction. Even without the above Gazette Notices it is a well-known fact and practice among advocates in this region that matters emanating from Nanyuki and its environs are heard at Nyeri Law Courts.

I find no justification why the appeal and the present application was filed in Meru. I can only guess that the decision to do so was informed by the advocate's own convenience. What then should happen to the appeal and the instant application?

Learned counsel for the respondent urged the court to dismiss them because the court cannot even transfer the file to Nyeri. That argument, with respect, is not in consonance with the provisions of Order 46 Rule 5(1) and (2) of the Civil Procedure Rules.

I will reproduce only subrule (2).

"(2). The court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court:

Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and of their witnesses and to the date on which such trial is to take place and all the other circumstances of the case."

Since the court has unlimited original jurisdiction and in view of the permissive provision of order 46 aforesaid, the High Court cannot dismiss or strike out any suit which ought to have been filed in a particular District Registry. It may proceed under rule 5(2) aforesaid.

In **Francis Ndichu Gathogo** (supra) Mulwa, J. dismissed the plaintiff on the ground that he had no jurisdiction in Meru to hear the matter because the accident, the basis of the claim had taken place in Nairobi. On appeal, the Court of Appeal held that Mulwa, J. was clearly in error in dismissing the plaintiff. It further held that the judge ought to have made use of Order 46 Rule 5(2). The objection is sustained.

For these reasons, it is directed that the appeal be and is hereby transferred to Nyeri High Court where the same and the present application will be heard and determined. The cost of this objection is awarded to the respondent.

Dated and delivered at Meru this 12th day of June 2009.

W. OUKO

JUDGE