



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA
MISCELLANEOUS CIVIL APPLICATION 45 OF 2007

1. ZEDEKIAH MUDAMBA APPLICANTS

2. SOLOMON KISALI

V E R S U S

BENJAMIN GODIA RESPONDENT

RULING

The applicants, ZEDEKIAH MUDAMBA and SOLOMON KISALI, are the defendants in a case which was filed by the respondent, BENJAMIN GODIA, at the Senior Resident Magistrate's Court, Vihiga. The said case is Civil Suit No. 75/2007.

The applicants have asked this court to order that the case against them be transferred from Vihiga to the Principal Magistrate's court, Kapsabet.

It is the applicant's contention that the incident which gave rise to the suit occurred at Kemeloi sub-location, Chebala Location, in Nandi South District.

According to the applicants, they both reside at Chebala, which is a place that is located some six kilometers from Cheptulu Market. The applicants also say that their witnesses were all resident at Kapsabet, in Nandi South District.

Therefore, the applicants say that Kapsabet was much more readily accessible to them and to their witnesses, as compared to Vihiga. The reason advanced by the applicants was that whereas there was direct vehicular transport between Cheptulu Market and Kapsabet, there were very few vehicles that traveled from Cheptulu towards Vihiga.

Due to the small number of vehicles plying the Cheptulu-Vihiga route, the applicants contend that the fare was Kshs.200/= per person. That would be very expensive if the applicants had to ensure that their witnesses travelled to Vihiga, for the hearing of the case.

In the event that the case was not transferred to Kapsabet, the applicants would feel that by being compelled to travel to Vihiga, from Cheptulu, was a punishment to them.

It was for those reasons that this court was asked to order that the case be transferred from Vihiga to Kapsabet.

In answer to the application, the respondent first pointed out that by virtue of the provisions of section 3 (2) of the Magistrate's Court Act, the Resident Magistrate's Court at Vihiga had jurisdiction throughout Kenya.

In that respect, I do not think that the applicants ever suggested that the Resident Magistrate's Court at Vihiga did not have the requisite jurisdiction to hear and determine the case. Had the applicants cast doubt on the jurisdiction of the Resident Magistrate's Court, I would have made it clear to them that the territorial jurisdiction of a Resident Magistrate's court was nation-wide.

The respondent then pointed out that the suit in issue was in respect to moveables. He said that the claim was for compensation for the trees which had been damaged. Therefore, it was the respondent's submission that by virtue of the provisions of section 14 of the Civil Procedure Act, as read with section 15, the plaintiff was right to file the suit at Vihiga.

Furthermore, whilst conceding that the applicants are resident at or near Cheptulu, the respondent points out that the applicants' postal address was P. O. Box 257, Tiriki.

Now, Tiriki was within Vihiga District at the time when the suit was filed. Cheptulu was also within Vihiga District at that time.

Subsequently, the original Vihiga District was sub-divided, giving rise to Hamisi and Vihiga Districts.

Following the sub-division, the respondent concedes that the applicants' residential and postal addresses were now within Hamisi District. Therefore, the respondent argued that there would be no reason to transfer the case to Kapsabet, when within Hamisi District, there was a court of competent jurisdiction.

In reply, the applicants said that whereas they had their postal addresses at Tiriki, they did not reside there.

According to the applicants, their residence at Chebala was far from Hamisi, as those two places were some 12 kilometres apart.

In contrast, Kapsabet was 18 kilometres away from Cheptulu, but it was more readily accessible due to the large number of public service vehicles.

If the applicants, or anyone else, wanted to travel between Chebala and Hamisi, they would have to travel to Cheptulu and then onwards to Serem. However, as far as the applicants were aware, there were no public service vehicles plying the route between Serem and Hamisi. Thus, the distance between those two centres would, most likely, have to be covered on foot.

As the parties do agree that as at August 2007, when the suit was filed, Cheptulu Market was within Vihiga District, I hold that the respondent was perfectly entitled to institute proceedings before the Senior Resident Magistrate's court, Vihiga. The jurisdiction of that court derived from the fact that the defendants were resident within the area which falls under the jurisdiction of that court.

Meanwhile, the parties did not make available to me a copy of the Plaint. However, the respondent told me that the claim was for compensation in respect of trees allegedly destroyed by the applicants.

Although the respondent described the claim as for moveable property, I do not think that that is entirely accurate.

The proviso to the provisions of section 12 of the Civil Procedure Act reads as follows:

“Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.”

At the time suit was filed, the applicants were resident with Vihiga District.

And even though the respondent believes that trees are moveable property, I find and hold that trees, by their very nature are deemed to be a part of the land upon which they are found. They are immovable.

Pursuant to the provisions of Section 14 of the Civil Procedure Act, even if trees were deemed to be movables, a suit for compensation for wrong done to such movable property could be instituted either where the trees were damaged or where the applicants were resident.

In effect, from whichever angle one looks at the case herein, the respondent cannot be faulted for instituting proceedings at the Senior Resident Magistrate’s Court, Vihiga.

The question that must now be determined is whether or not, the suit should now be transferred; and if so, whether the suit should be transferred to Kapsabet or to Hamisi.

In determining that issue, I will completely ignore the applicants’ expressed concern, as stated on the face of the application, that the court at Vihiga may not be fair or impartial. I have chosen to ignore that contention as the applicants failed to provide this court with any material from which I could ascertain the basis, if any, for the said concern.

It is a very serious matter indeed to cast aspersions on the integrity of a judicial officer, and therefore anybody who chooses to do must ensure that he has sufficient material to back up their contention. But in this case, the applicants did not even attempt to justify their alleged apprehension. It was therefore very wrong of the applicants to raise an issue which they had absolutely no intention of justifying.

In the same vein, it was not right for the respondent to assume that the applicants’ only intention, for seeking the transfer of the case was;

“to scout for a court they believe will favour them.”

Courts are supposed to do justice without fear or favour. That is our obligation and calling. Therefore, it is not right to suggest, but without tendering anything to back such suggestion, that any particular court would favour one or the other party.

Having given consideration to the issues raised before me, including the place whereat the cause of action accrued; the nature and location of the subject matter of the suit; the place of residence of the defendants; and the convenience of the parties and their witnesses, I have come to conclusion that the ends of justice would be met if the case was transferred from Vihiga to a court which was not only of competent jurisdiction but also one which will provide convenience to the parties and their witnesses.

The plaintiff is a resident of Chebara sub-location, Nandi South District, whilst the applicants find it more convenient for themselves and their witnesses to travel to Kapsabet. In the circumstances, I find and hold that this is an appropriate case that warrants transfer. It is therefore ordered that the SPMCC No. 75 of 2007 be transferred forthwith to the Kapsabet Principal Magistrate’s Court, for hearing and determination.

As regards costs, it is hereby ordered that the same shall abide the outcome of the suit. In other

words, if the applicants are successful in the substantive suit, they will also be awarded the costs of the application dated 26/10/2007. But if the respondent should win the suit, the costs of the application will be awarded to him.

It is so ordered.

Dated, Signed and Delivered at Kakamega, this 16th Day of April, 2008.

FRED A. OCHIENG

J U D G E