REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 30 of 2007

1. **MESHACK RIAGA OGALO**
2. **WILLIS OPIYO OTONDI**
3. **PROF. GILBERT OGUTU**
4. **EDWARD ADERA OSAWA**
5. **HESBON OTIENO OMANJO**
6. **MAGDALINA ABOGE**
7. **ZECHARIA ORIGA OPIYO**
8. **ODIMO NUNDU (Suing in their capacities as officials of the Luo Council of Elders)…..……..…..……PLAINTIFF**

VERSUS

HENRY MICHAEL OCHIENG'

T/A OFAFA CLUB……..…...……..1ST DEFENDANT

LUO UNION TRUSTEES (REGISTERED…....….2ND DEFENDANT

ROBERT OTIENO OKUKU……..…...……..3RD DEFENDANT

DAVID OPAR…….....……...……..4TH DEFENDANT

BOARD OF GOVERNORS OF RAMOGI

INSTITUTE OF ADVANCED TECHNOLOGY.....5TH DEFENDANT

RULING

The Plaintiffs have filed this suit against the defendants vide a plaint dated 21.3.2007 and filed on

11.4.2007. The subject matter of the suit is stated in paragraph 5 of the plaint as Kisumu Block 5/2. The Plaintiffs are suing in their capacity as officials of the Luo Council of Elders a Society registered under the Societies Act Cap.108 Laws of Kenya

1st, 3rd and 4th defendants are described in paragraph 2 as adult males of sound mind residing and working for gain and or carrying on business within the Republic. The second defendant is described as a body corporate incorporated under Cap.163 and it has maintained its status in pursuance to Sectin3 of the Trustees (perpetual succession Act Cap.164 Laws of Kenya while the 5th defendant is an institution operational pursuant to the provision of the Education Act, Cap.211 Laws of Kenya. The cause of action as well as the reliefs being sought are well set out in the plaint. Paragraph 13 thereof reveals, that the defendants are involved in a plethora of suits in the High Court at Kisumu namely to wit 79/01, 42B/02, 913/02, 248/01, 619/04 But there is no other suit involving them plaintiffs and the defendants or any other party over the same subject matter though the suits mentioned in paragraph 13 of the plaint as being between the defendants and other parties seem to be in respect of the same subject matter. The central theme in the plaint is that they are coming in to prevent the property from being wasted.

Defendant nos, 1,2,3 and 4 have filed a joint appearance on 24.5.2007 and a joint defence on 8.6.2007. The 5th defendant entered appearance separately on 2.7.2007 and filed a separate defence on the same date of 2.7.2007. In the joint defence the first defendant has described himself as being a partner with two others of a business known as OFAFA Club and also Secretary to the second defendant. The 3rd and 4th defendants are described as the duly registered trustees of the 2nd defendant. Paragraph 15, 16 and 17 respond to paragraph 13 of the plaint confirming existence of the suits mentioned and that they relate to the same subject matter. Paragraph 23, 24, 26 and 27 dispute the jurisdiction of Nairobi High Court to try the suit whose subject matter is located in Kisumu and that they would apply to have the matter transferred to Kisumu High Court for hearing and final disposal. The 5th defendant on the other hand has no objection to the jurisdiction of the Court.

As per the averments in the joint defence the 1st 2nd 3rd and 4th defendants have filed a notice of motion under Section 17 of the Civil Procedure Act seeking to transfer this matter to the High Court at Kisumu for hearing and final determination. The grounds in support are set out in the body of the application, supporting affidavit and oral submissions in Court. The major ones is that all the plaintiffs except Plaintiff no 3, all the defendants and the subject matter of the suit is within the jurisdiction of Kisumu High Court. That the 3rd plaintiff though working in Nairobi has another home in Kisumu within the jurisdiction of Kisumu High Court. That there are other suits in Kisumu High Court in which documents have been produced which documents will be required in this case. Further that the Plaintiffs and defendants are old man with no sufficient means to be traveling to Nairobi for the case.

Turning to the grounds of opposition it is contended that they have merits as they do not answer the grounds in their defence and if the supporting affidavit has any defect the same is cured under order 18 Civil Procedure Act.

In opposition the plaintiffs/respondents filed grounds of opposition to the application. The major points raised by then are:-

(1) Appearance is defective as it offends order IX 4 rule 2.

(2) The application is incompetent as Section 17 does not apply to the High Court.

(3) That the issue of property is not the only one that the court is concerned with. There are other issues that concern the trust ship of the Kisumu property which can be handled by this Court.

On the courts assessment of the facts herein it is clear that objection has been raised that touches on the locus standi of the applicant in this matter. It is stated that the memo of appearance is defective as it contravenes order 9 rule 2 Civil Procedure Rules. Order 9 rule 2 Civil Procedure Rules, provides that an appearance is to be signed by an advocate or if in person by the person or his recognized agent. Rule 5

provides that where more than one defendant appear in the same advocate and at the same suit by the same advocate and at the same time the names of all the defendants so appearing shall be inserted in the same memorandum of appearance. There is no similar provision for several defendants appearing in person and appearing at the same suit by the same time. The implication then is that each of them has to file a separate memorandum of appearance. It would appear that the joint memo of appearance filed herein offends the rules of procedure and is therefore invalid. This invalidity robs the applicant not only the right of audience, but also the right to rely on the defence on record, in which this courts' lack of jurisdiction to try the suit has been pleaded. This finding alone is sufficiently to dispose off the application because without lows standi in the matter the filing of the application remains on act of a busy body in so far as he has not properly vested himself of the right to appear and take part in the proceedings.

The foregoing notwithstanding the application itself raises a legal issue which should not be left hanging since it has been argued. The application is brought under Section 17 of the Civil Procedure Act which states "when a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts any defendant after notice to the other parties to the other parties or the Court of its own motion may, at the earliest possible opportunity apply to the High Court to have the suit transferred to another court, and the High Court after considering the objection, if any shall determine in which of the several courts having jurisdiction the suit shall proceed". As submitted by the Plaintiff respondents counsel, section 17 applies only to subordinate courts and not the High Court. On this ground too the application has been faulted.

The jurisdiction of the High Court is governed by Section 60 (1) of the Constitution which states "*There shall be a High Court which shall be a superior court of record and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law"*

By "u*n limited jurisdiction"* it is meant to cover both property of whatever value and wherever it may be within the boundaries of Kenya as a country on the world map. Since Kisumu is within the boundaries of Kenya as delianated on the world map, it means that a High Court sitting at Nairobi has jurisdiction to try issues affecting properly situated in Kisumu and or issues affecting Kenya citizens working for gain or resident within the jurisdiction of Kisumu High Court.

In the course of his submissions the applicant mentioned a circular emanating from the Honourable the Chief Justices' office directing that suits should be filed in High Courts nearest to where the subject matter and litigants are situated. Although the circular was not annexed this court has judicial notice of the same. The existence of such a circular does not in anyway take away the unlimited jurisdiction of the High Court. It is just an administrative arrangement bringing to the fore issues of reasonableness, prudence, inconvenience, saving on costs etc which factors form the core for establishment of other High Court stations as out posts. "Encouraging centralization of trials to the central registry of Nairobi would defeat the administrative idea of taking services closer to the people for easy administration and delivery of justice to litigants.

In this courts own ruling in the case of **NUR MUSLIM SCHOOL SOCIEITY (**through **MOHAMED ABDI SHEKH AND OTHERS VERSUS ALI A. DUHOMY AND TWELVE OTHERS, NAIROBI HCCC NO. 468 OF 2006** delivered on 9th March 2007, in which a similar application had been made this court set out the provisions of Section 60(1) of the Kenya Constitution already set out herein and then made the following observation at page 3 of the ruling line 3 from the bottom.

The power to transfer a case from one High Court to another is not maintained. However the confirmation of unlimited jurisdiction gives the High Court power to determine the place of trial or conduct of proceedings in any case before any High Court when determining the place of trail and or conduct of proceedings, the High Court will of course have regard to the convenience of the parties".

In the cited ruling this court took recognition of the fact that from the averments in the plaint both disputants were in Malindi, the Plaintiffs were seeking to wrestle control of a school and bank account from the defendants which institutions were based in Malindi, there is a high Court in Malindi which can

be accessed by the disputants. On that account this court saw no harm in making a determination that further proceedings in that matter be continued in Malindi High Court. That was to be done irrespective of where the meeting had been held to elect officials.

At page 4 of the ruling paragraph 3 line 4 from the bottom, this court made further observations. "*However for the sake of convenience to both parties and need to set down costs of litigation on travel from Malindi to Nairobi, this high court invokes its unlimited jurisdiction and make a determination that the best place to continue the proceedings will be Malindi High Court. There will be no need cut transport a judge from Nairobi along with the file to Malindi. The file alone will be relocated to Malindi High Court and proceedings there will be continued by the competent judge in Malindi who has concurrent jurisdiction with the Judge making this order*".

This court still holds the same view that no jurisdiction exists for a litigant to apply for a transfer of a case from one High Court to another. But room exists for determination by a High Court Judge that proceedings in a particular case before him/ her be relocated to another High Court for hearing and final disposal. The primary consideration as stated earlier on being cutting down on costs by bringing services nearer to the consumer. This court has no doubt that the administrative circulars on the subject that emanate from the honourable the Chief Justice's Chambers from time to time are on recognition of the foregoing need as well as the unlimited jurisdiction vested in the High Court. This Court has judicial notice of the fact that invocation of this unlimited jurisdiction is usually invoked informally firstly at the filing stage when a particular High Court registry rejects acceptance of the filing of a particular case and then directing the filing of the same at the nearest High Court. In the second instance the jurisdiction is invoked informally in court by a litigant simply mentioning the file before the judge for directions. In the 3rd instance the court makes orders *suo moto* on record and then advises the litigants.

In the instant case it is a party who has purported to invoke the courts jurisdiction. The court has already ruled that as a matter of law the application is incompetent firstly due to lack of locus standi by the applicant to raise it as the appearance filed is in competent for the reasons given. In the second instance it is also incompetent because of the defects raised against the supporting affidavit. It is evident from the record that the supporting affidavit is signed by four defendants. Despite the affidavit being signed by four purported deponents, paragraphs 1,3,11,13,15 and 16 betray the signatures. They show clearly that it is the applicant present who swore the affidavit. In fact paragraph 16 shows clearly that it is to the best of his knowledge and belief. This court does not understand how such an affidavit was deponed before an advocate unless if the affixing of the stamp is suspect. If it ever was sworn in the form it is presented in, the same warrants and invites not only reproach but also a reprimand to the Counsel concerned to be on the lookout in future by taking time to check the contents and ensuring they conform to the law before appending his signature thereon. Such a diligence performance of ones duty in the exercise of ones profession saves the law from being made nonsensical and saves courts time. It also helps to enhance the dignity of the profession.

The applicant has argued that the defect is curable under order 18 Civil Procedure Rules. Rule 3(1) of order 18 Civil Procedure Rules provides that an affidavit shall be confined to such facts as the deponent is able if his own knowledge to prove. Rule 4 on the other hand provides that every affidavit shall state the description, the place of abode and postal address of the deponent. The operative words in rule 3(1) and 4 refer to "a *deponent*" and not "deponents." This being the case the proper construction of these two provisions is that the intention of the legislative or the rules committee is that there shall be one deponent to an affidavit and if there is need for more than one, then the additional parties swear supporting affidavits. If joint affidavits were receivable in evidence there would have been provision for words such as these "or deponents" in both rule3(1) and 4.

This Court is a live to the provision in rule 7 which states "*The court may receive any affidavit sworn for the purpose of being used in any suit not withstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof*". The irregularity envisaged by this rule is one that is minor and does not go to the root of the affidavit. The affidavit herein which is made out in the name of one deponent but signed by 3 other extra persons is not only an irregularity but an illegality which cannot stand. Case law on the subject is clear. In the case of **RAJPUT VERSUS BARCLAYS**

BANK O FKENYA LTD AND OTHERS NAIROBI HCCC NO.38 OF 2004 one of the issues for the determination was whether a failure to comply with the provisions of the Oaths and Statutory Declarations Act Cap.15 and its rules is a matter of substance or of forum whether an affidavit which does not comply with the provisions and rules is incurable and should be struck out. The holding was that such an affidavit is incurable and it should be struck out.

Applying that to the supporting affidavit herein, it is clear that the same is incompetent and it has to be struck out. Once struck out the application cannot stand on its own. This coupled with the earlier faulting of the appearance and joint defence due to lack of locus standi arising from the filing of an incompetent appearance, robs the applicant locus standing to agitate any thing in this matter.

When the documentations of the 1st, 2nd, 3rd and 4th defendants are not considered, the court is left with the documentations for the plaintiff and the 5th defendant who have no objection to the jurisdiction of this court. It therefore follows that even if this court were to find it fit to ignore the incompetent application and invoke its unlimited jurisdiction under Section 60(1) of the constitution to determine whether the proceedings are to be relocated to the High Court in Kisumu or not, it cannot make a firm decision on the matter as in doing so in the absence of other parties' papers on record, would amount to a breach of natural justice. It is desirable to have all the papers on record before making such a decision.

In conclusion the applicant's applicant dated 13.6.2007 has been faulted and the same is struck out for reasons that:-

(1) Since the joint appearance filed by the applicant and his co defendants No.1,2,3 and 4 offends the rules of procedure on entry of appearance the applicant lacks locus standi to file the same.

(2) The affidavit in support of the same is incompetent as it offends the provisions of the rules of procedure and affidavits as there is no provision for a joint affidavit. It appears to have been sworn by one person and yet it was signed by the other 3 defendants.

(3) There is no jurisdiction vested in the High Court under Section 17 Civil Procedure Act that can be invoked by a litigant to transfer a case from one High Court to another High Court for hearing and final disposal.

(4) Not withstanding no.3 above jurisdiction exists in the High Court under the unlimited jurisdiction provision under Section 60(1) of the Kenya Constitution for the High Court to determine relocation of a case to another High Court for hearing and final determination which jurisdiction cannot be invoked in favour of the partie s herein as once the papers of the 1st, 2nd, 3rd and 4th defendants are invalidated due to lack of locus standi what is left on record are papers of the plaintiff and the 5th defendant who have no objection to the jurisdiction of this court.

(5) Notwithstanding No.4 above this court can revisit the issues of relocation to another High Court, when all the documentations for all the parties are regularized on record.

The application is therefore struck out with costs to the plaintiffs.

DATED, READ AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2007.

R. NAMBUYE

JUDGE