

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUSIA

MISCELLANEOUS APPLICATION 2 OF 2005

ERICK NANGABO..... APPLICANT

VS

SAMWEL NJUGUNA KARIUKI RESPONDENT

RULING

Through a summons dated 24th January, 2005, filed under sections 6 and 18 (1) (a) of the civil Procedure Act and Order XXX VII of the Civil Procedure Rules, Eric Nangabo applied for a stay of proceedings and orders issued in Nakuru CMCC No.2604 of 2004 and for a further order to have the aforesaid suit withdrawn and transferred to Ukwala SRM'S Court for purposes of consolidating the same with Ukwala SRMCC No.16 of 2004. He swore and filed an affidavit in support of the application dated 24th January,2005. The application was opposed by Samwel Njuguna Kariuki the Respondent herein who filed a replying affidavit sworn on 31st January, 2005.

The brief facts of this matter are set out in the two affidavits filed for and against the summons. The parties i.e Eric Nangabo and Samwel Njuguna entered into an agreement on 13th November, 2004 at Busia before Ingosi N. Luhomba Advocate in which the former sold motor vehicle registration number KAQ 978 D to the later at a consideration of Ksh.580,000/=. The later paid a sum of Ksh.380,000/= leaving a balance of Ksh.200,000/=. A term of agreement set out that the former would repossess the aforesaid motor vehicle if the later failed to pay the balance by the 26th day of November, 2004. The former defaulted and this prompted the later to file Ukwala SRMCCC No.16 of 2004 in which he successfully obtained an exparte order on 16.12.2004 to repossess the motor. The order also directed the OCS Nakuru Police Station to impound and keep the aforesaid motor vehicle pending the hearing of the application interpartes.

On the 22nd day of December, 2004 the respondent perhaps sensing that the applicant may repossess the motor vehicle in view of his default to settle the outstanding purchase price moved to Court vide Nakuru CMCCC No.2064 of 2004 and successfully obtained an order to have the motor vehicle repossessed and kept at Nakuru Police Station.

The applicant now accuses the Respondent of filing the Nakuru C.M's Civil case while he knew that there was a pending suit over the same matter before the Ukwala Senior Resident Magistrate's Court. He has urged this Court to order for a stay of proceedings in the Nakuru Court. He has also prayed for the same case to be withdrawn and transferred to Ukwala for consolidation with the Ukwala case.

The Respondent has denied that he had prior knowledge of the existence of the Ukwala case before filing the Nakuru case. The Respondent has further accused the applicant of having taken possession of motor Registration No.KAQ 978 D in disregard of the Court orders issued by the two Courts which had directed that the same be kept under the custody of the OCS Nakuru Police Station.

I have heard the accusations presented by both parties. The parties agree in two aspects: First that motor vehicle registration KAQ 978 D was sold at busia and secondly that the same was stationed at Nakuru before the two suits were filed. Ordinarily the applicant should have filed his suit either at Nakuru or Busia Law Courts pursuant to the Provisions of section 15 of the Civil Procedure Act. The applicant has not given to this Court the reasons for choosing to institute a suit at Ukwala Senior resident Magistrate's court. Though the aforesaid Court has countrywide jurisdiction, still the applicant must justify why he

did not file the suit in a place where the defendant resides.

I have also perused the proceedings of the Ukwala SRM'S Court. The proceedings disclose that a Mr. Ingosi appeared before the aforesaid Court on 28th December, 2004 where he informed the Senior resident Magistrate that he was not sure whether the pleadings had been served upon the Respondent. It is only on 2nd January, 2005 that an affidavit of service sworn by Robert Mbeja indicating that pleadings were served upon the Respondent on 17th December, 2004. This affidavit was rejected by the respondent who claimed that the same was purposely made to fix him and further deny him a right to be heard. I have perused the aforesaid affidavit of service. The same shows that it was filed at Ukwala Court on 11.1.2005. It also reveals that the pleadings were filed at the Ukwala Court by the firm of Ingosi N. Luhombo Advocate on behalf of the applicant herein. There is doubt whether the aforesaid firm of Advocates would competently act for the applicant in view of the fact that he acted for both parties while executing the agreement for sale dated 13th November, 2004. Why did the applicant's process server wait until 2nd January, 2005 to file an affidavit of service which he was supposed to file before the 29th day of December, 2004? Was it necessary for it to be filed after the 29th day of December, 2004? The conduct of the applicant and the process server as manifested in the way the affidavit of service was handled creates doubt in my mind as to whether the respondent was actually served. In view of that I am satisfied that the Respondent was not served at the time of filing the Nakuru Case.

The discretion to stay a suit or proceedings under section 6 of the Civil Procedure Act must be brought to the attention of the Court where the suits are pending. This court cannot exercise that discretion at this stage. Even if this Court were to exercise that discretion, good reasons must be advanced to enable this Court to stay proceedings. In this matter, I am not satisfied that pleadings in respect of the Ukwala were served. The parites in any case agree that the orders issued both at Ukwala and Nakuru Law Courts

Were directed at the OCS, Nakuru, to repossess and keep possession of motor vehicle registration no.KAQ 978 D. It therefore beats logic to stay the orders which agree in substance. I will not exercise my discretion to stay proceedings and the orders issued by the Nakuru Chief Magistrate's Court in view of my above reasons.

I have also been urged to exercise my discretion under section 18 (1) (b) (ii) of the Civil Procedure Act to withdraw and transfer Nakuru CMCCC No.2604 of 2004 to Ukwala SRM'S Court for consolidation with Ukwala Civil case No.16 of 2004. The main reasons advanced by the applicant are that the Ukwala case was filed earlier than the Nakuru case and secondly that the respondent filed the Nakuru case while he had prior knowledge of the existence of the Ukwala case. I agree with the applicant that the Ukwala case was filed earlier than the Nakuru case. But on the second reason, I have already said that there is doubt whether the Respondent had prior knowledge of the existence of the Ukwala case. The discretion to transfer a case must be exercised judicially and with good reasons. This court will consider the nature of the case and the character of the proceedings and of course the cost element and the difficulties which may be encountered by the parties. Another matter which is not disputed is that, the two suits arose from the same transaction and basically seek nearly the same remedies. In this case I am not convinced that the applicant chose Ukwala as the best convenient Court. I will deny him the prayers sought in this motion in view of the fact that he failed to justify why he instituted the suit at Ukwala in contravention of section 15 of the Civil Procedure Act. I will therefore dismiss this motion with costs to the Respondent.

This court still retains its discretion under section 18(1) of the civil procedure Act of to act its own motion without notice to either party at any stage to withdraw any suit or other proceeding pending in any court subordinate to it and thereafter transfer the same for trial or disposal to any court subordinate to it and competent to try it or dispose of the same. In this dispute I have already pointed out that the cause of action appears to have arisen at Busia where the parties executed the agreement of sale dated 13th November, 2004. The terms of the aforementioned agreement were breached. The subject matter of the agreement i.e motor vehicle registration no. KAQ 978 D is based at Nakuru. The Respondent(Defendant) resides at Nakuru. The effect of the default clause i.e repossession of the motor can only be executed at Nakuru. I think the dispute can properly be heard and disposed of at Nakuru Chief Magistrate's Court pursuant to the Provisions of section 15 of the Civil procedure Act. In the circumstances of this case, I

will exercise my discretion under section 18 (1) b (ii) suo moto ex debito justitae to have the Ukwala SRMCCCno. 16 of 2004 withdrawn from that Court and thereafter transferred to Nakuru Chief Magistrate's Court to be consolidated with the Nakuru CMCCC no.2604 of 2004. The parties and their advocates should appear before the aforesaid Court for directions to be given by the presiding magistrate upon hearing them on how to proceed for hearing in the matter.

DATED AND DELIVERED THIS 8th DAY OF April 2005.

J. K. SERGON

JUDGE