



Ringera (Suing as Representative of the Estate of the Late Desmond Muriungi Kinoti) v Nairobi Women’s Hospital & another (Miscellaneous Civil Application E374 of 2023) [2024] KEHC 3179 (KLR) (Civ) (4 April 2024) (Ruling)

Neutral citation: [2024] KEHC 3179 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E374 OF 2023

CW MEOLI, J

APRIL 4, 2024

BETWEEN

JOSEPH KINOTI RINGERA (SUING AS REPRESENTATIVE OF THE ESTATE OF THE LATE DESMOND MURIUNGI KINOTI) APPLICANT

AND

NAIROBI WOMEN’S HOSPITAL 1ST RESPONDENT

DR. FIONA KAHONGE 2ND RESPONDENT

RULING

1. For determination is the motion dated 09.06.2023 by Joseph Kinoti Ringera (hereafter the Applicant) essentially seeking that the court be pleased to set aside, vary or review the orders issued by this court transferring the suit HCCC No. 230 of 2019, Joseph Kinoti Ringera v Nairobi Women’s Hospital & Another (hereafter the subject suit) to the subordinate court for trial , and that the court be pleased to re-transfer the subject suit to the Civil Division of the High Court. The motion is expressed to be brought under Order 45 Rule 1 & 3(2), Order 51 Rule 1 of the Civil Procedure Rules (CPR) and Section 1A, 1B & 3A of the Civil Procedure Act (CPA) and premised on the grounds on the face of the motion as amplified in the supporting affidavit sworn by Applicant.
2. The gist of the affidavit is that the subject suit was filed in the High Court to recover general and special damages arising from the negligence that resulted in the death of the Applicant’s son, Desmond Muringi Kinoti (hereafter the Deceased). That upon compliance with Order 11 of the CPR the matter was certified ready and scheduled for hearing on 16.03.2023. However, this court issued orders pursuant to which the Deputy Registrar issued a notice to the effect that the suit was transferred to the Chief Magistrate’s Court, Milimani.



3. He asserts that based on the nature of the claim and decision in PKM (suing on own behalf and as next friend of AJB) & GSM v Nairobi Women’s Hospital & Mutinda [2018] eKLR, likely damages could exceed Kshs. 20,000,000/-, the limit of the pecuniary jurisdiction of the Chief Magistrate’s Court. Hence this court is the correct forum to handle the matter. That unless the motion is allowed the Applicant will suffer injustice while continued delay will defeat the provisions of Section 1A, 1B & 3A of the CPR. He concludes by deposing that it is in the interest of justice that the motion is allowed as prayed.
4. Nairobi Women’s Hospital and Dr. Fiona Kahonge (hereafter the 1st & 2nd Respondent/Respondents) oppose the motion through a replying affidavit dated 23.08.2023 sworn by Dennis Ngaira, counsel on record for the Respondents. Confirming the Applicant’s narration of events leading to the transfer of the subject suit, he asserts that the nature of the claim falls within the jurisdictional limits of the Chief Magistrate’s Court. He particularly takes issue with the decision in PKM (supra) by stating that the facts of the claim in the said case differ from the Applicant’s claim in the subject suit and reiterates that the Chief Magistrate’s Court will be the appropriate forum to handle the subject suit. In summation, he deposes that the award of general damages is discretionary and that the motion has contributed to the delay in hearing of the subject suit.
5. In rejoinder by way of supplementary affidavit, the Applicant asserts that at his death the Deceased was aged 26 years, enjoyed a good life, was a bright promising engineer in his fifth and final year of electrical engineering at the University of Nairobi and had bright prospects of employment upon completion of his studies. He asserts that the Deceased would likely have started working at the age of 28 years until the statutory retirement age of 60 years. Asserting earnings between Kshs. 200,000/- to Kshs. 300,000/- per month, and thus adopting an average salary of Kshs. 250,000/- and 32 active work years, he asserts that the he would have been entitled to a minimum of Kshs. 96,000,000/- calculated as Kshs. 250,000/- x 12 x 32.
6. He concludes by stating that special damages in respect of claim amount to Kshs. 414,180/-, and the likely award on pain and suffering would be Kshs. 3,000,000/-. Moreover that, the Deceased was survived by a school going child aged 6 years, who would have depended on the Deceased until attaining the age of majority.
7. The motion was canvassed by way of written submissions. Counsel for the Applicant after reiterating the contents of the Applicant’s affidavit material cited the provisions of Article 169 of *the Constitution*, Section 7(1) of the Magistrate’s Court Act, and several decisions including Owners of Motor Vessel “Lillian ‘S’ v Caltex Oil (K) Ltd (1989) KLR, and COA Civil Appeal No. 91 of 2003 Mumias Sugar Co. Ltd v Francis Wanalo [2007] 2 KLR 74 . In support of the submission that the claim by the Applicant ought to be heard in the High Court as likely damages would exceed the pecuniary jurisdiction of the subordinate court, and possibly result in an appeal, leading to dissipation of resources. The Court was thus urged to be guided by the overriding objective.
8. The Respondents’ counsel , submitting on the question whether the Court ought to review, vary and or set aside its order, cited the provisions of Order 45(1) of the CPR and the decision in Evan Bwire v Andrew Aginda Civil Appeal No. 147 of 2006 as quoted in Stephen Githua Kimani v Nancy Wanjira Waruingi t/a Providence Auctioneers [2016] eKLR. His argument was that the Applicant in his submissions, seems to allude to mistake or error on the face of the record regarding the Court’s directions to transfer the matter to the Chief Magistrate’s Court. Pointing out that the academic records of the Deceased as presented in the Applicant’s affidavit material are not new materials or facts as copies of the same had already been attached to the Applicant’s bundle of documents which this



Court had the opportunity of perusing before arriving at its determination to transfer the file to the lower court.

9. It was further submitted that the Applicant failed to evince any material to show that the Deceased's average salary would have been Kshs. 200,000/- , instead relying on mere assumptions which the court should not give weight to. That the asserted expected loss of future earnings is speculative and not based on evidence. Hence not qualifying as "any other sufficient ground" provided for under Order 45 (1) of the CPR. Consequently, the Applicant has not established sufficient grounds to warrant the review or varying of this court's decision. The decisions in *Gammel vs Wilson (1981) 1 ALLER* as quoted in *Sheikh Mushtag Hassan Vs Nathan Mwangi Kamau Transporters & 5 others (1985) eKLR* and *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR* were called to aid.
10. Concerning the prayer for the retransfer of the subject suit from the Chief Magistrate's Court, it was summarily argued that the Applicant's claim therein clearly falls within the jurisdictional limits of the Chief Magistrate's Court. And that conventional awards of general damages in cases of similar nature ordinarily fell below Kshs. 20 million. He concluded by submitting that the decision of this Court to transfer the file to the lower court was proper and therefore the Applicant's motion should be dismissed with costs to the Respondents.
11. The court has considered the rival affidavit material and submissions by the parties. The Applicant's motion invokes inter alia the provisions of Order 45 Rule 1 & 3(2) of the CPR and Section 3A of the CPA. The latter reserves "the inherent power of the court "to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the court". The former on its part provides that;-
45.

(1) Any person considering himself aggrieved—

- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

.....

3(2) Where the court is of opinion that the application for review should be granted, it shall grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.

12. The motion stems from the order of this court issued pursuant to sections 11 and 18(1) (a) of the CPR transferring the subject suit to the Chief Magistrate's Court. The order was subsequently notified through a notice by the Deputy Registrar of this court dated 28.04.2023. (Annexure JKR-1). That said, it is not clear why counsel for the Applicant while preparing the instant motion, would present



the trouble-inviting grouping of words “...set aside, discharge, vary and or review...” knowing all too well the purport of the specific words vis-à-vis the pertinent facts herein. The Applicant invoked both the provisions of Order 45 of the CPR alongside Section 3A of the CPA.

13. This being the case, the Court proposes to first deal with the limb of the key prayer relating to review before dealing with the rest of the limbs seeking the setting aside, discharging and or varying the order. In *Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited* [2020] eKLR the Court of Appeal observed that an application for review involves exercise of judicial discretion. That said, there are legion authorities on the principles governing a motion brought under Order 45 (1) of the CPR cited above which stipulates specific grounds upon which review may be sought.
14. Gleaning through the Applicant’s supporting and supplementary affidavits it is apparent that both barely disclose any of the specific grounds under the said Order upon which the review prayer is predicated, despite the Applicant’s invocation of Order 45 Rule 1 of the CPR. Thus, it is difficult to see the relevance of Order 45 Rule 1 CPR in this instance.
15. Nevertheless, the Applicant has also invoked Section 3A of the CPR which to my mind would perhaps have more bearing on the matter before the court. The Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR stated as follows regarding the discretion of the court under that section; -

“ Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by “inherent power” it means that:

“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another versus Malolm Bell* [2013] eKLR, to add the following: -

“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.” (sic)

16. It is undisputed that the subject suit was transferred to the Chief Magistrate’s Court by the High Court. However, the key prayer in the motion is seeking to “...set aside, discharge, vary...” the order on transfer pursuant to the notice of the Deputy Registrar dated 28.04.2023, rather than a review of the actual transfer order. The court’s order rather than the notice of the Deputy Registrar should have been the subject of the prayer. It seems that the Applicant’s counsel did not peruse the record of the subject suit which contains the order made by this court to transfer the subject suit. Be that as it may, it is settled that the discretion of the court to set aside an order is unfettered and that a successful applicant



is obligated to adduce material upon which the court should exercise its discretion, or in other words, the factual basis for the exercise of the court's discretion in their favor.

17. In the case of Shah –vs- Mbogo and Another [1967] E.A 116 the rationale for the discretion was spelt out as follows: -

“The discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist a person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice.”

18. The principles enunciated in Shah –vs- Mbogo (supra) were amplified further by Platt JA in Bouchard International (Services) Ltd vs. M'Mwereria [1987] KLR 193. Although the courts in the above cases were contemplating applications to set aside exparte judgments, the principles pronounced therein would apply in equal degree in this matter. The Applicant has made heavy weather of the nature of the claim against the Respondents in reliance of the decision in PKM (suing on own behalf and as next friend of AJB) & GSM v Nairobi Women's Hospital & Mutinda [2018] eKLR, in urging that the matter be retransferred to this court.

19. The subject suit was transferred pursuant to the authority donated to the High Court by Section 18(1) (a) of the CPR which provides that;-

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same.

20. It is undisputed that the claim as originally filed before this court relates to fatal claim filed by the Applicant on his own behalf and on behalf of the estate of the Deceased (Annexure JKR-1). Consequently, under the provisions of the Magistrate Court's Act, the subordinate court would ordinarily be cloaked with jurisdiction to entertain the claim. The Applicant's contention nevertheless rests on the subordinate's court's pecuniary jurisdiction to entertain the subject suit in light of the decision in PKM (supra) and facts as advanced in the supplementary affidavit.

21. The High Court's original jurisdiction to entertain civil matters is provided for under Article 165(3) (a) of *the Constitution* as read with Section 5 of the *High Court (Organization and Administration) Act*. The pecuniary jurisdiction of the Magistrates courts in civil matters is prescribed in Section 7 of the Magistrate's Court Act which states that;-

(1) A magistrate's court shall have and exercise such jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter does not exceed—

(a) twenty million shillings, where the court is presided over by a chief magistrate;

(b) fifteen million shillings, where the court is presided over by a senior principal magistrate;

(c) ten million shillings, where the court is presided over by a principal magistrate;

(d) seven million shillings, where the court is presided over by a senior resident magistrate;
or



(e) five million shillings, where the court is presided over by a resident magistrate.

22. In addition, Section 11 of the CPR provides that:

Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts: Provided that— (i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same county.

23. This court having reviewed the Applicant’s affidavit material and upon perusing the decision in PKM (supra), agrees with the Respondents’ contention that the facts and claim in the latter are distinct from the Applicant’s claim and facts in the subject suit. For starters, in PKM (supra), the claim was in respect of a minor who at birth suffered severe asphyxia and as a result developed cerebral palsy. Further, what was claimed therein and subsequently awarded were special damages and future medical expenses for the minor’s care that resulted in the award exceeding the sum of Kshs. 20,000,000/-. Additionally, it is trite that special damages must be specifically pleaded for and proved. In this case, the special damages pleaded amount to Kshs. 414, 180/.

24. Regarding general damages awardable under the Law Reform Act and Fatal Accidents Act, the guiding principles are well known. For instance, in SJ v Francesco D. Nello & Another [2015] eKLR the Court of Appeal observed that:-

“The guiding principle in the assessment of damages has been the subject of numerous authorities. For the purposes of this case, we refer to the *Ossuman Mohammed & Another vs. Saluro Bundi Mohamud*, CA 30/1997 (unreported) wherein the following passage, in the case of *Kigaragari vs. Aya* (1982 – 1988), KAR 768 is employed;

“Damages must be within limits set out by decided cases and also within limits the Kenyan economy can afford. Large awards are inevitably passed on the members of the public, the vast majority of whom cannot afford the burden in the form of increased costs of insurance or increased fees. Over time, courts have held that damages should not be so inordinately low or so inordinately high as to be a wholly erroneous estimate of damage.”

25. Ultimately, the court’s exercise in assessing and awarding general damages is discretionary, but in keeping with the guiding principles. The Applicant has not provided any decision in a suit based on facts similar to the facts upon which the subject suit was founded, and in which damages awarded exceeded the pecuniary jurisdiction of the Chief Magistrate’s Court. It seemed that, by his supplementary affidavit the Applicant was inviting this court to try his case prematurely. The speculative and untested material canvassed in this regard cannot form the basis of any firm conclusions on likely eventual damages. Certainly, not in the figures proposed by the Applicant. As earlier observed, the setting aside of an order involves exercise of discretion. This court upon a careful review of the Applicant’s pleadings in the subject suit was reasonably persuaded that the suit fell within the pecuniary jurisdiction of the Chief Magistrate’s Court and therefore ordered transfer.



26. The Applicant has not demonstrated reason sufficient to move this court to exercise its discretion by setting aside its decision transferring the subject suit to the subordinate court. The motion dated 9.06.2023 must fail and is hereby dismissed with costs to the Respondents.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 4TH DAY OF APRIL 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr. Kamunda

For the Respondents: Mr. Okatch

C/A: Erick

