



Njuka v Gituma (Civil Appeal 24 of 2021) [2023] KEHC 3180 (KLR) (18 April 2023) (Ruling)

Neutral citation: [2023] KEHC 3180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL 24 OF 2021
WM MUSYOKA, J
APRIL 18, 2023
(FORMERLY KAKAMEGA HCCA NO. 1 OF 2020)**

BETWEEN

NICODEMUS OWOTSI NJUKA APPELLANT

AND

LAWRENCE MWIRIGI GITUMA RESPONDENT

*(An appeal arising from the judgment and decree of the Hon. SO Ongeri,
Principal Magistrate, in Vihiga PMCCC No. 7 of 2019, of 5th January 2022)*

RULING

1. On October 7, 2022, I delivered a judgment on the appeal filed herein, where I allowed the appeal, on terms. Subsequently, a Notice of Motion, dated March 24, 2023, was lodged herein on March 29, 2023, under certificate of urgency. It seeks review of the judgment, on certain aspects. The said Motion was placed before J Kamau J on March 29, 2023, who made the following order:

“I have looked at the appellant’s N/M application dated 23/3/2023 and filed on 29/3/2023 and the supporting affidavit of Maureen Tesot that was sworn on 24/3/2023 and the enclosure therein and noted that the Judgment the appellants wants reviewed was by Musyoka J. Accordingly, I hereby direct that this file be placed before Musyoka J on 18/4/2023 for his further orders and/or directions. Orders accordingly.”

2. At the time I delivered the judgment on October 22, 2022, I was a Judge of the High Court sitting at the Kakamega High Court station, which was then in charge of the Vihiga High Court registry, as no Judge of the High Court had been posted to Vihiga then. I have since been transferred to the High Court at Busia, where I have been sitting since March 1, 2023. The Motion that I am invited to consider was filed at the Vihiga High Court registry on March 29, 2013, almost a month after I had left Kakamega, and ceased to be seized of matters at the Kakamega and Vihiga High Court stations.



3. The orders that were made, or the directions given, on March 23, 2023, with respect, violate judicial policy, on what should happen with matters that were previously being handled by a judicial officer who has gone on transfer. The policy, as I understand it, and as it should be, is that any matter filed at the court or station after the officer has gone on transfer, should be taken over and handled by the successor of the transferred officer, regardless of whether it seeks review of a decree passed or order made by the outgoing or transferred officer, or the setting aside of such a decree or order. The incoming officer steps into the shoes of the transferred officer, and deals with all the orders made and decrees passed by the transferred officer, as if they had been made or passed by the succeeding officer.
4. I reject the notion, that a court file should chase after the transferred officer to his new station, for that officer to handle proceedings initiated after he has been transferred, with respect to orders he made or decrees he passed in his previous station. An order or decree on record in any court file is an order made by the court, and it can be handled by the incoming judicial officer, without reference to the transferred officer. Looking at it otherwise would be to deny parties the right to an easier access route to justice, and would have implications on the right to faster or speedier disposal of cases, by having the file in the matter chase after the transferred officer wherever he has been transferred to. It would also increase costs of litigation, both for the court and the litigants, if court case files have to be sent across the country, for transferred judicial officers to handle, while, in fact, their successors have jurisdiction to handle them. It defeats and makes nonsense of the essence of transfer, if judges continue to be seized of and to handle matters domiciled at their former stations. It causes unnecessary delays in prosecution of cases, and unjustifiably contributes to creation of backlog.
5. The policy operates the same way with what happens where a judicial officer ceases to be attached to a court or court station in other ways. Had he or she died, for example, would the file in the matter be taken to his or her grave for him or her to handle it? If he or she had exited the service, either on retirement or resignation or removal, would the matter still be sent to him or her in his or her retirement, or whatever, for him or her to deal with his or her decree or order? If he or she had been promoted to a higher court, say, in the case of a Judge of the High Court, to the Court of Appeal, would the matter be placed before him or her, as a Judge of the Court of Appeal, to review or set aside orders that he or she had made or decrees that he or she had passed when he or she was at the High Court?
6. What does the law say on this? Judicial policy, according to the relevant law, is that once an officer is transferred, matters that he or she was handling in the previous station should be taken over and handled by the officer succeeding him or her. There is no room for the file to be sent to the transferred judicial officer at their new station. The reasons for this are clear, and I have discussed them above. The policy is uniform for both civil and criminal processes.
7. The instant matter is civil in nature. It seeks review of a judgment. So, the applicable law should be the [*Civil Procedure Act*](#), cap 21, Laws of Kenya, and the Rules made under it.
8. The [*Civil Procedure Act*](#) deals with it at section 80, which states as follows:

“Review

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or



(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

9. So, what is section 80 of the *Civil Procedure Act* saying? That the review of an order or decree of the court is to be by the court which made the order or passed the decree. What does “court” mean, in the context of section 80? The High Court station or Magistrate Court station seized of the matter. That would mean the court itself, not the judicial officer presiding over matters at that court, so that when the officer is transferred, the court remains, and review would be by the court, not the officer who has gone on transfer. Applying that provision to the instant situation, it would mean that the order or decree, sought to be reviewed, was made or passed by the High Court of Kenya at Vihiga, then presided over by Musyoka J. Musyoka J has been transferred to Busia, but the High Court at Vihiga has remained. It is, therefore, the High Court at Vihiga which has jurisdiction to review that judgment of October 22, 2022, and not Musyoka J, as the High Court at Vihiga was not transferred, but the presiding officer was. The succeeding officer now constitutes the High Court at Vihiga, and should handle the review, going by section 80. Musyoka J constitutes the High Court at Busia, not the one at Vihiga. The High Court at Busia did not make the orders or pass the decree of October 22, 2022, and Musyoka J, sitting as the High Court at Busia, has no jurisdiction, under section 80, to review orders that were made by the High Court at Vihiga, for he has ceased to be seized of matters filed in that court.
10. Under the *Civil Procedure Rules*, the relevant rules are in Order 45, the relevant part being Rule 2, which states as follows:
- “(1) An application for review of a decree or order of a court upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.
 - (2). If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.
 - (3) If the judge who passed the decree or made the order is still attached to the court but is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.”
11. So, what does Order 45 rule 2 mean? What Order 45 rule 2 does is to elaborate on section 80 of the *Civil Procedure Act*. The review application should be placed before the judge, who passed the decree or made the order, while sitting at the court or station where the file or matter is domiciled, if that judge is still at that court or station. If the judge who passed the decree or made the order is no longer attached at that court or station, for whatever reason, including transfer, then the file or matter should be placed before any other judge attached to that court or station, where the order was made or decree passed. The rule is specific here, as it talks of the review application being heard by any other judge at the court “at the time the application comes for hearing.” The effect of this is that when a judge is no longer at the court or station, he, then, automatically, ceases to be seized of the matters domiciled at that court or station, and any fresh proceedings that come up, after he ceases to be attached to that court or station, with respect to matters he had handled, should not be placed before him wherever he would happen to be, instead it ought to be placed before any other judge at that court or station, where the matter



or file is domiciled. The other bit is about the judge still being at the station, but unavailable for some reason or other, for a long period of time. That does not apply here, but it says that the Chief Justice may designate another judge, whether based in that court or station, or in another court or station, to handle the matter.

12. Let me now apply the principles set out in section 80 of the *Civil Procedure Act* and Order 45 rule 2 of the *Civil Procedure Rules* to the instant matter. I am no longer attached to the High Court at Vihiga. I am no longer seized of the matters domiciled at the High Court at Vihiga. The matters that I am now seized of are those domiciled at the Busia High Court registry. Consequently, the matters domiciled at the Vihiga High Court registry ought not follow me to the High Court of Kenya at Busia. They ought to be handled by the Judge of the High Court at Vihiga, who is the one now seized of the matters domiciled at that High Court registry or station. The application I am being asked to consider was filed after I had ceased to be attached to the High Court at Vihiga, and after I had ceased to be seized of the matters domiciled there, and the hearing of that application ought to be, by virtue of Order 45 rule 2(2), “by any other judge who is attached to that court at the time the application comes for hearing.”
13. The same principle applies in criminal matters, where it is stated at section 200 of the *Criminal Procedure Code*, cap 75, Laws of Kenya. The outgoing judicial officer ceases to be seized of the matters domiciled at the station that he is leaving, and the incoming officer takes over. The issue of any of those matters following the outgoing officer to his new station does not arise. The outgoing officer drops everything that he was handling at the court or station that they are leaving, including part-heard matters; and the incoming officer takes over everything, including the part-heard matters, and takes the steps, that are detailed in section 200 of the *Criminal Procedure Code*, to progress the cases, one way or other.
14. For avoidance of doubt, section 200 of the *Criminal Procedure Code* provides as follows:
 - “Conviction on evidence partly recorded by one magistrate and partly by another
 - (1) Subject to subsection (3), where a magistrate, after having heard and recorded the whole or part of the evidence in a trial, ceases to exercise jurisdiction therein and is succeeded by another magistrate who has and exercises that jurisdiction, the succeeding magistrate may—
 - (a) deliver a judgment that has been written and signed but not delivered by his predecessor; or
 - (b) where judgment has not been written and signed by his predecessor, act on the evidence recorded by that predecessor, or resubmit the witnesses and recommence the trial.
 - (2) Where a magistrate who has delivered judgment in a case but has not passed sentence, ceases to exercise jurisdiction therein and is succeeded by a magistrate who has and exercises that jurisdiction, the succeeding magistrate may pass sentence or make any order that he could have made if he had delivered judgment.
 - (3) Where a succeeding magistrate commences the hearing of proceedings and part of the evidence has been recorded by his predecessor, the accused person may demand that any witness be resubmitted and reheard and the succeeding magistrate shall inform the accused person of that right.
 - (4) Where an accused person is convicted upon evidence that was not wholly recorded by the convicting magistrate, the High Court may, if it is of the opinion that the accused person was materially prejudiced thereby, set aside the conviction and may order a new trial.”



15. I was transferred from the High Court of Kenya at Kakamega to the High Court of Kenya at Busia, the effective date of transfer being March 1, 2023. My last day of duty at the High Court of Kenya at Kakamega was February 28, 2023. As said above, the High Court of Kenya at Kakamega was responsible for the High Court of Kenya at Vihiga, as no Judge had been posted to that station yet. A Judge was subsequently posted there, whose first day of duty was March 1, 2023. I ceased to be attached to the High Court of Kenya at Kakamega and the High Court of Kenya at Vihiga on February 28, 2023, and, effective from that date, I stopped being seized of the matters domiciled in those 2 High Court stations. My transfer meant that I dropped all the matters that I was seized of at the High Court of Kenya at Kakamega and at Vihiga, except for rulings and judgments arising from hearings that I had conducted up to February 28, 2023, and I took over all the matters that my predecessor at the High Court of Kenya at Busia was handling, effective from March 1, 2023. So, the issue of any files following me from the High Court of Kenya at Kakamega and at Vihiga, with respect to proceedings commenced after March 1, 2023, should not arise. Since I am no longer seized of matters from the High Court of Kenya at Kakamega and at Vihiga, I cannot touch any of those matters, unless I receive authorization from the Chief Justice, otherwise I would be encroaching on matters that are not within my docket.
16. My predecessor at the High Court of Kenya at Busia was very emphatic, when handing over to me, that I should not, under any circumstances, forward any file to him, at his new station. What he told me is the correct position, going by the provisions that I have cited above. My brother is no long attached to the High Court of Kenya at Busia. He is no longer seized of the matters that are domiciled at the High Court registry at Busia. I am the one seized of those matters. The orders that were made and decrees passed by him, in matters at Busia, are now my business. Should any applications come my way, for review or setting aside of any decrees passed or orders made by him, prior to my taking over from him, it will be my jurisdiction, not his, to deal with such matters. I would have no business sending any file to chase after him at his new station, and, most certainly, I will do no such thing. The same principle should apply to the matters that I was handling at the High Court of Kenya at Kakamega and at Vihiga. Any orders that I made or decrees that I passed, while seized of matters in those 2 stations, are orders and decrees of those courts, and not of the court at Busia. None of the matters that I handled at Kakamega and Vihiga should be send my way, except for rulings and judgments in respect of hearings that I had completed prior to the transfer. That is the law.
17. I believe I have said enough to demonstrate that the file herein should not have been forwarded to me. I am no longer seized of the matter. My successor, at the High Court of Kenya at Vihiga, is the one now seized of it, and is the proper person to handle the Motion dated March 24, 2023, by virtue of section 80 of the Civil Procedure Act and Order 45 rule 2(2) of the Civil Procedure Rules. Consequently, I do hereby order and direct that the file be returned to the High Court of Kenya at Vihiga. Should my successor at Vihiga disagree, there is liberty to forward the file to the Chief Justice, or the Principal Judge of the High Court, for allocation of a Judge to deal with it.

**RULING DELIVERED DATED AND SIGNED IN OPEN COURT AT BUSIA THIS.....
18TH.....DAY OFAPRIL.....2023**

W. MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

