



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL APPEAL NO.185 OF 2018

JULIUS LEKURUITO

NICKSON LOLGOSOI (Suing as the legal Representative Of MARTHA

NULKIAPU LEKURITO(DECEASED)APPELLANTS

-VERSUS-

NOTTINGHAM MWANGI.....1ST RESPONDENT

MOSES MWANGI.....2ND RESPONDENT

JUDGEMENT

1. On the 13th of September, 2010 the deceased was knocked down by motor vehicle registration No. KAX 586Z, the property of and driven by the 1st Respondent. The Administrator of the Estate (the Appellants) sued the Respondents by an amended plaint dated 23rd September 2013. The Appellants pleaded for compensation for pain and suffering, loss of dependency, and special damages in the sum of Kshs.35,500/=.

2. The Respondents in their statement of defence to the amended plaint denied negligence in the occurrence of the accident and instead stated that the deceased contributed to the fatal injuries she sustained. They denied Jurisdiction of the court.

3. The defendants then filed a **Notice of Preliminary Objection dated 20th of May 2013** challenging the territorial jurisdiction of the court. The Preliminary Objection was not argued.

However, the Appellants filed a **Notice of Motion dated 2nd of September 2013**, seeking for orders that; also state the facts prior to the impugned ruling, that

a. Spent

b. Pending the hearing and determination of the Application interparties, this Honourable Court be pleased to stay proceedings.

c. That the Honourable Court be pleased to return the plaint filed before the Honourable Court and amended on the 23rd of September 2015 together with the original official receipts to have the same presented to Nyahururu Chief Magistrate's Court where the same should have been instituted.

d. The plaintiff be at liberty to apply

e. The cost of the Application be in the cause.

4. The Respondents through their Replying Affidavit dated **14th of October 2015** deponed as follows:

a. That the entire proceedings by the Appellant/Applicant was bad in law, incompetent, fatally defective and an abuse of the process of Court and therefore should be dismissed

b. The application dated 2nd September 2015 was devoid of merit and totally defective as the prayers sought by the Appellant/Applicant herein were incapable of being granted as the Court herein was functus officio.

c. The Applicant filed Nakuru Chief Magistrate Civil Case No.252 of 2012 in Nakuru even though the accident occurred along the Nyahururu – Ol Kalou road within the jurisdiction of the Nyahururu Senior Principal Magistrate’s Court a fact which the Applicant clearly admits.

d. That they challenged the territorial jurisdiction of this court in the statement of defence dated 10th of July 2012.

e. That they filed a Notice of Preliminary Objection dated 20th of May 2013 which was served upon the Applicant’s advocate and fixed for hearing on several occasions.

f. Even when the advocate on record herein took over the matter and the Preliminary Objection was pending for hearing, they still insisted on proceeding with the matter.

g. Instead of the advocates regularizing the suit after discovering that it was wrongly filed before this Honourable Court, they ran to the High Court seeking transfer of the suit which application was declined.

h. The current advocates took over the matter on 23rd of July 2013 when they filed a notice of change of advocates in court and subsequently amended the pleadings, they deemed it fit to file this application then and had to wait for more than 2 years to file this present application.

i. The applicants cannot purport to blame their former advocates for the mistake as the present application was only filed when they exhausted all avenues to proceed with the matter

j. This Honourable Court cannot reopen the case when the same has been declared null and void by the High Court.

5. Upon the hearing of the Application dated **2nd of September 2015**, the Trial Magistrate found that **Order 4 Rule 9 (1) of the Civil Procedure Rules, 2010** allows the return of the plaint but emphasizes that it is the judge that should endorse therein the date of its presentation and return, the name of the party presenting it and a brief statement of the reasons for returning it.

6. The trial court concluded that the only court with jurisdiction to return the plaint is the High Court, and dismissed the application.

7. The Appellants being dissatisfied with the **Ruling and order dated 3/12/2015** preferred this appeal upon four grounds:

a. The Honourable Learned Magistrate erred in Law and fact by dismissing the Appellants Notice of Motion dated 2nd of September 2015 apparently only because Order 4 Rule 9 refers to the work to the word “judge” which in the court’s view restricts jurisdiction to the High Court, when the Chief Magistrate’s Courts is rested with the jurisdiction.

b. The Honourable Learned Magistrate erred in law and fact by restricting the definition of the word judge to be only associated with the High Court and overlooked the fact that under **Section 2 of the Civil Procedure Act** the word “Judge” means the ‘the presiding officer of the court’.

c. That the Honourable Learned Magistrate misdirected her mind by restricting the definition of the court to mean High Court and overlooked **Section 2 of the Civil Procedure Act** wherein the term “**Court**” means **‘the High Court or the subordinate court acting in the exercise of civil jurisdiction’**.

d. The Honourable Learned Magistrate erred in law and fact by dismissing the Appellant’s application even after agreeing with the Appellants rights to have their plaint returned to them for filing in a proper court and when the application had not been substantially opposed without any justifiable cause.

8. The Appellants pray for judgement as follows:

a. The appeal be allowed with costs.

b. Setting aside the Honourable Magistrate’s ruling and Order of **3rd December, 2015 in CMCC No.252 of 2012 Nakuru**, dismissing the Appellant’s Notice of Motion dated 2nd September 2015, and in place allowing the said Notice of Motion dated 2nd September 2015.

c. An order directing the Chief Magistrate’s Court to return to the Appellants their plaint in CMCC No. 252 of 2012 Nakuru, with an endorsement as envisaged by **Order 4 Rule 9(2) of the Civil Procedure Rules** so that the same can be presented to the proper court.

Analysis and determination.

9. Order 4 Rule 9 of the Civil Procedure Rules provides that

1. A plaint may at any stage of the suit be returned to be presented to the court in which the suit should have been instituted,

2. On returning a plaint the judge shall endorse thereon the date of its presentation and return, the name of the party presenting it and

a brief statement of the reasons for returning it.

10. Section 2 of the Civil Procedure Act, 2010 defines a 'judge' as "**judge**" means **the presiding officer of a court**' while defining a 'court' as "**court**" means the **High Court or a subordinate court, acting in the exercise of its civil jurisdiction**'. **Section 11 of the Civil Procedure Act, 2012** provides for the court in which suit may be instituted, thus:

"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.

11. **Section 18** thereof grants power to the High Court to withdraw and transfer a case instituted in a **subordinate court** on the application of any of the parties or of its own motion to itself or to another subordinate court, as follows:-

18 (ii) (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; or

(b) Withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter –

(i) try or dispose of the same; or transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

(ii) retransfer the same for trial or disposal to the court from which it was withdrawn.

18 (2) where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

12. Ngugi J, in the case of **Anchor Limited VS. Sports Kenya (2017) eKLR** stated as follows:

"One workable and pragmatic definition of a technicality has been bequeathed to us by the Learned Honourable Justice Richard Mwangi, in **Kenya Ports Authority Vs. Kenya Power & Lighting Co. Limited (2012) e KLR** and another one supplied by the Learned Hon. Justice C.W. Githua in **James Muriithi Ngotho & 4 others Vs. Judicial Service Commission (2012) e KLR**; both decisions substantively say that procedural technicality is a lapse in form that does not go to the root of the *suit*".

13. In the former case, Justice Mwangi defined a technicality thus;

"Combining the meanings of these words, "procedural technicalities" may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying structures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.

I can think of no better example of a technicality than citing a wrong provision of the law being used as a basis to dismiss a suit application. I need not say more about this argument by the Defendant".

The above analysis was necessarily to bring to the parties attention of the legal provisions that under pin the matter of inter courts transfers of suits, which are filed in courts with concurrent jurisdiction but at different territorial jurisdictions. This too applies to transfers from, for instance, suits filed in the now specialized courts, the Environment and Land Court as well as the Employment and Labour courts. If the trial court's interpretation was to be adopted, there would be untold suffering and prejudices to parties whose pleadings are filed in the not proper courts by having their complaints struck out, despite time limitation.

14. In my very considered opinion, it would be an injustice to deny a party its right to be heard by the court for the only reason that its suit has been filed in a court without territorial jurisdiction.

As stated at **Paragraph 18 of this judgement, Section 18 (1) of the Civil Procedure Act, 2012** clothes the High Court with power and discretion to direct and distribute the business of the court to the various subordinate courts in the same county. Granted, the Chief

Magistrates Court at Nyahururu does not fall in the same county with the Chief Magistrates Court at Nakuru.

15. What we have here is one of those procedural technicalities that are curable under **Article 159 (2) (d) of the 2010 Constitution**. There would be no prejudice to the Respondents if the plaint is returned to the Appellants, to facilitate filing it at the court with territorial jurisdiction for the matter to be heard and determined on merit. To do otherwise would be against the spirit of the Constitution, and objectives of **Section 1A, 1B and 3A of the Civil Procedure Act**.

16. The jurisdiction to strike out a pleading for want of territorial jurisdiction is one that ought to be exercised with extreme caution. The court ought to consider the prejudice that would be caused to the respondent by shutting him from the seat of justice. There must be clear obvious reasons to necessitate such action – **DT Dobie & Company (Kenya) Ltd Vs. Muchina (1982) KLRI**.

Further in the above case it was held that no suit ought to be summarily dismissed, unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption.

17. Looking at the parties pleadings, a reasonable cause of action is evidently pleaded.

By upholding the trial court's ruling of the **3/12/2015**, I would effectively be blocking and shutting the appellant from exercising his rights, guaranteed under **Article 22 (1) (d) of the Constitution** that empowers the court, meaning the superior courts and subordinate courts to, while observing the rules of natural justice not to be unreasonable restricted by procedural.

18. For the above reasons, I find and hold that the trial magistrate misapprehended and misdirected herself in the meaning of a court, a judge and powers bestowed to the said **"judges"/"courts"** and thereby arrived at a wrong interpretation as to the powers of transfer of suits from one court to another.

The appeal is thus allowed in its entirety. I proceed to set aside the ruling subject of this appeal dismissing the Appellant's Notice of Motion dated 2/9/2015, and in its place allow the said Motion.

19. Consequently, the Chief Magistrate sitting at the Chief Magistrate's Court at Nakuru is hereby directed to return to the Appellants the plaint and all accompanying documents thereto in Nakuru CMCC No. 252 of 2012, with an endorsement as envisaged under Order 4 Rule 9 (2) CPR, so that the same can be presented to the proper court, where it ought to have been instituted.

For avoidance of doubt, upon return of the plaint, and pursuant to **rule 9(2)** thereof, the **Deputy Registrar, in the case of the High Court or the Executive Officer, in case of the Chief Magistrate's Court**, shall comply with the rule, by endorsing thereon the date of its presentation and return, the name of the party presenting it and a brief statement of the reasons for returning it.

20. This judgement shall be stated as the reason for returning the plaint.

I order no costs on the appeal in view of the peculiar circumstances of the dispute.

Orders accordingly.

Delivered, signed and dated electronically at Nairobi this 13th Day of May 2020.

J.N. MULWA

HIGH COURT JUDGE.