



REPUBLIC OF KENYA

IN THE HIGH OF KENYA

AT MACHAKOS

CIVIL CASE NO. 9 OF 2016

MATTHIAS MUTISYA MWINZI.....1ST PLAINTIFF/APPLICANT

JOSEPHINE KATIO MUTISYA.....2ND PLAINTIFF/APPLICANT

VERSUS

BASH HAULIERS.....1ST DEFENDANT

RITCO CO LTD.....2ND DEFENDANT

RULING

1. The applicants approached the court by Notice of Motion dated 4.2.2019 and amended on 22.5.2019 that was brought under **Section 3A** of the Civil Procedure Act as well as Order 51 Rule 1 and Order 12 Rule 7 of the Civil Procedure Rules for orders that; the dismissal of the suit on 28.11.2018 for want of prosecution be set aside and upon the setting aside the suit **HCCC 9 of 2016** be reinstated for hearing; that the costs of the application be in the cause.

2. The application is supported by the affidavit sworn by Daniel Matthias Mwinzi and the grounds briefly are that the court overlooked the fact that one year had not lapsed since the last action by counsels on the file; that the notice of dismissal dated 9.11.2018 was never served on the plaintiff's counsel's post office box or in his chambers; that the failure to serve led to the suit being dismissed unheard; that the defendants will not be prejudiced by the reinstatement of the suit and further that there was no inordinate delay in bringing the application.

3. There is no indication of a reply to the amended notice of motion. What is on record is a reply to the notice of motion dated 4.2.2019 and it is vide an affidavit dated 25.2.2019 deposed by Caren Jaguga, the Legal officer of Fidelity Shield Insurance Co Ltd that was authorized by the Respondent under the principle of subrogation. It was averred that the grounds set out in the application do not warrant the orders sought and in the alternative if the application is allowed then the suit be transferred to another court.

4. The court directed that the application be canvassed vide written submissions and it is only the applicant's submissions that are on record. Learned counsel in placing reliance on the provisions of Order 17 Rule 2 (1) of the Civil Procedure Rules and the case of **Gold Lida Ltd v NIC Bank Ltd & 2 Others (2018) eKLR** urged the court to allow the application.

5. Having considered the application, the issues to be determined are whether the dismissal for want prosecution can be set aside and whether the suit can be transferred to another court. The dismissal of the suit was for want of prosecution and provision for the same is made under Order 17 rule 2(1) of the Civil Procedure Rules which provides as follows

“(2) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.

6. Having examined the record, I find that the steps taken by the plaintiff all the way up to 20.4.2018 were quite substantive as there is indication of compliance with Order 11 by the plaintiff and it would be unfair to disregard the same. In exercise of this court's discretion and powers under **Section 3A** of the Civil Procedure Act I allow the application.

7. With regard to the 2nd issue, it is trite law that in law no court or person assumes jurisdiction. Jurisdiction is a creation of statute. In Kenya, all courts derive their power from the Constitution under Article 159. The Constitution provides for the establishment of the Superior Courts under Article 162 and subordinate courts under Article 169. Judicial Power is exercised by the courts which consist of;

- a. The Supreme Court
- b. The Court of Appeal.
- c. The High Court.
- d. Subordinate courts including Magistrates Courts, Kadhis Courts, Courts Martial. (see Article 169 of the Constitution).

8. Under the subordinate courts are the following hierarchy of courts as per the Magistrates Courts Act, 2015.

- a. Chief Magistrate- pecuniary jurisdiction of Kshs 20,000,000/-
- b. Senior Principal Magistrate- Kshs15m/-
- c. Principal Magistrate-Kshs10m/-
- d. Senior Resident Magistrate-Kshs 7m/-
- e. Resident Magistrate-Kshs 5m/-

9. Jurisdiction is specifically granted each court by law. The jurisdiction for instance of the High Court is unlimited in civil matters except employment and land matters. However the Magistrates Courts Act, 2015 makes provision for the nature of civil suits that are to be instituted in respect of a subject matter in accordance with the grade of a Magistrate.

10. In selecting a court with power over the type of litigation, regard must be made to the pecuniary limitation of such courts and the enabling law which empowers such court to hear such a case (see Section 4 and 12 of the Civil Procedure Act). The litigant must before choosing where to file a matter be informed by the subject matter of dispute. The question to consider before choosing the court is;

- i. What is the pecuniary value of the subject matter?
- ii. Which court is within the local limits where the property is situate?

See Section 11 and 15 of the Civil Procedure Act

11. In the instant case, the provisions of Section 11 of the CPA require; "a suit to be instituted in the lowest grade of court competent to try and determine it." Combined with section 12 and 15 of the CPA, requiring suits to follow subject matter in terms of pecuniary and territorial jurisdiction all dictated the fact that the High Court was the wrong court for the instant case. The case could only be tried before the magistrates court because the subject matter is a suit arising from a fatal accident in which the pecuniary jurisdiction does not exceed Kshs 20,000,000/.

12. Section 18(1) of the CPA is to the effect that "*On the Application of any of the parties and after notice to the parties and after hearing such of them as desired to be heard, or of its own motion without such notice the High Court may at any stage:*

- (a) *Transfer any suit or other proceedings pending before it for trial or disposal to any subordinate to it and competent to try or dispose of the same; or*
- (b) *Withdraw any suit or other proceedings pending in any court subordinate to it, and thereafter-*
 - (i) *Try or dispose of the same,*
 - (ii) *Transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same,*
 - (iii) *Transfer the same for trial or disposal to the court from which it was withdrawn.*

13. The principles upon which this court will exercise its discretion as regards the transfer of cases have been well laid down in the Ugandan case of **David Kabungu v Zikarenga High Court Misc. App. 36 of 1995 [1995] 3 KALR** in which Okello J stated as follows:-

"Section 18(1) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party. ... There are also authorities that the principal matters to be taken into consideration are balance of convenience, questions of expenses, interest of justice and possibilities to undue hardship and if the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the duplication must be refused."

14. In addition, the overriding objective of the Civil Procedure Act and Rules made thereunder is to facilitate the just, expeditious, proportionate and or affordable resolution of civil disputes governed by the Act. In the furtherance of this overriding objective, the courts are mandated to ensure the just determination of proceedings, **efficient disposal of business of the court, the efficient use of available judicial**

and administrative resources and the timely disposal of proceedings at a cost affordable by the respective parties. I find it would be efficient to allow the case now pending before this court to be determined by the magistrate's courts. A transfer of the suit would be in the best interest of both parties, and there is no prejudice that shall be occasioned because there are no interim orders in force and that the magistrates court is a stone throw away from this court.

15. In the result I find the application dated 4.2.2019 and amended on 4.6.2019 has merit. The same is allowed in the following terms:

a. The orders of dismissal dated 28.11.2018 are vacated and that the suit is hereby reinstated.

b. The suit be and is hereby transferred to the Chief Magistrate's court for hearing and final disposal. The same to be mentioned on the 11.6.2020 before the Hon Cm for directions.

c. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Machakos this 7th day of May, 2020.

D. K. Kemei

Judge