



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
ANTI-CORRUPTION & ECONOMIC CRIMES DIVISION
ACEC NO. 16 OF 2017

ETHICS & ANTI-CORRUPTION COMMISSION.....PLAINTIFF

V E R S U S

KANYI JOSEPH KARANJA, CECILIA FAITH MANGO AND

MICHAEL KIOKO MAUNDU T/A KANYI & COMPANY ADVOCATES.....1ST DEFENDANT

KIKAMBALA DEVELOPMENT COMPANY LTD.....2ND DEFENDANT

EPHRAIM MAINA RWINGO..... 3RD DEFENDANT

JANE NJERI KARANJA.....4TH DEFENDANT

SELINE CONSULTANTS LTD..... 5TH DEFENDANT

FREDICK OTIENO OYUGI.....6TH DEFENDANT

JOY KAVUTSI ASIEMA.....7TH DEFENDANT

JOAN ZAWADI KAREMA.....8TH DEFENDANT

JUMA BENSON THOYA..... 9TH DEFENDANT

HARRY JOHN PAUL ARIGI..... 10TH DEFENDANT

MAURICE MILIMU.....11TH DEFENDANT

RULING

1. The substantive suit herein was commenced by way of a Plaint on 21st June 2017 seeking recovery of Ksh70million against the defendants jointly and severally being money allegedly obtained by the defendants out of Ports Authority Pension scheme. A Notice of Motion of even date seeking injunctive orders against the respondents restraining them against transferring, alienating, disposing or in any other way dealing with property known as CR. No.19534 subdivision No. 5043 or transferring, withdrawing or disposing Kshs 5million held in British American Asset Managers LTD portfolio in the name of Karanja Kanyi was canvassed and a Ruling delivered on 19th December 2017. Thereafter, the 1st defendant filed an application dated 7th July 2017 seeking to strike out the suit on grounds that it did not disclose any reasonable cause of action against him. From the record, the application is still pending. Subsequently, an application dated 7th August 2018 seeking to amend the plaint was also filed. The same was however allowed by consent on 8th October 2018.

2. On 23rd November,2018 parties intimated to the court of their intention to negotiate and record a consent. On the same day, parties recorded a partial consent with the 1st defendant depositing 45 million as part payment of the plaintiff's claim which money was deposited in an Escrow account jointly operated by Advocates of EACC and the firm of Kanyi and Company Advocates.

3. On the same day, the court gave directions for parties to comply with Order 11 of the Civil Procedure Rules. Subsequently, on 27th March 2019 parties entered a consent order lifting freezing orders issued against the 1st defendant in respect of funds held by Britam Asset Managers Ltd and transfer of 5 million with interest to an Escrow account held by Kanyi Karanja and Culent Simiyu. As at 28th March, 2019 a total sum of Kshs. 59,000,000/- had been deposited and only a balance of Kshs. 11,000,000/- which was outstanding. Subsequently, the full amount of Kshs 70 million was deposited leaving interest and costs of the suit as the only issues pending settlement.
4. For one reason or the other, this matter has been pending for over one year now pending conclusion of the outside court settlement. The matter is almost concluded save for costs and interest which have not been agreed.
5. However, in a twist of events, the 1st, 2nd, 3rd, 4th and 5th defendants filed a Notice of Motion dated 22nd January 2020 seeking transfer of this matter to the High Court in Mombasa for hearing and final determination. The application is based on grounds that on 9th December 2016 the Hon. The Chief Justice under Gazette Notice No. 10263 directed that all matters relating to corruption be filed in Nairobi.
6. That the cause of action having arisen in Mombasa and the applicants also being residents of Mombasa, the interest of justice would demand that the matter be transferred to Mombasa High Court for hearing and determination. The applicants relied on Chief Justice Gazette Notice No. 8458 dated 10th August 2018 which opened Mombasa High Court Sub-Registry and hearing of some cases by Mombasa High Court inter alia, Pet. 1/2019 as proof that Mombasa High Court has jurisdiction.
7. In response, the respondent filed a replying affidavit sworn on 14th February 2020 by Culent Simiyu Lunyolo stating that; the application is an afterthought considering that parties have been appearing and prosecuting several applications leading to the deposit of the full principle sum (70 million) which is the subject of this suit; since 10th August, 2018 when the Gazette Notice opening Mombasa High Court sub-registry was published, the applicants have never raised the issue of transfer of the file.
8. He averred that Nairobi Anti-Corruption and Economic Crimes Division was gazetted on 8th December 2015 as a specialized court dealing with corruption related matters hence the right court to hear such matters. That on 9th December, 2016 Chief Justice Maraga issued practice directions directing that all corruption related matters be heard in Nairobi. That on 20th July, 2018 the Chief Justice issued further directions that all corruption related matters be filed in the respective registry at Nairobi.
9. Further, he contended that, although Mombasa High Court Sub- Registry was gazetted, the same has not been operationalized. To support that position, it was deposed that the Presiding Judge in Mombasa J. Ogolla had recently transferred **Mombasa H.C. Petition No. 155/2019** from the Constitutional and Human Rights Division in Mombasa to Nairobi High Court Anti-Corruption and Economic Crimes Division on grounds that it was the right court seized with the mandate to deal with Anti-Corruption related matters.
10. He contended that, Nairobi High Court Anti-Corruption and Economic Crimes Division was well equipped and staffed to hear such matters expeditiously hence the application herein amounts to abuse of the court process.
11. During the hearing, Mr. Kanyi appearing for the applicants, basically reiterated the grounds and affidavit in support of the application. Counsel submitted that following the gazettement of Mombasa Sub-Registry, he filed H.C. **Petition No. 1/19** in which he challenged criminal charges against him related to this suit. That the court heard the same and delivered Judgment in his favour on 7th November 2019 thus confirming that Mombasa High Court can hear Anti-Corruption related matters. He attached a copy of the said judgment.
12. Mr. Kanyi submitted that parties are spending exorbitant costs in travelling from Mombasa to Nairobi hence denying them the right of access to justice. He urged the court herein to apply its administrative powers to transfer the matter suo motto. That devolution will not make sense if courts are to be centralized in Nairobi.
13. On her part, M/s Okwara appearing for EACC basically adopted her averments in their replying affidavit. She stated that this court has the sole jurisdiction to hear the matter. She opined that the applicants are guilty of laches given that the matter has been going on before this court for far too long without raising the issue of transfer. She also referred to Mombasa H.C. Petition No. 155/19 which Justice Ogola allegedly transferred to Nairobi for hearing. She contended that, although gazetted, Mombasa Sub-Registry has not been operationalized.
14. I have considered the application herein, response thereto and oral submissions by both counsel.
15. The application is simply seeking transfer of this case from Nairobi to Mombasa High Court on grounds that all parties are based in Mombasa and the cause of action arose in Mombasa. That and territorially, Mombasa High Court is the most suitable court to hear the same to attain the objective of access to justice and devolution.
16. Both parties are in agreement that vide Gazette Notice No. 9123 of 8th December 2015, the Chief Justice Hon. Mutunga created the High Court Anti-Corruption and Economic Crimes Division based at Nairobi to hear all Corruption related matters.
17. It is also an admitted fact that on 9th September 2016 Hon. Chief Justice Maraga issued practice directions vide Gazette Notice No. 10263 directing that all Judicial Review and Petitions relating to Corruption matters be heard at Nairobi High Court Anti-Corruption and Economic Crimes Division.
18. Indeed, by Gazette Notice No. 7262 of 20th July 2018 the Chief Justice issued practice directions which at paragraph 8 provides that;

“All cases relating to corruption and economic crimes which have been filed before other stations or divisions of the High Court, in which hearing has not commenced, shall be transferred to Anti-Corruption and Economic Crimes Division.”

At paragraph 6, his Lordship directed all corruption related matters be it by Judicial Review, Petitions, Criminal Reviews, Revisions, Appeals or any other application arising from Magistrate's Court be heard by Anti-Corruption and Economic Crimes Division.

19. It is also not in dispute that vide Gazette Notice No. 8058 of 10th August 2018 the Hon. Chief Justice established Mombasa sub-registry at Mombasa High Court. The only point of departure is that, according to Mr. Kanyi, no further ceremony is required to start the court Sub-Registry and that some matters have been filed and handled in Mombasa with finality. To the EACC, gazettelement of the Sub-Registry is not itself enough to start a court hence the need to operationalize it whatever that means.

20. Ordinarily, courts jurisdiction is derived from the Constitution or Statute. A judge or any judicial officer for that matter cannot assume non-existent jurisdictional authority. Jurisdiction is a creature of the law. In the case of **In the matter of the Interim Independent Electoral Commission Constitutional Application No. 2/2011** the court had this to say;

“Assumption of jurisdiction by courts in Kenya is a subject regulated by the Constitution, by Statute law and by principles laid out in Judicial precedent.”

21. According to Article 163(3) of the Constitution, the High Court has unlimited jurisdiction over civil and criminal matters. However, such jurisdiction is further operationalized by Statute. Under Section 5 of the Judicial Service Act No. 01/2011 and High Court Organization and Administration Act No. 27/13, the chief justice is empowered to issue practice directions to govern exercise of jurisdiction donated by various statutes. It is in the strength of these powers that Mombasa Sub-Registry Anti-Corruption and Economic Crimes Division was opened.

22. Since gazettelement of the sub-registry, I am reliably informed from the judiciary administration that the Chief Justice has not appointed or nominated a Judge designated for purposes of hearing corruption related matters in Mombasa. I believe that is what M/s Okwara may have been referring to as operationalization. Without formal nomination of a Judge to specifically deal with those matters, the Sub-Registry cannot operate as envisaged under the practice directions of 20th July 2018.

23. The objective of the practice directions issued by the Chief Justice is not intended to take away any constitutional jurisdiction of the High Court in any station but to reinforce it for effective case management. Although arguments have been advanced that Mombasa High Court has handled some matters, there is proof also that the same court has transferred some on account that it is only Nairobi High Court Anti-Corruption Division to deal with such matters. Indeed in **Constitution Petition No. 155/2019 George Mugoye Mbeya v Ethics Anti-Corruption Commission and 2 Others (2019)eKLR** Justice Ogolla heard the application for conservatory orders owing to the urgency of the matter but proceeded to transfer the petition to Nairobi Anti-Corruption and Economic Crimes Division for hearing and determination. At page 6 paragraph 5 (ii) the court stated that:-

“The Petitioner (sic) herein dated 30th September 2019 is hereby transferred to the Anti-Corruption and Economic Crimes Division established in the High Court of Kenya pursuant to the Chief Justice Practice Directions dated 9th December 2016 as amended on 9.7.18 for purposes of taking directions on the hearing and determination of the same.”

24. Although it sounds contradictory that Mombasa High Court has heard some matters and transferred others, the fact remains that there is no Judge yet appointed for purposes of hearing Anti-Corruption related matters at the High Court. That being the case, it is my humble view that the Presiding Judge Anti-Corruption and Economic Crimes Division should write to the Hon. Chief Justice to nominate a Judge to hear such matters in Mombasa to put into effect the opening of the sub-registry. In the meantime, and for the sake of certainty and consistence, this matter should continue being heard in Nairobi.

25. On the other hand, this matter has been going on before this court since 2017. The same is almost getting to conclusion. Owing to adoption of various consents and deposit of the entire principle sum in an escrow account, the only issue outstanding is whether interest and costs should be awarded. This is a matter that is gearing to conclusion. Parties have fully participated in the proceedings without raising the issue of territorial jurisdiction. To raise it at this stage is perhaps an afterthought since it is clear that Nairobi High Court Anti-Corruption Division has the mandate to determine the matter and considering the circumstances that Mombasa High Court is yet to be operationalized, it is safer that the matter proceeds in Nairobi Anti-Corruption Court.

26. The issue of expeditious delivery of justice is a factor to which each party should be willing to participate in. If parties enter consent judgment for payment of the principle sum, they can submit on the award of costs and interest which can take a short time and the court shall deliver a ruling.

27. For the above stated reasons, it is my holding that, justice demands that this matter proceeds to conclusion before Nairobi High Court Anti-corruption division. Parties are advised to expedite the process to avoid many and unnecessary mentions at Nairobi. I hope with the electronic proceedings now in place, most mentions shall be conducted virtually hence no need to spend money by travelling to Nairobi. Application is therefore dismissed with no order as to costs Order accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF July 2020.

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J. N. ONYIEGO

JUDGE