



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

MISC. CIVIL APPLICATION NO. 3 OF 2018

JOSEPH KARIUKI NJOKA..... APPLICANT

V E R S U S

ACTION AID INTERNATIONAL KENYA.....RESPONDENT

R U L I N G

1. The applicant in his chamber summons dated 6/01/2018 seeks orders as follows:-
 - a. That his case CMCC No. 139 of 2015 be withdrawn from Embu chief Magistrate and transferred to Principal Magistrate Wanguru.
 - b. That upon transfer this court gives directions as to how his case should proceed before the trial magistrate.
 - c. That the respondent's counsel be investigated for forgery of document No. 16 on the defendant's list and bundle of documents.
2. A preliminary objection was raised by the defendant on grounds that the applicant is not a party to the proceedings in CMCC No. 139 of 2015. It was further stated that this court has no jurisdiction to hear and entertain the application and that it is only the trial magistrate who ought to deal with the application.
3. The defendant nevertheless filed a replying affidavit in response to the application.
4. The grounds supporting the application are contained in the affidavit of Joseph Kariuki, the applicant herein. He depones that the trial magistrate denied him a chance to be heard, argue or give his verbal testimonies on 22/01/2018 while he allowed the defence counsel more than an hour to ventilate his defence. It is further alleged that the learned magistrate allowed the defence to file statements beyond the 14 days that the court had given him.
5. Basing his allegation on the matters deponed, the applicant accuses the magistrate of being biased or having been compromised.
6. The respondent in the replying affidavit sworn by his advocate Ms. F.W. Njoroge gives the history of the case. Firstly he talks of the applicant's frequent change of advocates in the case. Secondly was the request to amend the plaint in which he was accommodated by the respondent although the amended plaint introduced new prayers in the claim and increased the amount claimed.
7. It is deponed that the counsel sought leave for the defendant to file his list and bundle of documents which was allowed with extension of time at a later date.
8. The plaintiff filed documents without leave on 10/01/2018 after the pre-trial directions and did not serve them on the defendant. He even went further and took a hearing date for the case exparte. This was despite the fact that the applicant head filed another list and bundle of documents before the pre-trial directions.
9. When the matter came up for hearing, the court directed the applicant to serve the respondent with the new bundle of documents to which he protested and chose to withdraw the documents.
10. The case proceeded for hearing and the plaintiff told the court that he wished to rely on his statement and bundle of documents after briefly articulating his case. The respondent then cross-examined him on his evidence and documents. The defence case was then set for 26/03/2018.
11. The respondent further states that the allegations of bias on part of the trial magistrate are untrue. Both the court and the respondent have accommodated the applicant to pave way for hearing of the case. The applicant specifically wants his case to go to Wanguru court which means he has shopped for a court that may give him a favourable outcome.

12. The grounds were raised in the preliminary objection. Firstly, that this court has no jurisdiction to hear and determine this application. Section 18 of the Civil Procedure Act empowers the High Court to withdraw and transfer any case filed in the subordinate court on application by any of the parties. In my considered opinion, the ground lacks merit for it has no basis in law.

13. The second ground was that the applicant is not a party to this case. On perusal of the plaint, the plaintiff is called Joseph Kariauki Njoka. This is the same name used by the applicant in this application. The defendant did not explain this ground. It was not explained why and how the applicant who have used the same names as those in the plaint was not a party to the case. In my view, this ground too is baseless.

14. I find no merit in the preliminary objection and I hereby declare that this court has jurisdiction to determine this application under Section 18 of the Civil Procedure Act.

15. I have perused the submissions of the parties in this application which are hereby considered alongside the proceedings before the trial court.

16. The issues raised in this application are as follows:-

- a. Whether the magistrate was biased against the applicant so as to justify transfer of this case to another court.
- b. Whether the orders for investigation of the respondent's counsel for forgery of documents is merited .
- c. Whether the other orders sought in regard to how the case should be conducted upon transfer are within the powers of this court.

17. I have perused the proceedings before the trial court. The applicant applied to amend his plaint which application was allowed by consent. He was given 21 days to file the amended plaint. The amended plaint was filed on 2/08/2016. The respondent disputed the amended plaint on grounds that it was not in compliance with the consent order for it had changed the nature and extent of the claim from Kshs. 2,569,800/= to Kshs.3,504,800/=. It was pointed out that two prayers which were not in the original plaint were added in the amended plaint.

18. The respondent applied for striking out of the plaint but this prayer was dismissed after careful consideration of the overriding objective under Section 1A of the Civil Procedure Act. The ruling was in favour of the applicant.

19. When this case came up for hearing, the plaintiff took oath and stated as follows:-

....I have filed all th evidence that I wish to rely on. I adopt it as my evidence. I did not file the email evidence because I don't have it. I am claiming from the defendant Kshs.3,854,800/=. This is for work done and not paid for.....

20. The court then called upon the respondent (defendant) to cross-examine the applicant (plaintiff). Attached to the statement of the plaintiff was a big bundle of documents which were interrogated in cross-examination by the respondent.

21. The procedure in hearing cases of civil nature where parties have filed statements and documents which are in essence their evidence is for the party or witness to identify and adopt their statements. This may take a few minutes because all the evidence is documented. The cross-examination is bound to take longer because the evidence adopted may be bulky and must be tested in cross-examination by the opposite party.

22. The gist of this summary of the procedure explains why the plaintiff took what he says was five (5) minutes while the defendant took a longer time to cross-examine him. The long list and bundle of documents were bound to increase the time taken in cross-examination.

23. At the close of the cross-examination, the applicant said, "*I close my case.*" The respondent's counsel asked for their case to be fixed on another date which request the court granted. The counsel in her replying affidavit has explained that the time she prayed for adjournment was 5.00 p.m. and she was travelling to Nairobi where she is based.

24. The applicant voluntarily gave his evidence before the court and was taken through the process of cross-examination without any problem as borne by the record. He also voluntarily closed his case and gave way for the respondent to proceed save that time was up and the counsel was travelling.

25. The allegations of bias against the trial magistrate have not been proved and are an afterthought and uncalled for.

26. The applicant wants his case to go to a particular court without giving any reason in his supporting affidavit. In his submissions he states that the reason is because he wants a site visit by the court in that areas. The question that arises is why the applicant did not file the case at Wanguru in the first place. I am convinced that the applicant may be contemplating forum shopping which this court would not allow in the interest of justice.

27. Concerning the prayers on how the case should be conducted in the event that it is transferred, I am of the considered view that this court has no power to interfere with the judicial independence of the trial magistrate. The case will be heard on its merits and the applicant will be at liberty to make any application he finds appropriate before the trial magistrate.

28. The applicant alleges forgery of documents on part of the respondent's counsel. However, no proof of this wild allegation has been

shown. His supporting affidavit has no material on how and where the forgery was done.

29. The applicant is at liberty to cross-examine the respondent on his documents. A counsel is an officer of the court and is not expected to engage in forgery of evidence for his client. This would be against the etiquette that an advocate must ensure is guarded. I take the learned counsel's explanation as genuine and satisfactory that she got the documents from her client and filed them within her instructions in the suit.

30. The allegations of bias on part of the trial magistrate have not been proved. No good cause has been shown for referring this case for investigation. The allegation is absolutely baseless.

31. I find no merit in this application and dismiss it with costs.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 18TH DAY OF JULY, 2018.

F. MUCHEMI

JUDGE

In the presence of:-

Ms. Wairimu for Ms. Njoroge for the defendant/ respondent

Applicant present