



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Miscellaneous Application 247 of 2009

KIPKEBE LIMITED APPLICANT

VERSUS

JUSTUS ARAKA PETER & 26 OTHERS RESPONDENTS

RULING

The applicant’s application dated 10th December 2009 was brought under **section 65 (2)** of the **Constitution of Kenya** and **sections 3A, 18** and **63 (e)** of the **Civil Procedure Act**. The application seeks stay of hearing of nearly 45 cases that were filed before the Senior Resident Magistrate’s court at Keroka pending investigations by the police as to the validity of the said cases. The application further seeks transfer of the said cases from Keroka Senior Resident Magistrate’s court to other courts of competent jurisdiction to hear the same either in Kisii, Ogembo, Kilgoris, Oyugis or any other court within the supervisory jurisdiction of this High Court station. Prayer 4 of the application is worded as follows:

“That upon the conclusion of the police investigation, the police do file their report to this honourable court on their findings and if any criminal offence be discovered to have been done in relation to claim documents, the police do proceed to take appropriate action in respect of their findings.”

The application was made on the grounds, *inter alia*:

- ~~€€€€€€€€~~ **That most of the respondents have filed multiple suits based on documents purported to have been issued from the applicant’s clinic at Kapkatet Mission, in form of Forms LD104 and treatment chits which were supplied to Dr. P.M. Ajuoga to prepare medical reports.**
- ~~€€€€€€€€~~ **That the applicant’s record reveal that the respondents did not report the alleged injuries and/or accidents which are the subject of the suits and no Form LD104 in respect thereof were filled at the applicant’s clinic.**
- ~~€€€€€€€€~~ **That many of the subject claims are alleged to have taken**

place three to four years ago but the cases were filed only in May 2009 or thereabout.

- ~~€€€€€€€€~~ That the applicant commissioned private investigations which confirmed that the documents being uttered by the claimants did not emanate from the applicant's dispensary and Kapkatet Mission hospital as denied that the claimants were ever attended to at the said hospital.
- ~~€€€€€€€€~~ That the applicant has lodged a complaint with the police at Nyamira police station and investigations are in progress. The police indicated that they would have completed the investigations in April/May 2010.
- ~~€€€€€€€€~~ That the hearings are going on at Keroka Senior Resident Magistrate's court and some of them may be finalized before the said investigations have been completed.
- ~~€€€€€€€€~~ That there is a likelihood that some of the claimants have made fraudulent claims.

The applicant's application was supported by an affidavit sworn by **Mwikali Muthoka**, a Legal Officer of the applicant. The affidavit basically amplified the said aforesaid grounds.

The application was opposed by M/s G.J.M. Masese & Company, Advocates for the respondents. In the grounds of opposition filed it was stated that the application is frivolous, vexatious and an abuse of the court process, that it is materially and incurably defective, bad in law and devoid of merits.

Mr. Otieno for the applicant made brief submissions in support of the application.

Mr. Nyangosi for the respondent pointed out that the applicant's counsel is seeking stay of proceedings even in matters where he is not acting for the applicant. He cited several cases where the applicant is represented by other firms including L.G. Menezes Advocates and Bett Kipyegon Advocates. That being the case, the orders sought cannot be granted, he submitted. Mr. Nyangosi further submitted that the hearing dates at Keroka Law Courts had been fixed by consent of counsel for the parties. If the applicant knew that it was awaiting a report from the police investigations sometimes in April or May 2010, nothing prevented the applicant's counsel from fixing the hearing dates subsequent to the period April/May 2010.

In any event, the issues raised by the applicant are matters of evidence that can be dealt with during the hearing and if any party is dissatisfied with the outcome of any case he is at liberty to file an appeal, counsel added.

I have considered the issues raised by the parties herein. In an adversarial system of justice the court of law has to hold the scales of justice in a manner that does not seem to give

any undue advantage to one of the sides at the expense of the other. When a suit is filed in court the claim is presumed to be genuine until evidence is led to prove otherwise. Each party is at liberty to prepare himself and/or arm himself in all lawful means as would grant him success in the trial.

The applicant has so far instructed **Rapid Investigations Services**, Insurance Private Investigators, to undertake investigations as to the validity of a number of the claims. The said firm tendered their reports to the applicant sometimes in October 2009 and according to them, the claims that they investigated are fictitious and ought to be vigorously defended. If the applicant was desirous of making a complaint to the police for further investigations, and has already done so, there is no reason why those investigations have not been completed so far. There is however no documentary proof that the police are carrying out any investigations on the claims at the request of the applicant.

I agree with Mr. Nyangosi that if indeed the claims filed before the trial court are not genuine the applicant will be in a position to tender evidence to prove as much and in the event that the trial court finds otherwise, the applicant can prefer an appeal to this court.

It is also trite law that M/s Otieno & Company Advocates cannot purport to seek orders on behalf of the applicant in matters where the applicant is represented by some other firms of advocates. Even if the orders sought in the instant application were merited, such orders can only be made in respect of the matters where Mr. Otieno Advocate is on record for the applicant and not otherwise.

All in all I find this application to be bad in law and lacking in merits and dismiss the same with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 2ND DAY OF MARCH, 2010.

D. MUSINGA
JUDGE.

2/2/2010

Before D. Musinga, J.

Mobisa - cc

Mr. Otieno for the Applicant

Mr. Ogari for Mr. Nyangosi for the Respondent

Court: Ruling delivered in open court on 2nd March, 2010.

D. MUSINGA
JUDGE.