



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, JJ.A)

CIVIL APPEAL NO. 242 OF 2014

BETWEEN

JUSTUS MUNYINYI MACHARIA T/A GUSII PROPRIETARY CLUB..... APPELLANT

VERSUS

DAKIANGA DISTRIBUTORS LIMITEDRESPONDENT

(Appeal from the decision/orders of the High Court of Kenya at Nairobi, (Mabeya, J.) dated 20th February, 2014 in H.C.C.C. NO. 397 OF 2012)

JUDGMENT OF THE COURT

1. This is an appeal from a ruling and order of the High Court, (A. Mabeya, J.) given on 20th February 2014 in Nairobi HCCC No. 397 of 2012 allowing the respondent's application to have that suit transferred to the High Court at Kisii for hearing and disposal.

Background

2. The dispute between the parties arises from a landlord/tenant relationship over premises known as Kisii Municipality/Block 3/107 (the premises) situated in Kisii.

3. Abigael Wanjiru Mbiri, deceased, occupied the premises as a tenant where she conducted the business of a hotel. She unsuccessfully challenged a notice issued to her by the respondent seeking to terminate her tenancy in the Business Premises Rent Tribunal (BPRT). During the pendency of proceedings, she was evicted from the premises. Somewhere along the way she died. Her legal representative, Justus Munyinyi Macharia, (the appellant) was substituted.

4. The appellant appealed the decision of the BPRT to the High Court at Nairobi in Civil Appeal No. 950 of 2005. Allowing that appeal, the High Court in a judgment delivered on 20th December 2011 held that the conduct of the respondent "by unlawfully evicting the tenant and demolishing the premises...amounts to an actionable tort" and that "the tenant is entitled to damages for the wrongful act/conduct of the landlord."

5. Taking queue from that judgment, the appellant filed suit in the High Court at Nairobi on 20th June 2012, being Civil Suit No. 397 of 2012, seeking special damages of Kshs. 9,929,765 and aggravated

damages arising from “the unlawful eviction” from the premises.

6. On 13th August 2012, the respondent filed an application dated 7th August 2012 before the High Court at Nairobi in that suit seeking orders for the transfer of the suit to the High Court at Kisii on the grounds that the cause of action arose in Kisii; that its registered office is in Kisii; that it intended to call witnesses based in Kisii and that in all the circumstances it would be just to have the matter heard and determined in Kisii.

7. In opposition to that application, the appellant filed a replying affidavit in which he deposed that the application for transfer of the suit was mischievous; that the object in seeking to have the suit transferred was to enable the respondent “*manipulate the file and frustrate and/or embarrass the expeditious determination of the matter*”; that the proceedings before the BPRT and the subsequent appeal in Civil Appeal No. 950 of 2005 were conveniently heard and determined in Nairobi; and that it was not for the respondent “*to choose where the suit is to be filed.*”

8. Upon considering that application, Mabeya, J. was satisfied that the same had merit and, as already indicated, allowed it on 20th February 2014. Aggrieved, the appellant lodged this appeal.

The appeal and submissions by counsel

9. Learned counsel for the appellant, Mr. Muchangi Nduati, adopted the appellant’s written submissions and urged that the only issue pending determination before the High Court is assessment of damages; that the question of visiting the premises does not therefore arise as liability is already established; that the Judge erred in failing to take cognizance of Section 14 of the Civil Procedure Act under which a plaintiff has the option of instituting a suit for compensation for a wrong in either the court where the wrong was done or where the defendant resides; that the Judge erred in relying on an inferior provision in Section 15 rather than Section 14 of the Civil Procedure Act; and that the Judge misdirected himself and was not impartial in ordering the transfer of the suit.

10. Opposing the appeal, learned counsel for the respondent, Mr. Bosire Gichana, submitted that the Judge properly exercised his power to transfer the suit, having taken into consideration all the relevant factors that the property and the witnesses are based in Kisii and it would be costly to bring them to Nairobi; that the cause of action arose in Kisii; and that the appellant has not demonstrated why this Court should interfere with that exercise of discretion by the lower court.

Determination

11. Having considered the appeal and submissions by counsel, the only question we have to determine is whether the decision to transfer the suit from the High Court at Nairobi to the High Court at Kisii is well founded.

12. It is clear, based on the plaint, that the suit before the High Court arises from a landlord and tenant relationship over the property known as Kisii Municipality/Block 3/107 situated in Kisii from where the tenant claims to have been unlawfully evicted.

13. The respondent says that all the witnesses are based in Kisii and the court may be called upon to visit the property and it would be oppressive to have witnesses travel to Nairobi. On the other hand, the appellant’s main concern, based on the material placed before the lower court, was that if the matter is tried at the High Court at Kisii, the respondent would “*manipulate the file and frustrate and/or embarrass the expeditious determination of the matter.*”

14. In our view, the learned Judge took all relevant factors into account, including the concerns expressed by the parties, in reaching the decision that the proper place for the trial would be Kisii. In his words, the Judge had this to say:

“In this case, the Defendant has enumerated various factors in a bid to persuade the court to

transfer the suit. Such include the fact that the matter arose from a premises located in Kisii County and it intended to call witnesses that were resident in that area. No doubt that the Defendant is likely to incur unwarranted expenses in transporting and maintaining the witnesses to attend and give evidence in court at Nairobi. This in essence is bound to be prohibitive and might deny the Defendant justice. The mere fact that **HCCA NO. 950 of 2005 (supra)** was determined in Nairobi does not bar the Defendant from seeking the leave of this court to have the suit transferred to the High Court at Kisii. The trial of the Appeal did not require attendance of witnesses or visiting the premises as contended by the Defendant. In this suit however, it has been deponed by the Defendant that witnesses will be called from Kisii. This was not challenged or denied by the Plaintiff. In this court's view therefore, the High Court at Kisii has the jurisdiction to assess and determine the issue of damages. In as much as the Plaintiff craves justice, the Defendant also has a right to have its case heard in a court in which it would be able to produce witnesses without undue delay or expense to prove its case. As a general rule, the court should not interfere with the Plaintiff's right under Section 14 of the Civil Procedure Act, unless the expense and difficulties of the trial would be such as to lead to an injustice. Since the Plaintiff has not convinced the court that he will be prejudiced by the transfer of the suit as sought, the Defendant's prayer is merited."

Based on that passage, it is clear to us that the Judge carefully considered all the matters he was invited to consider before arriving at his well considered decision. In our judgment, it cannot be said that the Judge wrongly exercised his discretion (in line with the principles in **Mbogo vs. Shah [1968] E. A. 93**) in reaching that decision. We find no merit in the appeal.

It is dismissed with costs to the appellant.

Dated and delivered at Nairobi this 10th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

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DEPUTY REGSITRAR