Suke v Ampath Centre (Civil Appeal 161B of 2018) [2024] KEHC 6192 (KLR) (31 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6192 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL 161B OF 2018

JRA WANANDA, J

MAY 31, 2024

BETWEEN

DANIEL KIPLANGAT SUKE ..... APPELLANT

AND

AMPATH CENTRE ..... RESPONDENT

RULING

1. I already concluded this Appeal vide my Judgment delivered herein on 12/05/2023. There is now however an Application filed by the Respondent praying that I review and set aside the said Judgment.

2. At all material times in this Appeal, the Advocates for the Appellant were Messrs Mathai Maina & Co. The Appellant then appears to have filed a "Notice to Act in Person" but later appointed its present Advocates, Messrs Mutai Oduor & Co. For the Respondent, Messrs Cheptinga & Co. has remained on record.

3. As captured in my said Judgment, the Appeal arose from a Ruling rendered in Eldoret Chief Magistrate Court Civil Case No. 311 of 2018 which struck out the suit by which the Appellant had sought relief against the Respondent for misdiagnosis of his illness leading to an erroneous conclusion that he was suffering from HIV (Human Immunodeficiency Virus). The suit was struck out for want of jurisdiction. In the suit, the Appellant had sought a declaration that the Respondent's said acts amounted to negligence and a breach of duty of care required of a doctor to a patient. He therefore also sought general damages, exemplary damages and costs of the suit.

4. Among other challenges raised by the Respondent before the lower Court (as the Defendant therein), was the Preliminary Objection to the effect that the Court had no jurisdiction to hear and determine matters arising out of any breach of the *HIV and AIDS Prevention and Control Act* No. 14 of 2006 pursuant to Section 26 thereof since such jurisdiction lay with the HIV AIDS Tribunal established

under the said Act. It was this Preliminary Objection that the trial Court allowed and thus struck out the suit and which decision is what then led to the filing of this Appeal.

5. Upon hearing the Appeal, I found that the trial Magistrate erred in his finding that he did not have jurisdiction to hear the case and thus set aside the decision and remitted the matter back to the same Court, but before a different Magistrate, for hearing and determination.

6. In my said Judgment, after citing several authorities and provisions of law, including, and particularly Section 26 of the *HIV and AIDS Prevention and Control Act*, I made the following findings:

> "42. It is therefore clear from a reading of the said provision that although the Section confers on the Tribunal the power to award damages for "pain and suffering or emotional and psychological suffering" such power is limited only to cases of discrimination.
>
> 43. From the foregoing, I am satisfied that neither the *HIV and AIDS Prevention and Control Act* or any written law, confers express jurisdiction on the HIV and AIDS Tribunal to hear and determine claims for damages for negligence arising from wrong misdiagnosis of HIV AIDS. Further, I hold that such jurisdiction cannot be implied by judicial craft or legal sophistry.
>
> 44. In any case, all other medical misdiagnosis and malpractice claims are being heard and determined by the ordinary Courts of law. On what basis therefore should only HIV AIDS related claims be excluded? In fact, were such exclusion to be effected, it would seem to amount to a discriminatory practice outlawed under Article 27 of *the Constitution* of Kenya which provides as follows:
>
> (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.
>
> (2) Equality includes the full and equal enjoyment all rights and fundamental freedoms.
>
> (3) .....
>
> (4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.
>
> (5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in Clause (4).
>
> (6) .....
>
> (7) .....
>
> 45. I am therefore of the considered opinion that the HIV and AIDS Tribunal has no jurisdiction to deal with a claim of negligence for misdiagnosis for HIV AIDS. Such matter falls outside the Tribunal's jurisdiction. The Appellant's claim did not contain any allegation that the testing was conducted compulsory or that he never gave consent to the testing or that there was violation of any provision of the Act. These are the matters which the Act

expressly empowers the Tribunal to hear and determine, not compensation for negligence in misdiagnosing HIV AIDS illness on a patient.

46. For this reason, I find and hold that a cause of action founded on negligence, even where the same arises from or is in relation to HIV AIDS, can only be heard and determined by the ordinary courts. Accordingly, it is my finding that the trial Magistrate erred when he ruled that the trial Court had no jurisdiction to deal with the Appellant's suit. The trial Magistrate was therefore wrong in declining jurisdiction and in striking out the suit."

7. Before I delivered the said Judgment on 12/05/2023, the Application dated 2/05/2023 filed by the Appellant in person was placed before me on 3/05/2023. The Application sought that I arrest the Judgment in favour of HIV and AIDS Tribunal Case No. 12 of 2022. The grounds of the Application were that the Appellant it had just come to the attention of the Appellant that this Appeal was pending judgment on 12/05/2023, that he had however filed a complaint before the HIV and AIDS Tribunal and that there is likelihood that the Court and the Tribunal will render separate and parallel decisions in the matter.

8. I however declined to arrest the Judgment since I had already spent considerable time and "burnt the midnight candle" in writing, researching and concluding the Ruling which was by that date ready for delivery. I also did not find any good grounds presented for arresting the Judgment. I also could not understand how and why the Appellant having filed this Appeal which was only awaiting Judgment, still subsequently went ahead to file parallel proceedings before the HIV & AIDS Tribunal. It was also not clear whether a Notice to Act in Person" had been filed and served by the Appellant. Accordingly, I proceeded to deliver the Judgment on 12/05/2023.

9. The Respondent has now returned to this Court with the instant Application brought by way of the Notice of Motion dated 19/05/2023. The same is filed through Messrs Cheptinga & Co. Advocates and seeks the following orders:

   i. [.....] Spent

   ii. [.....] Spent

   iii. This Honourable Court be pleased to review/set aside the Judgment and all consequential orders delivered on 12th May 2023 in favour of the Appellant against the Respondent pending the hearing of this Application inter partes and the main suit.

   iv. Costs of this Application be in the Cause.

10. The Application is brought under Section 1A, 3A, 34(1), 34(2) 63(e), 80, 99 and 100 of the *Civil Procedure Act* and Order 45(1) and 51(1) of the *Civil Procedure Rules* and "all other enabling provisions of the law". The Application is premised on the grounds stated on the face thereof and is supported by the Affidavit sworn by one Prof. Sylvester Kimaiyo.

11. In the Affidavit, the deponent stated that he is the Respondent's Executive Director, CARE, that he seeks a Review of the Judgment delivered herein on 12/05/2023, that the Appellant's Counsel did not disclose that he was not representing the Appellant since 3/05/2023 since the Appellant had filed a "Notice to act in person" and an Application that was seeking to withdraw the delivery of the Judgment had been filed, that the Appellant had tentatively withdrawn the Appeal vide their Application dated 2/05/2023 and lodged the claim in the HIV and AIDS Tribunal vide Case No. 12 of 2022, and that the Respondent did not intend and had not objected to the Appellant's Application dated 2/05/2023,

12. It was deponed further that the Judgment if implemented has activated two similar suits with the same subject matter that may lead to two parallel judgments being delivered by the lower Court and the HIV and AIDS Tribunal, that by the time that the Judgment was being delivered, the Application to stay/ arrest of the Judgment had not been withdrawn or dispensed with and that any execution shall derail donor funding towards HIV AIDS related provision of care since the donor funding does not have allocations for settlement of Court decrees and that that this shall expose the program to the donor shying away from funding and saving lives of millions of Kenyans living with and effected by HIV/ AIDS.

Replying Affidavit

13. On 26/06/2023, the firm of Mutai Oduor & Co. Advocates filed a "Notice of Appointment" indicating that they had come on record for the Appellant. Together with the Notice, the firm also on the same date, filed the Replying Affidavit sworn by the Appellant.

14. In the Replying Affidavit, the Appellant deponed that this Court having rendered its decision, is functus officio, that the filing of the "Notice to Act in Person" did not affect the Court's jurisdiction to render a judgment in this matter since Submissions had already been filed, that the matter pending before the Tribunal involves different issues that can only but be determined by the Tribunal which is seized with jurisdiction, that the issues raised in CMCC 311 of 2018 and orders sought therein pertains to medical negligence, issues that can only be determined by the Court which is seized of jurisdiction but not the Tribunal, that besides, the Court has already rendered itself on the issue of jurisdiction and hence the matter is Res Judicata, that the threshold for review of a judgment lawfully made has not been met since there is nothing new that the Applicant has disclosed to this Court, that there is no error apparent on the face of the record and no sufficient reason has been advanced to warrant the orders sought, that the Application is an afterthought, and that the Court should not review the decision since he stands to be greatly prejudiced because the matter has been pending in Court since 2018.

Plaintiff's Supplementary Affidavit

15. The Respondent, with leave of the Court on 12/07/2023, filed a Supplementary Affidavit. It was deponed therein that there was an additional issue which is the legal position that the Respondent has no capacity to sue and be sued since it is not a registered entity and is a project or department that operates under the auspices of Moi University, Moi Teaching and Referral Hospital and Indiana University, that this legal position was pleaded by the Respondent in its defence, that the Appellant misled the Court when describing the Respondent, that this legal position was also reiterated in the Respondent's Submissions to the Appeal, and that the name AMPATH is only a trade mark. The rest of the matters deponed are mere repetitions of what was already deponed in the Supporting Affidavit filed earlier and I will not therefore recount the same.

Hearing of the Appeal

16. It was then agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Respondent filed his Submissions on 12/07/2023 while the Appellant filed on 21/07/2023.

Respondent's Submissions

17. The Respondent's Counsel submitted that the Appellant's Counsel misled the Court on 12/05/2023 that he was representing the Appellant and hence he had no instructions to proceed, that the Appellant was acting in person and was no longer interested with the pursuit of the Appeal and had expressly and

unequivocally notified the Court and the Respondent that the Judgment be arrested and the Appeal be withdrawn since he had lodged a claim in the HIV AIDS Tribunal. Counsel then reiterated the argument that the Respondent is not a legal entity capable of suing and being sued and cited various authorities in support thereof. He submitted further that the issue was pleaded but that even if it were not pleaded, being a point of law, it can still be determined and the Court can even consider it suo motu. Again, the rest of the matters submitted upon are repetitions which I will not recount.

Appellant's Submissions

18. On his part, the Appellant's Counsel submitted that the Respondent seeks the orders pending hearing of a certain "main suit" yet there is no suit pending in this Court and that as such, the Application is incompetent, that the Respondent has in its Supplementary Submissions revised the Application and raised completely new grounds that are not contained in its Application, that the Respondent has for the first time, in Submissions, raised new issues relating to the Respondent's capacity to sue and be sued, that Submissions are not the proper forum for raising issues that were not raised in the main pleadings, that the same is an afterthought and raised hoping to salvage the Application.

19. Regarding the argument that the Appellant's Counsel who appeared to take judgment had no instructions, Counsel submitted that this is a red-herring, that the Respondent must show that the Counsel had been served with the "Notice of Intention to Act in Person", that he deliberately chose to ignore the same and that he misrepresented himself in Court, and that there is no such evidence. Counsel submitted further that as at the date of the Judgment, the substantive aspects of the proceedings had already been dealt with and taking a Judgment was by itself a mere administrative act that did not go to the substance of the issues before the Court, that the Judgment could have been delivered even in the absence of the parties and it would not have made a difference in terms of its effect. He cited the case of *Nyamogo & Nyamogo v Kogo*.

20. Regarding the argument that the Appellant had already expressed a desire to have the Judgment arrested and/or the Appeal withdrawn, Counsel submitted that the same does not meet the threshold for review of a judgment, that the record will show that when the application seeking arrest of the Judgment was placed before the Court, that Application was considered and the Court ruled that there were no reason to arrest the Judgment, that raising that matter now as a ground for review is an attempt to reinvent the wheel since the same was already considered and decided upon and is in effect Res Judicata. He added that moreover, this Court has already ruled that the HIV and AIDS Tribunal does not have jurisdiction to award damages for negligence which is the substratum of the matter before the lower Court, that it will be tantamount to driving the Appellant out of Court and sending him to a process that will not meet his claim, and that this will be injustice since Court orders are not issued in vain.

21. Counsel then revisited the issue of the Respondent's capacity to be sued and submitted that in any event, the same is a mere technicality that cannot be used to defeat the Appellant's case. He submitted that the issue is whether facts raise a reasonable cause of action and cited the case of *Yaya Towers Limited vs. Trade Bank Limited (In Liquidation)*, Civil Appeal No. 35 of 2000.

Determination

22. The Appellant's Counsel has correctly observed that the Application seeks orders for review or setting aside the Judgment "pending hearing of a certain main suit" yet there is no suit pending before this Court. According to Counsel therefore, the Application is incompetent. Although I agree that the portion highlighted is capable of rendering the prayer incompetent, it is evident that inclusion of the

same was unintended. It can only have been an inadvertent oversight and I excuse it with a view to upholding the current trend of resolving disputes on substance rather than on technicalities.

23. In view thereof, I find the issue for determination to be "whether this Court should review and/or set aside the Judgment delivered herein on 12th May 2023".

24. It is trite law that a party seeking review of Court orders is bound by the provisions of Order 45 of the *Civil Procedure Rules*. In respect thereto, Order 45 provides as follows:

    1. (1) Any person considering himself aggrieved—

        (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

        (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the Court which passed the decree or made the order without unreasonable delay.

25. In *Paul Mwaniki vs. National Hospital Insurance Fund Board of Management* [2020] eKLR, it was stated that:

> "… a review may be granted whenever the Court considers that it is necessary to correct an apparent error or omission on the part of the Court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the Court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."

26. It is therefore clear that Order 45 provides for three circumstances under which an order for review can be made. The first one is where there has been discovery of new and important matter or evidence. The second is where there has been a mistake or error apparent on the face of the record. The third ground is "for any other sufficient reason". Finally, and no less important, the Application must have been brought "without unreasonable delay".

27. The ground for seeking review herein is alleged to be that the Appellant had before delivery of the Judgment communicated notice of his intention to withdraw this Appeal because he had already filed a fresh case before the HIV and AIDS Tribunal and wished to pursue that avenue. It has been further argued that confirmation of this intention was the Appellant's Application dated 2/05/2023 whereof the Appellant sought arrest of the Judgment.

28. Although the Respondent does not expressly disclose the specific ground in Order 45(1) above under which he has moved the Court, from the Affidavits and Submissions presented, it is clear that the ground alleged is not "discovery of new and important matter or evidence" nor is it the ground of "a mistake or error apparent on the face of the record". The only possible ground therefore can only be "for any other sufficient reason".

29. Regarding the argument presented, as I had already stated hereinabove, before I delivered the Judgment on 12/05/2023, the Application dated 2/05/2023 filed by the Appellant in person was placed before

me on 3/05/2023. The Application sought that I arrest the Judgment because of the pendency of HIV and AIDS Tribunal Case No. 12 of 2022. The grounds of the Application were that it had just come to the attention of the Appellant that this Appeal was pending judgment but that he had however filed a case before the HIV and AIDS Tribunal and that there is likelihood that the Court and the Tribunal will render separate and parallel decisions over the same matter. As further aforesaid, I declined to arrest the Judgment and I proceeded to deliver it as scheduled 12/05/2023.

30. As also stated, in the Judgment, I ruled that the HIV and AIDS Tribunal has no jurisdiction to deal with a claim for compensation for negligence arising from misdiagnosis of a patient's illness as being HIV AIDS. For that reason, I found and held that a cause of action founded on negligence, even where the same arises from or is in relation to HIV AIDS, can only be heard and determined by the ordinary Courts. I then proceeded to find that the Magistrate erred when he ruled that his Court had no jurisdiction to deal with the Appellant's suit, in declining jurisdiction and in striking out the suit. In the end, I set aside the Ruling of the trial Court and remitted the suit back to the same Court for hearing and determination on its merits.

31. Clearly, the findings made in the Judgment as cited above conclusively extinguished any other ground alleged by the Respondent as a reason for reviewing or setting aside the Judgment. I say so because the Review or setting aside of the Judgment is not sought on the ground that the Judgment is contrary to the law but for purely extraneous matters. As soon as I ruled that the HIV and AIDS Tribunal lacks the jurisdiction to hear or determine the Appellant's case, his earlier intention to have the case heard by the Tribunal died "a natural death".

32. Indeed, it is clear that in appreciating that change of circumstances, the Appellant has now evidently abandoned the intention to proceed with the case at the Tribunal. The Respondent cannot therefore purport to compel or force the Appellant to submit himself before the same Tribunal. There is no jurisdiction there and the Appellant cannot be heard by it. I fail to understand how the Respondent can even imagine that this Court can make an express declaration that the Tribunal lacks the jurisdiction to hear the case but still send the Appellant to the same Tribunal. This would be the height of absurdity and I am even amazed that the Respondent's legal team can even entertain such thought in the first place, leave alone taking the step to proceed to file a formal Application to that effect before a Court of law.

33. The Respondent has also contended that at the Appellant's Counsel did not at the time of delivery of the Judgment, disclose to the Court that he was not representing the Appellant since 3/05/2023 because the Appellant had filed a "Notice to act in Person" and that an Application that was seeking to arrest the delivery of the Judgment was pending. This argument cannot be a serious one. It has not been demonstrated that the then Counsel for the Appellant was aware of these facts but even assuming that he did, this Court had by then already received and declined the Application seeking to arrest the Judgment. What then was Counsel supposed to do under those circumstances? In any event, Counsel's presence during delivery of the Ruling did not in any way affect the validity of the Judgment. Further, Counsel's presence was immaterial since it has not been demonstrated that he moved the Court to give any substantive orders on that date.

34. The Respondent has also contended that the Judgment has activated two similar suits dealing with the same subject matter and may lead to two parallel judgments being delivered by the lower Court and by the HIV and AIDS Tribunal. This cannot be a valid argument at all. This Court having already ruled that the Tribunal has no jurisdiction to hear the Appellant's case and remitted the case back to the Magistrate's Court for hearing and determination, any purported proceedings that is or was still ongoing before the Tribunal ceased or has ceased to exist and the same can no longer proceed before it. There cannot therefore be any honest allusion to the existence of two parallel proceedings.

35. The Respondent has further argued that execution of the Judgment shall derail donor funding towards HIV AIDS related activities because donor funding does not have allocation for settlement of Court decrees. The Respondent therefore argues that this shall expose the program to the donor shying away from funding and shall frustrate activities geared towards saving lives of millions of Kenyans living with and effected by HIV/AIDS. This is a purely extraneous argument that has no legal foundation. It is definitely not a legal argument and cannot be placed for determination by a Court of law. Shying away by donors cannot, in law, be a basis for extrajudicially forcing jurisdiction upon the Tribunal when the law does not donate to it such jurisdiction. A Court of law should be the last place for one to even suggest the possibility of such misconceived eventuality. As was stated by the Supreme Court in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, jurisdiction can neither be implied nor conferred by judicial craft or legal sophistry, it must be expressly provided for in *the Constitution* or by statute.

36. I therefore agree with the Appellant's Counsel that, regarding the issue of jurisdiction of the HIV & AIDS Tribunal, having rendered its decision on that issue, this Court is now also functus officio, and the Court having already rendered itself on the issue of jurisdiction, that matter is now also Res Judicata,

37. Further, as I have already observed, the Respondent has in its Supplementary Affidavit irregularly and unprocedurally raised totally new matters not raised in its Application nor were they in contention in the Appeal. This is wrong and unacceptable practice. For the first time in this Appeal, the Respondent has purported to raise new issues relating to its legal capacity to be sued. Submissions are not the forum for raising new issues that were not raised in the main pleadings and being given leave to file a Supplementary Affidavit only permits a party to clarify matters raised in the opponent's Replying Affidavit. Leave to file a Supplementary Affidavit should not be misused to introduce totally new matters. It is not and cannot be an avenue for doing so. In any case, to determine whether or not the Respondent possesses the legal capacity to be sued will force this Court to scrutinize and interrogate documents. This being an appellate Court, and such issue not having been brought before it as a ground of appeal or in response thereto, this Court cannot entertain it. Only the Court seized with the original jurisdiction can do so. In any event, this Court having already rendered its Judgment on 12/05/2023, is now functus officio and cannot at this stage reopen arguments on substantive matters, leave alone determine new matters.

Final Order

38. In the end, I find that the Respondent's Notice of Motion dated 19/05/2023 has not met the threshold for review of the Judgment delivered herein on 12/05/2023. Accordingly, the same is dismissed with costs to the Appellant.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF MAY 2024

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WANANDA J.R. ANURO

JUDGE