



Njuguna (Suing as a legal representative of the estate of Gerald Muiruri Kariuki (Deceased)) v Kagira (Civil Appeal 382 of 2019) [2023] KEHC 2918 (KLR) (Civ) (31 March 2023) (Judgment)

Neutral citation: [2023] KEHC 2918 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 382 OF 2019

JK SERGON, J

MARCH 31, 2023

BETWEEN

FRANCIS KARIUKI NJUGUNA APPELLANT

**SUING AS A LEGAL REPRESENTATIVE OF THE ESTATE OF GERALD
MUIRURI KARIUKI (DECEASED)**

AND

RAEL NJURA KAGIRA RESPONDENT

(Being an appeal from the judgment and decree of Honourable K. I. Orange (Mr.) (Senior Resident Magistrate) delivered on 13th June, 2019 in NAIROBI CMCC no. 8007 of 2010)

JUDGMENT

1. The appellant instituted the suit against the respondent in his capacity as the legal representative of the estate of Gerald Muiruri Kariuki (“the deceased”) through the plaint dated December 8, 2010 and sought for both general damages and special damages in the sum of Kshs 15,100/= plus costs of the suit and interest thereon, under the *Fatal Accidents Act* and the *Law Reform Act*.
2. The respondent entered appearance upon being served with summons and put in her statement of defence dated October 4, 2011 to deny the averments made in the plaint.
3. At the trial, the appellant testified and called one (1) additional witness whereas the respondent closed the defence case without summoning any witnesses.
4. Upon close of submissions, the trial court by way of the judgment delivered on June 13, 2019 dismissed the suit with costs, on the finding that it lacks jurisdiction to handle the suit.



5. Being aggrieved by the abovementioned dismissal order, the appellant has now approached this court by way of an appeal. His memorandum of appeal dated July 4, 2019 features four (4) grounds of appeal as follows:
 - i. That the learned trial magistrate erred in law and in fact by making an erroneous finding and conclusion that he had no jurisdiction to hear and determine the matter therein, and by dismissing the same with costs to the respondent, contrary to the law and Constitution of the Republic of Kenya thereof.
 - ii. That the learned trial magistrate erred in law and in fact by proceeding to hear and determine the suit, despite having formed an opinion that he lacked jurisdiction to hear and determine the suit therein, and hence prejudiced the appellant in the process thereof.
 - iii. That the learned trial magistrate erred in law and in fact by failing to determine the issue of liability and quantum as required by the law, despite the fact that he was dismissing the suit therein.
 - iv. That the learned trial magistrate erred in law and in fact by dismissing the suit with costs to the respondent, despite overwhelming evidence produced before the court by the appellant thereof, and the law conferring jurisdiction upon the court thereof.
6. The appeal was canvassed through written submissions.
7. The appellant on the one part contends that the trial court erred in its finding that it lacked jurisdiction to entertain the suit and yet at the time the suit was filed back in the year 2010, the applicable law conferring jurisdiction upon the magistrate's courts was section 3(2) of the Magistrate's Courts Act, cap 10 Laws of Kenya stipulating that:

“The Resident Magistrate's Court shall have jurisdiction throughout Kenya.”
8. The appellant further contends that the above proviso was reaffirmed by the court in the case of Paulo Anyanzwa Kutekha v Steel Structures Limited [2018] eKLR in which the High Court sitting on appeal determined that the subordinate court had jurisdiction to hear the suit and therefore reinstated the suit for disposal.
9. The appellant has faulted the trial court for proceeding to hear the parties in the suit before concluding that he lacked jurisdiction; rather than considering this issue at the preliminary stages of the suit.
10. The appellant has also faulted the trial court for not addressing the issues of liability and quantum which had been placed before him for consideration and determination.
11. For the above reasons, the appellant urges this court to allow the appeal by setting aside the dismissal order and either substituting it with an award of damages in favor of the appellant or by referring the matter back to the subordinate court for determination of the issues on liability and quantum.
12. On the other part, the respondent submits that in view of the fact that the material accident took place along Naivasha-Nairobi Highway and the respondent's last known address was in Nanyuki, the trial court acted correctly in finding that it did not have the jurisdiction to entertain the suit.
13. The respondent has also faulted the appellant for not attempting to have the file transferred to the appropriate court and cites among others, the case of Victoria Katuku (Suing as the legal Representative



of the Estate of Eunice Mueni Muthamba v Jessinkay Enterprises & 2 others [2017] eKLR where the court reasoned that:

“I note the defendant filed defence on February 28, 2007 in which it issued notice of the lack of jurisdiction by the court to hear and try the case herein and the plaintiff has been aware of the same all this time but took no action such as seeking to withdraw suit and instituting it at Mombasa. The plaintiff has not given a plausible explanation as to why she did not take any steps to have suit filed in Mombasa despite being alerted early in time by the defendants. The defendants issued the warning way back in 2007 and it has taken quite a long time for the plaintiff to take appropriate steps.”

14. The respondent further argue that in view of all the foregoing circumstances, the trial court acted correctly in declining to make a finding on liability and quantum.
15. It is the submission by the respondent that should this court be inclined to disagree with the finding by the trial court, then a fair order would be to direct that the file be referred to the subordinate court for determination of the issues of liability and quantum. Otherwise, the respondent is of the view that the appeal ought to be dismissed with costs.
16. I have considered the rival submissions and various authorities cited on appeal. As is required of an appellate court, I have re-evaluated the material which the trial court had the opportunity to consider, as well as the trial court’s findings on the same.
17. It is clear that the appeal lies against the dismissal order by the learned trial magistrate on the grounds that he lacked jurisdiction to entertain the suit.
18. In her final submissions before the trial court, the respondent argued that the court lacked jurisdiction to entertain the suit by virtue of section 15 of the *Civil Procedure Act*, cap 21 Laws of Kenya which stipulates that:

“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction—

- (a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or
 - (b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or
 - (c) the cause of action, wholly or in part, arises.”
19. The respondent argued in her submissions that the cause of action arose outside Nairobi and the respondent herself does not reside in or carry out her work in Nairobi, and hence the appellant ought to have instituted the suit either in Naivasha or Nanyuki instead.
 20. Upon considering the evidence and submissions by the parties, the learned trial magistrate concluded that the cause of action arose in Mai Mahiu which is outside the jurisdiction of the court and therefore dismissed the suit with costs to the respondent.



21. Upon my re-examination of the record and as earlier mentioned, it is apparent that the issue of jurisdiction was primarily raised and prompted by the respondent at the stage of final submissions.
22. Upon my further re-examination of the record, it is also apparent that while the respondent stated in her statement of defence that she was denying the jurisdiction of the trial court, she did not file a conditional statement of defence and/or memorandum of appearance, or raise the issue of jurisdiction at the preliminary stages of the suit.
23. From my study of the record, I observed that the respondent fully participated at the hearing of the suit and further submitted on both liability and quantum, in addition to submitting on jurisdiction.
24. In my view therefore, the conduct by the respondent could be taken to constitute an acquiescence of the jurisdiction of the trial court. In such instances, the legal position is that a party cannot be heard to subsequently challenge the jurisdiction of a court. This position was succinctly stated by the Court of Appeal in the case of *Raytheon Aircraft & another v air al-Faraj Ltd* CA No 29 of 1999 [unreported] and referenced by this court in the case of *Gremmo Danielle & another v Kilily Spa* [2009] eKLR thus:
- “...a party who seeks to challenge jurisdiction can only do so, if entered conditional appearance or filed a protest to entry of an unconditional appearance or defence. The Court of Appeal was very explicit *Kanti & Co Ltd v South Briton Insurance Co Ltd* [1985] KLR page 1 at page 2 it was by court of appeal held interalia;-
- “a defendant by entering an unconditional appearance to a summons to enter appearance, submits to the jurisdiction of the court and as long as the unconditional appearance stands, the court is seized of jurisdiction to try the suit, and the defendant cannot after filling such a memorandum of appearance abrogate or annul it unilaterally by entering an amended appearance under protest, without an order of the court releasing him from his admission and acceptance of the jurisdiction.”
25. This is a factor that the learned trial magistrate ought to have taken into consideration while making his findings.
26. Suffice it to say that, upon my perusal of the record I observed that the suit was filed in the year 2010 and during which time the applicable law conferring jurisdiction upon the Magistrate’s Courts was the *Magistrate’s Courts Act*, cap 10 Laws of Kenya. Of relevance is the proviso of section 3 which expresses that:
- “(1) There is hereby established the Resident Magistrate’s Court, which shall be a court subordinate to the High Court and shall be duly constituted when held by a chief magistrate, a senior principal magistrate, a senior resident magistrate or a resident magistrate.
- (2) The Resident Magistrate’s Court shall have jurisdiction throughout Kenya.”
27. It is noteworthy that the legal position has since changed, with the enactment of the *Magistrates’ Courts Act*, No 26 of 2015 and which repealed the *Magistrates’ Court’s Act*, cap 10 thus doing away with the countrywide jurisdiction of the Magistrate’s Courts.



28. The above position was echoed by the court in the fairly recent case of *Paulo Anyanzwa Kutekha v Steel Structures Limited* [2018] eKLR cited in the submissions by the appellant and where the court reasoned that:

“The Magistrates’ Court’s Act, cap 10 was repealed and replaced by the *Magistrates’ Courts Act*, No 26 of 2015 that commenced operation on January 2, 2016. This followed the promulgation of the new *Constitution of Kenya, 2010* which at article 169(1) established subordinate courts (including magistrates’ courts). Under article 169(2) Parliament was to enact legislation to confer jurisdiction, functions and powers upon the subordinate courts. It did so in the *Magistrates’ Courts Act*, No 26 of 2015 as far as those courts are concerned.

This new Act appears to have removed the country-wide jurisdiction of magistrates’ courts. At any rate, there is not a similar provision in the statute. The territorial jurisdictions set out in the *Civil Procedure Act*, therefore now appear to be substantive provisions regarding jurisdiction of the magistrate’s courts.

For purposes of this appeal, as already found, the lower court had jurisdiction to hear and determine the suit. The suit was wrongly struck out.”

29. However, in view of the foregoing circumstances, I am satisfied as to the validity of the argument by the appellant that at the time of filing suit, the learned trial magistrate had jurisdiction to entertain the suit by virtue of the applicable law at the time.

30. I am therefore of the view that the learned trial magistrate erred in finding that he lacked jurisdiction and in consequently dismissing the appellant’s suit.

31. I similarly find that as a result, the learned trial magistrate erred in not addressing the issues on liability and quantum, and I am satisfied that it is necessary for to interfere with the decision made.

32. The upshot therefore is that the appeal succeeds. Consequently, the dismissal order made by the trial court is hereby set aside. The suit is reinstated and should be heard by another Magistrate of competent jurisdiction other than Honourable K. I Orange.

Costs shall be in the cause.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS THIS 31ST DAY OF MARCH, 2023.

.....
J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

