



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 258 OF 2019

TALIB ABUBAKAR.....APPELLANT

-VERSUS-

SOLOMON ONYANGO WAO.....1ST RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATION.....2ND RESPONDENT

(Being an appeal against the ruling and order of Honourable E. Usui (Ms.) (Chief Magistrate)

delivered on 8th May, 2019 in MILIMANI CMCC no. 350 of 2019)

JUDGMENT

1. The 1st respondent herein instituted a suit before the Chief Magistrate's Court by way of the plaint dated 17th January, 2019 and sought for a permanent injunction and various damages plus costs of the suit and interest thereon against the appellant, arising out of a claim for unconstitutional, unlawful and illegal arrest and confinement by the 2nd respondent. The 2nd respondent was brought in as an interested party in the suit.
2. In brief, the 1st respondent pleaded in the plaint that the appellant had at all material times engaged him with the intention to import second hand clothes and shoes from Canada, and had requested the respondent to consolidate a container and have it shipped to Kenya from Canada.
3. The 1st respondent pleaded that he contracted the services of an agent named Connor, to do the shipment at a cost of approximately Kshs.370,000/=and which shipment was effected on 27th August, 2017 and arrived in Mombasa sometime on or about the 5th of October, 2017.
4. It was pleaded that the costs for statutory and related charges came to about Kshs.1,533,670/= and which sum he requested the appellant to avail but that the appellant indicated that he did not have the funds at the time.
5. It was further pleaded that the appellant later sent some funds towards offsetting the charges but that the funds were insufficient to cater for the entry charges, which eventually led to accumulated demurrage of the container.
6. The 1st respondent pleaded in the plaint that he eventually had to cancel the entry owing to the unpaid charges, only to be arrested on 12th January, 2018 at his residence and taken to Langata Police Station where he was forced to agree to pay to the appellant a total sum of Kshs.900,000/= out of which the sum of Kshs.300,000/= was to be paid in cash.
7. The 1st respondent further pleaded that he was equally forced to sign post-dated cheques under duress, totaling the sum of Kshs.2,641,444/= supposedly towards payment of demurrage even though the same resulted from the failure by the appellant to pay the requisite charges.
8. Subsequently, the 1st respondent filed the application dated 17th January, 2019 and sought for an order restraining the appellant and the 2nd respondent from arresting or in any way detaining him in relation to the transaction between him and the appellant.
9. In retort, the appellant filed the notice of preliminary objection dated 6th February, 2019 to challenge the competency of the suit on the grounds that the trial court lacks jurisdiction to entertain it since the jurisdiction to hear and interpret matters to do with the Constitution are

limited by the Constitution and the Magistrates' Courts Act No. 26 of 2015; and that the 1st respondent has no locus standi to institute the suit against him.

10. Upon hearing the parties on the preliminary objection, the trial court found that it had jurisdiction to hear the suit and consequently dismissed the preliminary objection and gave directions on submissions in respect to the application.

11. Being aggrieved by the aforementioned ruling, the appellant sought to challenge the same by way of an appeal. Through his memorandum of appeal dated 22nd November, 2019 the appellant put in the following grounds:

i. THAT the learned trial magistrate erred in law in her ruling dated the 8th of May, 2019 by holding that she had jurisdiction to hear, give redress and interpret the Constitution contrary to the Constitution and the Magistrates Act No. 26 of 2015.

ii. THAT the learned trial magistrate erred in law in her ruling dated the 8th of May, 2019 by holding that the plaintiff had locus standi to institute and further could maintain a suit and against the defendant, a Director of a Company, instead of the Company.

12. This court gave directions to the parties to file written submissions on the appeal. The appellant vide his submissions dated 18th January, 2022 argues that according to Section 8 of the Magistrates' Courts Act No. 26 of 2015 ("the Act"), Magistrate's Courts can only entertain constitutional claims relating to breaches of the two (2) fundamental rights stipulated under Article 25 of the Constitution: freedom from torture and cruel, inhuman or degrading treatment or punishment; and freedom from slavery or servitude.

13. The appellant has further cited the case of **Republic v Chief Magistrate's Court at Nairobi, Milimani & 3 others Ex-parte Solomon Kingora [2017] eKLR** where the court rendered the following decision:

"It is therefore clear that whereas the High Court's jurisdiction in such matters is unlimited, the subordinate courts can only deal with appropriate cases seeking redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights. From the said Article, it is Parliament that determines the parameters of the said appropriate cases since it was left to Parliament to enact the legislation conferring jurisdiction on the subordinate courts. This is exactly what Parliament did vide section 8 of the Act which provides as follows: -

"Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25(a) and (b) of the Constitution.

Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrate's courts under this section."

14. The appellant further submits that the 1st respondent has no *locus standi* to institute the suit in any case, since the transaction in question was entered into by or on behalf of the respective corporate entities and not the appellant and the 1st respondent.

15. For the foregoing reasons, the appellant urges this court to allow the appeal and to in turn allow the preliminary objection.

16. In response, the 1st respondent through his submissions dated 3rd March, 2022 contends that the trial court was correct in finding that it had jurisdiction to hear the matter, pursuant to the provisions of Section 8 of the Act and hence the trial correctly interpreted the relevant provisions of law.

17. The 1st respondent further contends that in any case, he is not seeking compensation for any loss or damage suffered as a result of any violation/infringement of his fundamental rights.

18. On the subject of locus standi, it is the submission by the 1st respondent that the violations pleaded in the plaint were directed at the person of the 1st respondent and not at his company, and hence he has locus standi to institute the claim against the appellant specifically as opposed to his company.

19. The 1st respondent has made reference to the provisions of Article 22(1) of the Constitution which read as follows:

"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

20. For the foregoing reasons, the 1st respondent urges this court to dismiss the appeal with costs.

21. The 2nd respondent did not participate at the hearing of the appeal.

22. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal fundamentally lies against the trial court's decision to dismiss the appellant's preliminary objection. I will therefore deal with the grounds of appeal contemporaneously.

23. As earlier noted, the appellant through his preliminary objection sought to challenge the competency of the suit on two (2) grounds.

24. The first concerns itself with whether the learned trial magistrate has jurisdiction to hear and determine the suit.

25. Reference is made to the provisions of **Section 8 of the Act** which was cited by both parties herein, and to reiterate the same, expresses thus:

“(1) Subject to Article 165 (3) (b) of the Constitution and the pecuniary limitations set out in section 7(1), a magistrate's court shall have jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) The applications contemplated in subsection (1) shall only relate to the rights guaranteed in Article 25 (a) and (b) of the Constitution.

(3) Nothing in this Act may be construed as conferring jurisdiction on a magistrate's court to hear and determine claims for compensation for loss or damage suffered in consequence of a violation, infringement, denial of a right or fundamental freedom in the Bill of Rights.

(4) The Chief Justice shall make Rules for the better exercise of jurisdiction of the magistrate's courts under this section.”

26. **Article 25(a) and (b) of the Constitution** referenced hereinabove provides for the fundamental freedoms applicable being freedom from torture and cruel, inhuman or degrading treatment or punishment; and freedom from slavery or servitude.

27. Upon my perusal of the pleadings in the suit, it is apparent that the 1st respondent's claim rides on the alleged illegal, unconstitutional and unlawful arrest and confinement which could fall within the category of **Article 25 (a)** (supra).

28. Be that as it may, upon my further perusal of the pleadings; particularly the reliefs sought; it is apparent that the 1st respondent is seeking for monetary compensation by way of damages arising out of the alleged unlawful arrest and confinement, which from a reading of Section 8(3) (supra), would imply that the magistrates' courts do not have jurisdiction to hear any claims for compensation or grant any forms of compensation arising out of an infringement or violation of a fundamental right/freedom.

29. The above position was restated by the court in the case of **Republic v Chief Magistrate's Court at Nairobi, Milimani & 3 others Ex-parte Solomon Kingora** (supra) cited in the submissions by the appellant.

30. In view of the foregoing and particularly on the premise that the 1st respondent's claim is essentially for compensation, I find that the trial court has no jurisdiction to hear and determine the same.

31. On the subject of *locus standi* of the 1st respondent in instituting the suit, upon my study of the pleadings and material on record, it is apparent that the claim in question is personal in nature both as concerns the appellant and the 1st respondent.

32. It therefore follows that the issue of the corporate entities would not arise herein, contrary to the averments being made by the appellant.

33. I am therefore satisfied that the 1st respondent has *locus standi* in the matter.

34. Upon taking into account all the foregoing factors hereinabove and more specifically, my finding on jurisdiction of the trial court, I am convinced that it would be a proper exercise of my discretion to interfere with the impugned ruling.

35. In the end, I will allow the appeal. Resultantly:

i. The ruling delivered on 8th May, 2019 is hereby set aside and is substituted with an order allowing the preliminary objection dated 6th February, 2019.

ii. Consequently, the 1st respondent's suit before the Chief Magistrates' Court is hereby dismissed for want of jurisdiction.

iii. In the circumstances of this appeal, a fair order on costs is to order which I hereby do that each party bears its own costs of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF MARCH, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant

..... for the Respondent