



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO 35 OF 2020

ZIZU INVESTMENTS LIMITED.....APPELLANT

VERSUS

ROVAS LIMITED.....1ST RESPONDENT

KIBOS SUGAR LIMITED.....2ND RESPONDENT

(Being an Appeal from the Ruling of Hon P. N Gesora Chief Magistrate at Kisumu Law Courts

delivered on the 24th day of June 2020 in CMCC No 171 of 2020)

JUDGMENT

INTRODUCTION

1. In his decision of 24th June 2020, the Learned Magistrate, Hon P. N. Gesora, Chief Magistrate, dismissed the Appellant's Preliminary Objection dated 15th May 2020 and allowed the Respondents' Notice of Motion application dated 11th May 2020 in which they had sought orders for a temporary injunction to issue restraining the Appellant, either by itself, its employees, servants, workers and or agents from claiming, entering into their premises, removing the gym equipment and/ or interfering with their use of the said gym equipment until the hearing and determination of the suit.
2. Being dissatisfied by the said decision, on 8th July 2020, the Appellant filed a Memorandum of Appeal dated 7th July 2020. It relied on fourteen (14) grounds of appeal.
3. On the same date, it filed a Notice of Motion application dated 7th July 2020 seeking a stay of proceedings **Kisumu Chief Magistrate Case No 171 of 2020 Rovas Limited & Kibos Sugar Limited & Zizu Investments Limited** pending the hearing and determination of the application and the Appeal herein, that there be an order for stay of execution of the Learned Magistrate pending the hearing and determination of the application and Appeal herein and that in the alternative, the Honourable Court be pleased to transfer the said case to Milimani Commercial Courts Nairobi for any further proceedings, hearing and final determination.
4. On 15th July 2020, Cherere J granted an order for stay of proceedings and execution pending the hearing and determination of the said Notice of Motion application. She further directed the Respondents to file their response to the said application. On 22nd July 2020, counsel for the Respondents informed the court that the said Notice of Motion application was not opposed whereupon the said Learned Judge granted an order for stay of proceedings pending the hearing and determination of the Appeal herein. She further directed the Appellant to file its Record of Appeal and that parties file their respective Written Submissions. The prayer in respect of the transfer of the suit from the lower court to Milimani Commercial Courts was not addressed. This court, however, noted that the said issue was a ground of appeal and was dealt with later on in this Judgment.
5. When the parties appeared before this court on 1st December 2020, they indicated that they had filed their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

LEGAL ANALYSIS

6. Having perused the grounds of appeal and the respective parties' written submissions, it did appear to this court that the issues that had really been placed before it were:-

a. Whether or not the Learned Magistrate erred when he dismissed the Appellant's Preliminary Objection challenging the court's jurisdiction;

b. Whether or not the Learned Trial Magistrate erred in having granted the Respondents herein an interlocutory injunction pending the hearing and determination of the suit in the lower court.

7. The court therefore dealt with the issues under the following distinct and separate headings.

I. PRELIMINARY OBJECTION

8. Grounds of Appeal Nos (1), (2), (3), (4) and (5) were dealt with together as they were all related.

9. The Appellant submitted that the Learned Magistrate erred in law and in fact in having dismissed its Notice of Preliminary Objection and finding that he had jurisdiction to hear the matter. It was its contention that site meetings and engagements were done in Nairobi equipment, the subject matter of the suit was installed at Rovas Gym along Kiambu Road Runda, payment of the gym equipment was made to its bank accounts at Diamond Trust Bank, Capital Centre in Nairobi and hence, the Learned Magistrate erred in having found that the lower court at Kisumu had jurisdiction to hear and determine the dispute.

10. It placed reliance on Section 15 of the Civil Procedure Act Cap 21 (Laws of Kenya) that provides that when filing a suit, a plaintiff must take into account where the defendant resides or carries business or where the cause of action arose.

11. It was emphatic that where money was deposited to a bank account did not invoice a jurisdiction, unless it was clearly specified in a contract. To buttress this point, it relied on the case of **Francis Mwangi Githuku & Another vs Jane Wambui Kingari & Another [2017] eKLR** where it was held that where money is deposited does not establish jurisdiction in a claim.

12. It also relied on the case of **County Government of Kakamega vs Ufanisi Freighters (K) Limited Trawlers Limited [2018] eKLR** where Njoki J held that the court where the cause of action arose or where the contract was made or where the defendant resided and/or carried on business was the one that had jurisdiction to hear and determine the matter.

13. It urged this court to transfer the suit to Milimani Chief Magistrates Court, Nairobi because of extremely high costs of prosecuting as witnesses would have to come from Nairobi to Kisumu coupled with the fact that one of its Appellant's witnesses was physically challenged which would then occasion a failure of justice. It placed reliance on the case of **Livingstone Maina Ombete vs Kenya Power & Lighting Company Limited [2017] eKLR** to support its argument that the High Court had power under Sections 17 and 18 of the Civil Procedure Act to transfer a suit from one subordinate court to another on application by any of the parties or on its own motion.

14. On its part, it was the Respondents' contention that the Appellant ought to have moved the High court for the transfer of the suit to Nairobi under Section 17 of the Civil Procedure Act and not raise a preliminary objection on the place of suing or territorial jurisdiction of the court.

15. In this regard, they relied on the case of **Willys Owiny vs James Godwin Diang'a Ketta [2009] eKLR** where the court addressed the power of the High Court to transfer a suit under Section 17 of the Civil Procedure Act. They further submitted that Article 159 (2) (d) of the Constitution frowned on undue technicalities in the dispensation of justice and argued that the Preliminary Objection by the Appellant was a technical move to frustrate the prosecution of the suit. It was therefore emphatic that the lower court at Kisumu had jurisdiction to hear and determine the matter herein.

16. It is now settled and trite law that a preliminary objection is one that raises a pure point of law. It cannot be raised if any fact has to be ascertained by further evidence or in circumstances where a court is called to exercise its discretion. It is a clear cut case where the point of law requires no explanation and/or clarification.

17. In the case of **Mukisa Biscuit Manufacturing Company Limited vs West End Distributors Ltd (1969) E.A 696**, a preliminary objection is defined as follows:-

“A preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings and which if argued as preliminary point may dispose of the suit. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion”

18. The question of whether or not the lower court at Kisumu had jurisdiction to hear and determine the dispute was not a pure point of law. Indeed, the place of suing required to be ascertained from facts that had to be placed before the court. The question of where the contract was made, where the cause of action arose, where the Appellant carried on business were matters of fact that required to be proven by facts. The Learned Magistrate did not therefore misdirect himself when he dismissed the Appellant's Preliminary Objection.

19. In the premises foregoing, Grounds of Appeal Nos 1, 2, 3, 4 and 5 were not merited and the same be and are hereby dismissed.

II. INJUNCTION

20. Grounds of Appeal No 6, 7, 8, 9, 10, 11, 12, 13 and 14 were dealt with under this head as they were all related.

21. The Appellant submitted that the Learned Magistrate erred in having found that the unsigned leases were mere pieces of paper and that the words leases on the invoices had no legal basis despite the Respondents having agreed to its existence. It was emphatic that the Respondents did not demonstrate that they had met the threshold of being granted an order for interlocutory injunction.

22. It placed reliance on the cases of Naftali Ruthi Kinyua vs Patrick Thuita Gachure & Another [2015]eKLR, Mrao Ltd vs First American Bank and 2 Others (2003) KLR 125 and Stars & Garters Restaurant & Another vs National Bank of Kenya Limited [2019] eKLR and Robert Mugo Wa Karanja vs Ecobank (Kenya) Limited [2019] eKLR in support of its case.

23. On their part, the Respondents argued that the Ruling of the court was concerned with the preservation of the status quo , the subject matter of the suit so that neither party was prejudiced pending the hearing and determination of the suit. They relied on the cases of Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] e KLR, Giella vs Cassman Brown & Company Limited [1973] EA 358, Mrao Limited vs First American Bank of Kenya Limited (Supra), Robert Mugo Wa Karanja vs Ecobank Kenya Limited & Another [2019] eKLR amongst several other cases.

24. The facts of the case show that while the Appellant contended that the said gym equipment was leased out while the Respondents averred that the Appellant sold them the said gym equipment. There appeared to have been an initial plan to lease out the said gym equipment. It was undisputed that the said Lease Agreement was never executed. The circumstances under which the said Lease was not executed and if indeed there was an agreement for purchase were issues of fact that required to be interrogated during trial.

25. The Learned Magistrate rightly observed that the parties were miles apart as regards the transaction and that there was need to interrogate the facts further. This court, however, took the view that in an interlocutory application, he ought not to have pronounced himself on the weight or value of the lease agreement as that was purely a matter for the trial court. Such a finding had the potential of embarrassing the trial court if it was not the same Magistrate who would hear the matter.

26. The principles guiding the grant of orders for injunction are well settled in the celebrated case of Giella vs Cassman Brown & Company Limited (Supra). These are that the applicant has to demonstrate that it has a *prima facie* case with a probability of success, that it shall suffer irreparable injury which cannot be compensated by damages if the interlocutory injunction is not granted and that if the court is in doubt then it can decide the application on a balance of convenience.

27. As the question of establishing a *prima facie* case has to be approached cautiously so as not to risk making a determination on the merits or otherwise of a case, this court has always found it safer to proceed on a balance of convenience, which this court found was in the interests of this case to grant. If at the conclusion of the trial, the Respondents were to prove that the Appellant sold them the gym equipment, then they would have suffered irreparable loss as the Learned Magistrate correctly observed.

28. This court did not therefore find a reason to fault the decision that was arrived at by the Learned Magistrate as in the circumstances of the case, it was only prudent that the *status quo* of the subject matter of the suit be maintained pending hearing and determination of this suit.

III. TRANSFER OF SUIT

29. The correct procedure for the transfer of the suit is clearly set out in Sections 17 or 18 of the Civil Procedure Act. Indeed, as was seen herein, the question of where the suit ought to have been filed was in contention, the Respondents having argued that the cause of action arose in Kisumu, that the gym equipment was installed in Kisumu and that payment of the monies was made from Kisumu while the Appellant having been emphatic that the suit ought to have been filed in Nairobi.

30. Section 17 of the Civil Procedure Act stipulates that:-

“Where a suit may be instituted in any one or two or more subordinate courts and in instituted in one of those court of those courts, any defendant after notice to the other parties, or the court on its own motion, may at the earliest opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed.”

31. Section 18(1)(a) and (b) (ii) of the Civil Procedure Act further provides that:-

“1(a) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage transfer any suit, appeal or other proceedings pending before it for trial or disposal to any court subordinate to it and competent to try and dispose of the same (emphasis court); or...

(b) (ii) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter transfer the same to trial or disposal to any court subordinate to it and competent to try or disposal of the same;...”

32. Further, Section 78 (2) of the Civil Procedure Act states that:-

“Subject as aforesaid, the appellate court shall have the same powers and perform as nearly as may be the same duties as are conferred and imposed on this Act on courts of original jurisdiction in respect of suits instituted therein.”

33. This court was therefore of the considered view that it could address the question of the transfer suit herein at this stage as it had the same powers to act as a court of original jurisdiction under Sections 17 and 18 of the Civil Procedure Act.

34. As was pointed hereinabove, the Respondents did not oppose the Appellant’s Notice of Motion application dated 7th July 2020 and filed on 8th July 2020 and the court granted Prayer No (3) of the said application.

35. Notably, in prayer No 6, the Appellant had sought the following order:-

“In the alternative to prayers (2) and (3) above the High Court be pleased to transfer Kisumu Chief Magistrates Case No 171 of 2020 between Rovas Limited & Kibos Sugar Limited vs Zizu Investments Limited to Milimani Commercial Courts Nairobi for any further proceedings, hearing and determination.”

36. This court is alive to the provisions of the Magistrate’s Court Act Cap 10 Laws of Kenya vide Section 3(2) gives a Magistrate’s Court countrywide jurisdiction to hear and determine any suit notwithstanding where the Defendant resides or where the cause of action arose. There seems to a conflict with the Civil Procedure Act in that the Civil Procedural law whereas the Magistrate’s Court is the substantive law establishing the Magistrate’s Courts and conferring it with geographical as well as pecuniary jurisdiction to hear and determine disputes.

37. **The Civil Procedure Act was enacted much earlier than the Magistrate’s Court Act and that in the event of a conflict between the two statutes the provision in the latter statute would be deemed to have amended the earlier provision.** Pursuant to that provision, this court finds that the trial court had jurisdiction to handle this matter.

38. The prayer for the transfer of **Chief Magistrates Case No 171 of 2020 between Rovas Limited & Kibos Sugar Limited vs Zizu Investments Limited** was therefore spent. The court would therefore be considering the transfer of the suit as aforesaid either under Section 17 or Section 18 of the Civil Procedure Act.

39. In Section 15 of the Civil Procedure Act, it is provided that every suit shall be instituted in a court within the local limits of whose jurisdiction the Defendant or each of the Defendants actually or voluntarily resides or carries on business or personally works for gain or have acquiesced in such institution of suit of the cause of action wholly or in part arises. Further, Section 12 of the said Act provides that subject pecuniary jurisdiction or other limitation prescribed by law suits shall be instituted where subject matter is situate.

40. In its affidavit by Rahim Samji that was sworn on 26th May 2020 in response to the Respondent’s Notice of Motion application dated and filed on 11th May 2020, the Appellant pleaded that they had installed the equipment at Horseshoe Villas Runda along Kiambu Road, Nairobi an averment that was never controverted by the Respondents.

41. However, a reading of the Ruling of the Learned Magistrate indicated that he only relied on the Respondents’ averment that the contract was through negotiations by emails and physical meetings and the gym equipment finally installed in Kisumu.

42. The court agreed with the holding in the case of **Francis Mwangi Githuku & Another vs Jane Wambui Kingari & Another** (Supra) that the place from where payments were made does not confer the court in that place jurisdiction to hear and determine the matter unless it has been expressly provided in a contract. The parameters of which a court should hear a matter was well set out in Sections 11, 12, 13, 14 and 15 of the Civil Procedure Act.

43. In the absence of any evidence to the contrary, this court came to the firm conclusion that the subordinate court in Nairobi is the one that had jurisdiction to hear and determine the dispute for the following reasons:-

“Under Section 15 (c) Explanation 3 of the Civil Procedure Act, it provides that a suit may be instituted in any of the following places:-

- a. **The place where the contract was made which in this case was not clear as the final lease appeared not to have been executed, a fact that the Learned Magistrate observed in his Ruling;**
- b. **The place where the contract was to be performed or the performance thereof was completed which in this case was Horseshoe Villas Kiambu Road Nairobi;**
- c. **The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable which in this case was paid at Diamond Trust Bank in Nairobi.**

DISPOSITION

44. For the foregoing reasons, the upshot of this court’s decision was that the Appellant’s Appeal that was lodged on 8th July 2020 was not merited and the same be and is hereby dismissed. The Appellant will bear the Respondents’ costs of this Appeal.

45. Under powers conferred upon it Section 18(1)(b) of the Civil Procedure Act, this court hereby directs that **Kisumu Chief Magistrate Case No 171 of 2020 Rovas Limited & Kibos Sugar Limited & Zizu Investments Limited** be and is hereby transferred to Milimani Commercial Courts Nairobi for hearing and determination expeditiously.

46. It is hereby directed that the file be placed before the Chief Magistrate of Milimani Commercial Courts at Nairobi on 18th May 2021 for further orders and/or directions.

47. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF APRIL 2021

J. KAMAU

JUDGE