



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO. E048 OF 2021**

**KOREA NYAMAI.....APPELLANT**

**VERSUS**

**NEEMA PARCELS LIMITED.....RESPONDENT**

*(Being an appeal from the Ruling of the Senior Principal Magistrate Court at Kilifi*

*(Hon. J.M.Kituku ) dated and signed and delivered on the 17<sup>th</sup> May, 2021*

*in Kilifi CMCC No. E090 of 2021)*

**Coram: Hon. Justice R. Nyakundi**

**Mr. Wairagu for the appellant**

**Mr. Kazungu for the respondent**

**RULING**

Appellant aggrieved by the order passed on 17.5.2021 by the session magistrate Hon Kituku of Kilifi Law Courts a motion under Certificate of Urgency was filed seeking the following reliefs;-

***a. That the applicant be granted stay of proceedings of Kilifi SPMCC E90 of 2021 pending the hearing and determination of the appeal.***

***b. That the intended appeal is partly a jurisdiction issue hence the learned trial magistrate was not seized of to adjudicate over the suit filed between the plaintiff and the defendant.***

In support of the application by the applicant is an affidavit deposed by Learned Counsel Mr Wambua Kilonzo dated 8.6.2021.

The Respondent in objection to any grant of orders being considered as prayed by the applicant filed a Replying Affidavit dated 16.6.2021. During the hearing the Learned Counsel for the Appellant mainly contended that when the parties appeared before Hon Kituku (SPM) at Kilifi, the issue of jurisdiction as to the cause of action was contested. It followed that the Learned Trial Magistrate did disagree with the objection by the appellant as deductible from the ruling dated 17<sup>th</sup> May, 2021.

Accordingly, the Memorandum of Appeal as envisaged intends to canvass purely a question of law on jurisdiction. It is at that stage the Court invited both counsels to address the preliminary issue now and then and not in the future on appeal for this Court to address its mind to it. I hold a strong view that when it comes to interlocutory appeals revisionary jurisdiction would be particularly the approach to take in disposal of such issues in order to give effect to the overriding objective under section 1(A) and 1(B) of the Civil Procedure Act. I thank the Learned Counsels for accepting to walk with me along this path in making brief oral submissions on the impugned Ruling.

**Determination**

The issue being disputed relates to jurisdiction as expressly and statutorily provided for under section 11, 12,13,14,15 and 17 of the Civil Procedure Act. ***The import of section (11) of the Act the word competent on the place of suing implies to the extent that the magistrate***

***court presided over by a Resident Magistrate, Senior Resident Magistrate, Senior Principal Magistrate and finally Chief Magistrate in that ranking order has authority to administer justice with reference to the subject matter, geographic and pecuniary limits of its jurisdiction.***

The proviso to section 12 provides ***that suits to obtain relief respecting, or compensation for wrong to, immovable property held by all on behalf of the defendant. Where the relief sought can be entirely obtained through his personal obedience be instituted either in court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of whose jurisdiction the Defendant actually and voluntarily or carries on business or personally works for gain.***

Section 14 provides;-

***“Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of the Court and the Defendant resides or carries on business or personally works for gain, within the local limits of the jurisdiction of another Court, the suit may be instituted at the option of the plaintiff in either of those Courts.”***

Furthermore under section 15 subject ***to limitation aforesaid every suit shall be instituted in a Court within the local limits of whose jurisdiction;-***

***a. The Defendant or each of the Defendant at the time of the commencement of the suit(actually and voluntarily resides or carries on business or personally works for gain in the case of the Owners of Motor Vessel Lilian ‘s’ V Caltex Oil Kenya Ltd[1989]KLR Nyarangi, JA as he then was in this landmark ruling stated inter alia;-***

***“That jurisdiction is everything without it, a Court has no power to make one more step where a Court has no jurisdiction that could be no basis for a continuation of proceedings pending other evidence. A Court of law down its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction.”***

It is well settled from the construction and interpretation of section 11, 12, 13, 14 and 15 of the Civil Procedure Act predominantly the objection as to the local jurisdiction of a Court does not normally stand on the equilibrium as an objection to the personal competence and subject matter jurisdiction to try the claim. It goes without saying competence of a Court to adjudicate over a dispute goes to the very root of the power conferred by the constitution and other enabling statutes. As summarized in the express provisions cited jurisdiction of a Court falls under the following categories territorial or what is commonly referred to as local limits jurisdiction, the pecuniary/personal jurisdiction and finally cause of action or a subject matter of the dispute. In drawing inferences and interpretation of distinction on the above classification due regard ought to be given on the cause of action and pecuniary jurisdiction. However it is not lost to the Court that there is proximity between the cause of action and territorial jurisdiction.

In the instant case a casual reading of the Ruling by the session Learned Trial Magistrate confirms that he held the opinion and decided that the issue on territorial jurisdiction was not a bar for the Court to entertain and determine the claim. ***“He went on to appreciate that Kilifi is in the midway between the parties and will even afford parties proportionate use of resources and save time. Furthermore the advocates are situated in Mombasa and Malindi respectively.”***

From this order there is no mention herein of matters directly and substantially in issue to this case in that pending suit. It was more of a forum of convenience for the parties. Jurisdiction as known in law is confined to persons who are within reach of the process of the court at the time of the service of the summons. It is not merely a midway principle accruing on the measure of distance or kilometres from each other.

My reading on the decisions captured by the superior courts in ***Simon Kiarie V Samuel Muigai Thuku [2005] eKLR, Justus Kyalo Mutunga V Laph Singh Harnan [2021] eKLR*** tend to settle the issue on territorial jurisdiction as non-responsive based on the provisions in the Magistrates Courts Act 2015. The time honored principle on jurisdiction is to give effect to both pecuniary and subject matter jurisdiction. Procedurally, it is unclear on the inconvenience in which a litigant would be subjected to in litigating a claim just outside his or her front door in gross disproportionate to the defendant’s convenience. The concept on territorial jurisdiction to me has a widespread application especially taking cognizance of our legal system and administration of justice. I have in mind public interest factors to a litigation;-

***a. The administrative factors namely crowded dockets in our legal system.***

***b. The law governing the cause of action.***

***c. Local interests in deciding localized controversies at home.***

***d. Right to access justice under article 48 of the constitution.***

***e. The tenets of forum non-convenience and the duty of fairness of the trial.***

At the outset to put it simply, the requirements that must be met before a court properly undertakes to umpire adjudication of civil disputes is to take notice of subject matter and territorial jurisdiction. In particular, adopting a view popular with the current jurisprudential question on personal jurisdiction of magistrates being of universal character and not limited to the local limits/county or sub county. With this trajectory under the provisions of the magistrates court act as read with section 15 of the Civil Procedure Act there is no dispute that the only divisibility in the ranking of the magistrates is at the scale of pecuniary jurisdiction.

It therefore behoves the Court in the legislative scheme that emerges from a combined reading of sections 11, 12, 13, 14 and 15 to give effect to the competence on personam and subject matter jurisdiction. Implicit in these emphasis are cumulative components of reasonableness of access to justice in Article 48 and the due process clauses under Article 50 of the Constitution. The Civil Court is primarily and expressly required under the provisions of section 15 to protect the Defendant against the burdens of being sued and litigating in distant or inconvenience forums, in my view giving credence to this provision on territorial jurisdiction. It also acts to ensure that counties through their respective courts do not reach out beyond the limits imposed by their counties as core equal sovereign in our system of government. So, territorial jurisdiction need not be confused with personam jurisdiction over things or cause of action. Justice is idea of giving each person his or her own fair due process as a matter of constitutional right.

The system must imbue in those who have reason to seek justice in our various Courts a sense of the fairness of the system of laws, processes and procedure underpinned primarily on access to justice. Jurisdiction being the authority in which judges and magistrates take cognizance of the cause of action which normally constitutes a subject matter ordinarily falls within the local limits of that Court. In my considered view jurisdiction as generally legislated by parliament and understood in our system of Court is a combined effect over the parties' territorial jurisdiction, the nature of the claim and its relationship to pecuniary measure. The Civil Procedure Act subject to the interpretation on territorial jurisdiction gives no room for a plaintiff or a suit to be filed against the defendant by any original process in any county, or sub-county than that whereof he or she is a resident or carries business at the time of service of summons for the claim.

Where is the connection? As discerned from the law there is an overlap between the territorial and the subject matter jurisdiction save for transactional or transnational contractual and commercial transactions normally transcending more than one venue as a focal point on the cause of action. I believe a better approach to rationalize the application of territorial jurisdiction is to sever it from that of personam which historically created the position of a "**District Magistrate**" and the phrase – "**Local District.**" This new structure clarifies by recognizing that statute imposed limitations on personam jurisdiction reach.

It is to be noted that section 11, 12, 13 and 15 takes into account all interests on the litigation catalogued as those of the plaintiff, the defendant and subject matter, limiting territorial authority to adjudicate as a basis to decline jurisdiction. The most exhaustive expose on the distinctions drawn on these issues is as pointed out in **Fazlehussein V Yusufally (5 A.I.R 1955)** where the court took the following approach to decide the question of jurisdiction;-

***"In considering the preliminary issue, the court must look into the averments in the plaint and consider any objections which the defendant may choose to raise against the maintainability of the action on those averments. The question of jurisdiction which is raised by way of a demurer has always to be decided on the allegations made in the plaint and not on the contentions that the defendant may raise. It is true that if the jurisdiction of the Court depends upon the proof of fact and the question as to the existence or otherwise of that fact is canvassed, the parties may lead evidence in support of the respective cases before the preliminary issue as to jurisdiction of the Court is decided"***

In the instant case during the hearing during the hearing Learned Counsel for the applicant submitted that the allegations made in the plaint discloses that the cause of action and place of residence of the defendant is identified as Watamu. Therefore the issue of jurisdiction will inevitably have to be considered in consonant to section 15 of the Civil Procedure Act.

The trial court while sustaining the suit noted that there was no issue as to territorial jurisdiction to warrant disqualification of the Court from downing its tools. Beyond reliance on the provisions of law the magistrates court act on jurisdiction the facts as pleaded did not constitute a cause of action in Kilifi as founded by the learned trial magistrate. Whether Kilifi Magistrate's Court is a forum of convenience or even a better one as decided by the trial court should not be a question of whim or convenience to the parties and their respective counsels.

The foregoing analysis logically leads me to the conclusion of interfering with impugned order on jurisdiction that the learned magistrate erred in holding that he had jurisdiction to entertain the claim between the appellant and the respondent. Flowing from this finding the ruling dated 17<sup>th</sup> May, 2021 dismissing the scope of preliminary objection is hereby set aside. As a consequence **Kilifi SPMCC E090 of 2021** be and is hereby transferred to **Malindi Chief Magistrate's Court** for hearing and determination. The costs of this application to abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED via EMAIL AT MALINDI THIS 22<sup>ND</sup> DAY JUNE, 2021.**

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**R. NYAKUNDI**

**JUDGE**

**NB:** In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.