



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(APPELLATE SIDE)

(Coram: Odunga, J)

CIVIL APPEAL NO. 111 OF 2015

JOHN NZIOKA KAVELA.....APPELLANT

VERSUS

GEORGE KIMONDIU.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

(Being an Appeal from the Ruling delivered by the

Honourable S. Mungai, SPM in Machakos SPMCC No. 17 of 2007 on 4th November, 2011)

BETWEEN

JOHN NZIOKA KAVELA.....PLAINTIFF

=VERSUS=

GEORGE KIMONDIU.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

JUDGEMENT

1. By a plaint dated 18th December, 2008, the Respondent herein instituted a suit against the Appellants herein claiming General Damages for malicious prosecution and unlawful arrest, defamation, special damages, costs and interests. It was the appellant’s case that following a complaint by the 1st Respondents against the appellant the appellant was arrested and arraigned before Kangundo SPM’s Court in SPMCC No. 362 of 2006 with the offence of stealing but was eventually acquitted.
2. In his plaint filed before the SPM’s Court Machakos, the appellant in paragraph 2 pleaded that the 1st defendant was residing and working for gain within the Republic of Kenya and that his address was Kathaania Market. This paragraph was not denied as the 1st Respondent considered it as being descriptive of the 1st defendant. The 1st defendant however challenged the Court’s jurisdiction. The 2nd Respondent however admitted the Court’s jurisdiction.
3. When the matter came up on 2nd August, 2011 the 1st Respondent took up the issue of jurisdiction. It was submitted that since the cause of action arose at Kangundo where the appellant was charged, the suit ought to have been filed at Kangundo and not Machakos. In response the appellant submitted that the cause of action arose at Kathaana Market within Machakos District hence the Court had territorial jurisdiction in the matter. In response, the 1st Respondent submitted that the said Kathaana Market is one kilometre from Kangundo.
4. In his ruling the Court found that the cause of action arose within Kangundo Law Courts where both the Plaintiff and the 1st Defendant resides and the suit should have been filed before the nearest court.
5. There are only two grounds of appeal in this appeal and these are:

a) THAT the learned magistrate erred in law and fact in finding that the Senior Magistrate court at Machakos lacks jurisdiction to hear the lower court suit.

b) THAT the learned in wholly relying on the evidence of the defence and disregarding the Appellant's arguments.

6. It was submitted by the appellant that Machakos Court also possessed the jurisdiction to hear and determine the matter by dint of sections 5, 14 & 15 of the *Civil Procedure Act* which provide that:

5. Any court shall subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred.

14. 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 one 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.

7. According to the appellant, the Senior Principal Magistrate's court sitting at Machakos has the requisite jurisdiction to hear and determine the matter since it has the jurisdiction of local limits by which the cause of action arose, and within the place which the 1st Respondent carries on business as evidenced in paragraph 2 of the plaint which was not denied by the Respondents.

8. In support of his case the appellant relied on the case of Abdi Abile Hassan vs. Laikipia Nature Conservancy & Anor [2016] eKLR where it was held that:

"...The fact that the appellant was charged in Nyahururu court, which was to the convenience of the police and in particular given that criminal jurisdiction is not defined by County or administrative boundaries does not in my view mean that the civil suit will have to be filed in Nyahururu. I therefore hold that the filing of the suit in Nanyuki was within the provisions of section 15 of the civil procedure Act as the defendant carries on business in Kanamba which is in Laikipia. It is my finding therefore that the suit was properly filed in Nanyuki court and the court had jurisdiction to entertain and hear the suit in Nanyuki."

9. According to the appellant, the scenario as in the case above is the exact to the present one. The appellant herein was charged in Kangundo but filed a suit in Machakos which still has jurisdiction. The 1st Respondent has not denied carrying on business in Kathaana market which is within the territorial jurisdiction of the Machakos Senior Principal Magistrate. It was therefore submitted that pursuant to the provisions of the law and case precedent, the lower court being the Senior Principal Magistrate sitting at Machakos has the requisite jurisdiction to hear the lower court matter and proceed to make a determination thereof and it is our humble prayer that this Honourable court does proceed to find as such and proceed to order the matter do proceed for hearing and determination before the said court.

10. In opposing the appeal, the 1st Respondent submitted that the subject matter of the lower court suit being a criminal matter occurred within the territorial jurisdiction of Kangundo Law courts and it is not in dispute that the criminal matter that gave rise to the civil proceedings in the lower court suit occurred within the jurisdiction of Kangundo Law Courts which was admitted by the Appellant's Advocate. However, the Appellant then chose to file the lower court suit in the Senior Principal Magistrate Court in Machakos based on section 15 of the *Civil Procedure Act*. However, the 1st Respondent relied on the decision of **Kimaru J.** in the Busia HCCC No. 185 of 2011 - Olaka vs Olaka in which the learned Judge had highlighted:

"Furthermore, Section 15 of the Act requires any other suit to be filed where either the defendant resides or the cause of action arose. This court will therefore not assume jurisdiction merely because it has unlimited territorial and pecuniary jurisdiction to hear any case."

11. It was submitted that though the Appellant has stated that the 1st Respondent resides and works for gain at **Kathaana Market** which is in Machakos County, this was never proven by the Appellant. The Appellant only stated that the 1st Respondent lives and works for gain at **Kathaana Market**. The same does not state that **Kathaana Market** is in Machakos County. There was no single document that was ever produced in court to show that is in Machakos County. In the plaint there is no mention that **Kathaana Market** is in Machakos County. According to the 1st Respondent *it is a principle of law that he who alleges a fact must prove it and reliance was sought from sections 107(1), 109 and 112 of the Evidence Act and the Court of Appeal's decision in Jennifer Nyambura Kamau Humphrey Mbaka Nandi [2013] eKLR.*

Determination

12. I have considered the issues raised in this appeal. The appeal arose from a preliminary objection. In Mukisa Biscuits Manufacturing Ltd. vs. West End Distributors Ltd. Civil Appeal No. 9 of 1969 [1969] EA 696, it was held that:

"A preliminary objection is in the nature of what used to be called a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

13. It follows that since it was pleaded by the appellant that the 1st Respondent was residing and working for gain at Kathaani Market and the said pleading was admitted, the objection had to be considered on the basis that that was the factual position. It was therefore upon the 1st Respondent to prove that Kathaani market was not within the jurisdiction of Machakos Court since it was the 1st Respondent that was

alleging that the Court had no jurisdiction.

14. In my view there was no evidence upon which the Court could make such a finding. In fact the Court seemed to have made its decision solely on the basis of where the cause of action arose but did not consider the second aspect of the residence and place of work of the defendants.

15. I therefore find that the trial court misdirected itself in striking out the suit.

16. In the premises this appeal succeeds, the order striking out the suit is hereby set aside and the suit is reinstated to hearing. The costs of this appeal are awarded to the appellant.

17. It is so ordered.

Read, signed and delivered in open Court at Machakos this 24th day of January, 2019.

G.V. ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Geoffrey