



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 105 OF 2009

JOYCE KIMENGELE

JOSHUA MBUNGU NDAKA (Suing as the legal Representatives

of the estate of

BENARD KIMENGELE NDAKA (DECEASED).....APPELLANTS

VERSUS

PETER MUTUKU KYENZE.....1ST RESPONDENT

WINNIE WANJIRU KAMAU2ND RESPONDENT

(Being an appeal from the Ruling/Order of Hon Kandet Senior Resident Magistrate at Chief

Magistrate's Court at Milimani Commercial Court in CMCC No 5942 of 2004

delivered on 5th February 2018)

JUDGMENT

INTRODUCTION

1. In a Ruling delivered on 5th February 2008, the Learned Magistrate, Hon K.L. Kandet (Mr) upheld the 1st Respondent's Preliminary Objection on the ground that since the cause of action arose in Machakos District and the Respondents resided in the same District, the matter ought to be transferred to Machakos for hearing and determination.
2. Being dissatisfied with the said decision, the Appellants filed an Amended Memorandum of Appeal dated 15th April 2014 on 4th March 2008. They relied on four (4) grounds of appeal.
3. It appeared from the court record that from the time Appeal was filed in this court, the Respondents had never attended court. They also never filed any Written Submissions. The Appellants' Written Submissions were dated and filed on 18th September 2018.
4. Being satisfied that the Respondents had been duly served with the Hearing Notice for 3rd April 2019 as was evidenced in the Affidavit of Service of Augustine Kyalo Mbuvi that was sworn on 15th March 2019 and filed on 28th March 2019 evidencing service of the said Hearing Notice upon their advocates by way of registered mail, and there having been no attendance in court by the Respondents and/or their advocates this court reserved its Judgment based on the Appellants' Written Submissions which they relied upon in their entirety. This Judgment is therefore based on the Appellants' Written Submissions only.

THE APPELLANTS' CASE

5. The Appellants submitted that the accident occurred along Nairobi-Mombasa Road and that from the pleadings, it was not possible to determine the exact place where the accident occurred, which fact could only be established by way of evidence. They therefore averred that the Learned Trial Magistrate erred when he arrived at a conclusion that the cause of action arose at Machakos.

6. They added that even if the court were not to agree with their above argument, Section 3(2) of the Magistrates' Courts Act Cap 10 (Laws of Kenya) provided that **"a Resident Magistrate shall have jurisdiction throughout Kenya."**

7. It was their further contention that the Civil Procedure Act was a procedural law that provided that a suit was to be instituted either where a cause of action arose or where a defendant carried on business. They relied on the case of **Simon Njogu Kariithi & Another vs Cleti Kambio Kimaiyo [2015] eKLR** in this regard.

8. They therefore argued that since the Civil Procedure Act was in conflict with the Magistrates' Courts Act which was the substantive law, then the Magistrates' Courts Act must take precedence over the Civil Procedure Act. They added that since the Magistrates' Courts Act had been enacted after the Civil Procedure Act, then the same was taken to have amended the Civil Procedure Act in that respect.

9. They also submitted that in his Statement of Defence, the 1st Respondent unequivocally admitted the jurisdiction of the Chief Magistrate's Court at Nairobi and consequently, he was bound by his pleadings. In this respect, they relied on the case of **Dakianga Distributors (K) Ltd vs Kenya Seed Co Ltd [2015] eKLR** where the Court of Appeal cited the Article entitled **"The Present Importance of Pleadings"** published in (1960) current Legal Problems that was quoted with approval by the Supreme Court of Malawi in **Malawi Railways Ltd vs Nyasulu [1998] MWSC** where it was held that:

"... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. . ."

10. In the same case, the Court of Appeal also placed reliance on the case of **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 others** (appearing as Supra) that cited with approval the decision of **Supreme Court of Nigeria in Adetown Oladeji (NIG) Ltd vs Nigeria Breweries PLC SC 91/2002** where Pius Adeneji, JSC expressed himself as follows:-

"...It is now a trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

11. They therefore urged this court to uphold their Appeal and set aside the Ruling/Order of the Learned Trial Magistrate with costs to them.

LEGAL ANALYSIS

12. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

13. This was aptly stated in the cases of **Selle vs Associated Motor Boat Company Ltd [1968] EA 123** and **Peters vs Sunday Post Limited [1985] EA 424** where in the latter case, the court therein rendered itself as follows:-

"It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses. But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

14. Having said so, in the Appeal herein, this court was not being asked to re-evaluate and/or re-assess whether the Learned Magistrate properly analysed the evidence that was adduced in the Trial Court. Rather, the question that had been placed before this court was whether or not the Learned Magistrate erred in ordering the transfer of this matter to Machakos.

15. The 1st Respondent's Notice of Preliminary Objection dated 22nd January 2008 and filed on 29th January 2008 raised the following preliminary objections:-

"That this court has no geographical jurisdiction to hear and determine this suit in that the cause of action arose in Machakos District, the 1st defendant resides at Machakos town, and the 2nd defendant resides at Athi River also within Machakos District."

16. In his Ruling, the Learned Magistrate observed that Section 14 of the Civil Procedure Act stipulates that a suit could be instituted either in the court in whose jurisdiction the cause of action arose or in the court in whose jurisdiction where the defendant resided or carried on business or personally worked for gain.

17. He pointed out that the Respondents were described as persons working for gain in Machakos and Athi River which fell within the jurisdiction of the Machakos Court. He, however, noted that the 1st Respondent had in his Defence admitted the jurisdiction of the Chief Magistrate's Court at Nairobi but that there was nothing to show that the 2nd Respondent had been served with Summons to enter appearance.

18. He determined that the admission of jurisdiction by the 1st Respondent could not *per se* grant the Appellant any other option as to the place of suing other than the option that was contemplated under Section 14 of the Civil Procedure Act.

19. Section 14 of the Civil Procedure Act stipulates that:-

“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.”

20. The objective of the Magistrates’ Courts Act No 26 of 2015 was for purposes of conferring jurisdiction, functions and powers on the magistrates’ courts to provide for the procedure of the magistrates’ courts and for other connected purposes. The said Act is an administrative law to give effect to Articles 23(2) and 109(1) (a) and (2) of the Constitution of Kenya, 2010.

21. Notably, Section 3(1) of the Magistrates’ Courts Act was no longer in existence, Cap 10 (Laws of Kenya) having been repealed. The Civil Procedure Act was a substantive Act and was not inferior to the Magistrates’ Courts Act. They were both at par. The Magistrates’ Courts Act was administrative in nature while the Civil Procedure Act gave the procedure of how civil matters were to be conducted.

22. As Cap 10 (Laws of Kenya) has since been repealed, this court found the case of **Simon Njogu Kariithi & Another vs Cleti Kembio Kimaiyo** (Supra) to have been distinguishable from the facts of this case.

23. In this regard, this court disagreed with the stand taken by the Appellant that the applicable law was the Magistrates’ Courts Act and not the Civil Procedure Rules on the ground that the former was a substantive law while the latter was procedural law, that the Magistrates’ Courts Act empowered resident magistrates to hear and determine matters throughout Kenya and that a resident magistrate had jurisdiction throughout Kenya.

24. This court noted that judgment was delivered by the Learned Magistrate Hon Mokaya (Ms) SRM on 29th March 2007. The Ruling, the subject of this Appeal herein was delivered on 5th February 2008, almost a year later.

25. Notably, on 28th August 2007, the Appellants’ advocates conceded to the 1st Respondent’s application seeking a stay and setting aside of the *ex parte* judgment on the ground that the 1st Respondent was not served. This was confusing to this court as M/S S.W. Ndegwa & Co Advocates filed a Memorandum of Appearance dated 12th July 2004 on even date. It was not clear when his Defence dated 20th July 2004 was filed because the stamp was illegible.

26. Further, this court got more confused as the Judgment by the Learned Trial Magistrate referred to the 2nd Respondent as “he” yet the 2nd Respondent was female and interlocutory judgment had already been entered against her. She did not testify during trial.

27. The above notwithstanding, a perusal of the Appellants’ Plaint that was dated and filed on 15th June 2004 showed that as the Learned Trial Magistrate had observed, the 1st & 2nd Respondents were said to have worked for gain at Machakos and Athi River respectively. This court also noted from the 1st Respondent’s Defence dated 20th July 2004 that to the extent that he had admitted the jurisdiction of the Chief Magistrate’s Court at Nairobi, he was bound by his pleadings as was held in the cases of **Dakianga (K) Ltd vs Kenya Seed Co Ltd** (Supra) and **Independent Electoral & Boundaries Commission & Another vs Stephen Mutinda Mutie & 3 Others** (Supra).

28. They could not purport to have admitted the jurisdiction of the Chief Magistrates’ Court at Milimani Commercial Court and then reneged on the said admission to contend that the said court had no jurisdiction to hear and determine the dispute. As the 1st Respondent’s Defence had not been amended, he was thus bound by all the averments therein.

29. This court noted that the material accident occurred on 1st April 2003 along Nairobi-Mombasa Highway. There was nothing in the Appellants or 1st Respondent’s pleadings to have suggested whether the occurrence of the accident was nearer to Nairobi or nearer to Mombasa as the court took judicial notice that the entire road between Nairobi and Mombasa was known as Nairobi-Mombasa Road or Mombasa-Nairobi depending on where one was approaching it from.

30. Having said so, this court noted that from the evidence of Joshua Mbugu Ndaka (hereinafter referred to as “PW1”), the brother to Bernard Kimengela Ndaka (hereinafter referred to as “the deceased”), that the accident occurred at the junction of Machakos- Mombasa Road. This was clearly within the jurisdiction of Machakos Law Courts as was rightly submitted by the 1st Respondent in his Preliminary Objection and upheld by the Learned Magistrate.

31. It was therefore the view of this court that the Learned Trial Magistrate arrived at a correct conclusion that the suit ought to have been filed at Machakos Law Courts.

32. This court was caught between going strictly by the law that stipulates that parties are bound by their pleadings or assigning a strict interpretation the provisions of Section 14 of the Civil Procedure Act that provides that a suit should be filed in the courts in whose jurisdiction where the cause of action accrues or where the defendant resides or working for gain or carries on business to determine whether or not the 1st Respondent’s admission or the jurisdiction of the Chief Magistrate’s Court at Milimani Commercial Courts could be sustained.

33. This court came to the conclusion that the admission 1st Respondent ought not to be allowed to stand because there was a substantive law that directed where matters ought to be filed. It took a firm conclusion that an admission based on a misapprehension of the law ought not to be allowed to stand. It would amount to a court upholding a wrong position of the law. A court ought to take judicial notice of facts and not be bound blindly. The Civil Procedure Act has been enacted to create law and order in the administration of justice, or else there would be anarchy confusion and uncertainty as to how cases ought to be prosecuted.

34. Accordingly, having considered the Written Submissions and case law that was relied upon by the Appellants, this court found and held that the Learned Trial Magistrate arrived at a correct position and did not apply the wrong principles in arriving at his decision.

35. In view of the fact that the Appellants filed their Memorandum of Appeal within the thirty (30) days during which period they were required to transfer the suit in default of which the suit was to stand as struck out, it was in the interests of justice that the Appellants' suit be saved.

DISPOSITION

36. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged on 4th March, 2017 was not merited and the same is hereby dismissed but with no order to costs as the Respondents did not participate in the proceedings herein.

37. Purely in the interests of justice, the Appellants are hereby directed to file the requisite application for the transfer of **CMCC No 5942 of 2004 Joyce Kimengele & Another vs Peter Mutuku Kyenza & Another** to Machakos Law Courts within thirty (30) days from today, failing which the order by Learned Magistrate that the suit would stand struck out within thirty (30) days will take effect.

38. Orders accordingly.

DATED and DELIVERED at NAIROBI this 30th day of July 2019

J.KAMAU

JUDGE