



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL APPEAL NO. 544 OF 2008

MUEMA MWANGANGI and

JACKSON MUSYOKA MWANGANGI.....APPELLANTS

(Suing as the legal representatives to the estate of Late **JOEL MWANGANGI**)

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

(Being an appeal from the ruling delivered on 18th September, 2008 by Hon. Ms. W Mokaya (Ag. Principal Magistrate) Milimani Commercial Courts in CMCC No. 9241 of 2005)

JUDGMENT

1. Vide a plaint dated 24th August, 2005 the Appellants filed a claim in the Lower Court as the legal representatives of the estate of the Late Joel Mwangangi (hereinafter the deceased). The claim is for damages arising from the death of the deceased who was fatally involved in an accident. The Respondent alleged negligence on the Respondent's side.

2. The Respondent filed a statement of defence and denied the claim and also denied the court's jurisdiction.

3. The Respondent filed a reply to the defence and joined issues with the defence except where there were admissions.

4. The Respondent subsequently filed the Notice of Preliminary Objection dated 4th November, 2007 on the following grounds:

“1. The Plaintiff has to comply with the mandatory requirements of Section 87 of the Kenya Railways Corporation Act Chapter 397 of Laws of Kenya.

2. This Honourable Court has no jurisdiction to entertain this matter by virtue of the provisions of Section 83 of Kenya Railways Corporation Act.”

5. The Preliminary Objection was heard by the trial court and in a ruling dated 17th September, 2008 the Preliminary Objection was sustained and the Appellants' suit was struck out.

6. The Appellant was dissatisfied with the said ruling and appealed to this court on the following grounds:

“1. That the learned Magistrate erred in failing to find that the Respondent has waived its right to go to arbitration.

2. That the learned Magistrate erred in finding that the Court had no jurisdiction.

3. That the learned Magistrate erred in failing to find that by filing a Defence to the Plaintiff’s suit, the Respondent had submitted to the jurisdiction of the Court.

4. That the learned Magistrate failed to consider and take into account authorities cited by the Appellant and which authorities were binding on her.

5. That the learned Magistrate erred in not calling (despite being requested to do so by the Appellant) the Court file in Milimani Miscellaneous Suit No. 121 of 2005 which contained *inter alia* the statutory notice served on the Respondent before the suit was filed.

6. That the entire ruling is not supported by the evidence before the Court.

7. The Appeal was canvassed by way of written submissions. I have considered the said submissions and the authorities cited.

8. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)”.

9. The essence of a Preliminary Objection was given by Law, JA and Sir Charles Newbold P. in **Mukisa Biscuits Manufacturing Co Ltd Vs West End Distributors (1969) Ea 696**. At page 700, Law, JA stated that:

“...a ‘preliminary objection’ consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Sir Charles Newbold P. added as follows at page 701:

A preliminary objection is in the nature of what used to be a demurrer. 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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

10. Section 83 Cap 397 Kenya Railways Corporation Act provides as follows:

“(1) In the exercise of the powers conferred by sections 13, 15, 16 and 17, the Corporation

shall do as little damage as possible, and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.

(2) Nothing in this section shall be construed as entitling any person to compensation –

(a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or

(b) for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence in such user.”

11. Section 87 Cap 397 Kenya Railways Corporation Act provides as follows:

“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect -

(a) the action or legal proceedings shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuing injury or damage, within six months next after the cessation thereof.”

12. Grounds of appeal no. 1-3 deal with the issue of waiver of the right to go to arbitration due to the filing of the defence and the implication thereof that the Respondent submitted to the court’s jurisdiction. The Appellants in their written submissions have not argued the said three grounds. The submissions by the Appellants counsel have focused on the issue of the statutory Notice. Consequently, I agree with the submissions of the Respondent’s counsel that the trial court’s holding that the Respondent had submitted itself to the jurisdiction of the court and that the issue of referral to arbitration did not arise is not challenged herein.

13. The Appellants in paragraph 8 of the plaint stated that notice of intention to sue had been given. The Respondent denied the same. The Appellants joined issues with the Respondent and reiterated the contents of paragraph 8 of the plaint. Bearing in mind the applicable test in a Preliminary Objection as enunciated in the case of **Mukisa Biscuits (Supra)**, my view is that the Preliminary Objection raised was not a pure point of law as it required the ascertainment of facts as to whether the Statutory Notice was served or not. It was a contested fact whether service of the Statutory Notice had been effected.

14. Although the Appellants’ counsel has submitted that the trial court ought to have allowed the production of the Statutory Notice or considered the contents of CMCC Misc. Appl. No.121 of 2005 that would have amounted to ascertainment of facts and evaluation of evidence. Although Misc. Appl. No.121 of 2005 forms part of the Record of Appeal herein, it is observed that the same does not form part of the record of the Lower Court file.

15. With the foregoing, I find merits in the appeal and allow the same with costs.

Dated, signed and delivered at Nairobi this 29th day of January, 2018

B. THURANIRA JADEN

JUDGE