



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 178 OF 2016**

**COUNTY GOVERNMENT OF KAKAMEGA.....APPLICANT**

**VERSUS**

**UFANISI FREIGHTERS (K) LIMITED**

**TRAWLERS LIMITED.....RESPONDENTS**

**(An appeal against the ruling and orders of Hon. Kyambia, P.M. in**

**Mombasa CMCC No. 373 of 2016 and Mombasa CMCC No. 374**

**of 2016 delivered on 18<sup>th</sup> November, 2016).**

**JUDGMENT**

1. The gist of this appeal are two cases that were filed in the lower court on 1st March, 2016, being Mombasa CMCC No. 373 of 2016, **Ufanisi Freighters (K) Limited vs County Government of Kakamega** and Mombasa CMCC No. 374 of 2016, **Trawlers Limited vs County Government of Kakamega**. The plaintiffs (hereinafter referred to as respondents) therein sought similar orders in applications dated 3<sup>rd</sup> May, 2016 for the court to strike out the defendant's (hereinafter referred to as the appellant) statements of defence, for judgment to be entered in favour of the respondents and for costs to be awarded to them. The applications were supported by affidavits sworn by the respondents' Finance Manager, Justus Kenani on 3<sup>rd</sup> May, 2016. The appellant's Counsel filed two Notices of Preliminary Objection on 23<sup>rd</sup> June, 2016, challenging the lower court's jurisdiction to hear the cases which should have been instituted within the local limits of the place where the cause of action arose and/or the appellant carries on business. The appellant filed replying affidavits on 23<sup>rd</sup> June, 2016 to oppose the said applications.

2. The Hon. Magistrate considered the applications and allowed the same, thereby striking out the statements of defence in the two suits. He also held that he had jurisdiction to hear the cases, by virtue of Section 3 of the Magistrates' Courts Act, 2015.

3. The appellant being aggrieved by the said decisions filed a memorandum of appeal on 16<sup>th</sup> December, 2016 raising the following grounds of appeal:-

(i) That the Honourable Trial Magistrate erred in law and in fact by holding that he had the jurisdiction to hear and determine the two cases, namely Mombasa CMCC No. 373 of 2016 and Mombasa CMCC No. 374 of 2016 contrary to the substantive provisions under the Civil Procedure Act, 2010;

(ii) That the Honourable Trial Magistrate misdirected himself on the law by laying reliance on the provisions of Section 3 of the Magistrates' Courts Act, 2015 to clothe himself with the jurisdiction to hear and dispose of the two cases namely Mombasa CMCC No. 373 of 2016 and Mombasa CMCC No. 374 of 2016 when, in fact the Magistrates' Courts Act, 2015, is silent on the question of whether or not the Magistrates' Courts have jurisdiction throughout Kenya in Civil matters;

(iii) That the Honourable Trial Magistrate misdirected himself on the law by, on the one hand recognizing that whereas the repealed Magistrates' Courts Act, Cap. 10 expressly clothed the Magistrates' Courts with jurisdiction throughout Kenya in civil matters, the Magistrates' Courts Act, 2015 was silent on that issue and that, therefore, recourse could only be had to the provisions of the Civil Procedure Act, 2010 and, on the other hand, ignoring the provisions of the Civil Procedure Act, 2010 and considering extraneous issues such as the need for expeditious disposal of suits, thereby further turning a blind eye to the fact that specific jurisdiction of Magistrates' Courts on certain claims depend on the provisions of the law to which the subject claim relates;

(iv) That the Honourable Trial Magistrate misdirected himself on the law by holding that the Civil Procedure Act, 2010 does not confer jurisdiction upon the Magistrates' Courts in civil matters when, in fact and in the absence of any provision under Magistrates' Courts Act, 2015, the question of civil jurisdiction of Magistrates' Courts can only be answered by reference to the Civil Procedure Act, 2010 and not any other statute;

(v) That the Honourable Trial Magistrate misdirected himself by laying reliance on the decision in Nairobi H.C. Miscellaneous No.18 of 2015 Ruth Gathigia Kamunya & another v George Kimani in finding that the Civil Procedure Act, 2010 does not confer jurisdiction on the Chief Magistrates' Court when, in fact, the subject decision was made during the existence of the repealed Magistrates' Courts Act, Cap.10 and which, indeed, at Section 3 thereof conferred the Magistrates' Courts with jurisdiction throughout Kenya in civil matters;

(iv) That the Honourable Trial Magistrate erred in law by failing to appreciate that under Section 15(b) of the Civil Procedure Act, 2010, the only exception to the mandatory requirement for instituting suits as stated thereat is only and only if a party has obtained leave of Court or if the Defendant has acquiesced in the institution of such a suit outside the requisite jurisdiction, which exception was absent in the two cases that were before the Honourable Trial Magistrate;

(vii) That the Honourable Trial Magistrate erred in law and in fact by failing to find that the Appellant and, indeed, the public at large would suffer prejudice, if the cases were maintained and heard in Mombasa when, as a matter of fact, being a County Government of Kakamega, as well as the subject matters in both cases and likelihood of majority of the witnesses being based at Kakamega, it was imperative to use the County Government's resources prudently, being public funds and that to proceed with the suits at Mombasa, would expose public funds and interests to prejudice;

(viii) That the Honourable Trial Magistrate misdirected himself by proceeding to overrule the Appellant's Preliminary Objection despite having had sufficient prior knowledge of a pending application in Mombasa H.C Misc. No. 537 of 2016 that sought to withdraw and transfer the above two cases before him to be tried and disposed of by the appropriate Magistrate's Court at Kakamega;

(ix) That the Honourable Trial Magistrate erred in law and in fact by striking out the Appellant's Defences (sic) to the two cases aforesaid and further by holding that they failed to disclose reasonable defences to the respective Respondents' claims; and

(x) That the Honourable Trial Magistrate erred in law and in fact by considering extraneous matters and principles of law on the one hand and, on the other, by failing to properly appreciate the nature of the matter before him hence arriving at the impugned decision herein.

The appellant prays that:-

(i) The appeal be allowed;

(ii) The ruling and order of the trial court (Hon. Kyambia, SPM) delivered on the 18th November, 2016 in Mombasa CMCC No. 373 of 2016 and Mombasa CMCC No. 374 of 2016 and all consequential orders flowing therefrom be set aside; and

(iii) The appellant be granted the costs of this appeal and the full costs in the trial court.

4. Counsel filed their submissions which they highlighted. Mr. Sifuma, Learned Counsel for the appellant stated that there were two suits before the lower court that form the subject of this appeal. The first, Mombasa CMCC No. 373 2016 was based on a contract for provisions for the County Industrial Center workshop. The second, Mombasa CMCC No. 374 of 2016 was the subject of a contract for rehabilitation of the Sitavita Water Resource at Kakamega County. Counsel submitted that the Hon. Magistrate did not have jurisdiction to entertain the two cases as a case has to be filed in the jurisdiction where a defendant resides. He informed the court that the current Magistrates' Courts Act is silent on issues of jurisdiction, therefore Section 15 of the Civil Procedure Act should have come into play on the issue of filing of the suits. It was contended that the Hon. Magistrate conferred jurisdiction on himself by invoking the provisions of Article 159(2)(b) of the Constitution by stating that cases have to be dispensed with expeditiously.

5. Mr. Sifuma argued that the witnesses for the appellant reside in Kakamega and work there and as such, the prosecution of this matter in Mombasa will lead to huge expenses on the part of the County Government of Kakamega. He indicated that he did inform the Hon. Magistrate that they had filed an application in the High Court to have the suit transferred to Kakamega Magistrates' Court.

6. Counsel relied on **Mulla on Civil Procedure (2012) 18th Edition** at p. 391 to show that the rationale on the defendant's actual and voluntary residence is in *pari materia* with Section 15 of the Civil Procedure Act.

7. Mr. Omwenga, Learned Counsel for the respondents opposed the appeal. He stated that Section 7 of the Magistrates' Courts Act gives pecuniary and not territorial jurisdiction. Counsel submitted that the Hon. Magistrate was correct in holding that he had jurisdiction to hear an application on whether he had jurisdiction hear the two cases. It was pointed out that as at that time, there was no stay prohibiting the Hon. Magistrate from hearing the application.

8. It was submitted that on the 19th December, 2016, Judge P.J. Otieno dismissed an application seeking to transfer the suits to Kakamega for the reason that at the said time the statements of defence had been struck out. Counsel added that no witness statements, bundle and list of documents had been filed at the time the two applications for striking out the statements of defence were filed. It was therefore not apparent that the witnesses would be from Kakamega. It was argued for the respondents that if they will be required to take witnesses to Kakamega, it will be very expensive for them, for the reason that they are based in Mombasa and the explanation to part c of Section 15 of the Civil Procedure Act applies.

9. Counsel submitted that directions had not been given as to the hearing of the cases as at the time the statements of defence were struck out. He relied on the provisions of Article 159(2)(b) of the Constitution and Section 1A of the Civil Procedure Act which stipulates for expeditious hearing of cases.

10. In responding to the foregoing, Mr. Sifuma stated that the appeal herein is against the striking out of the statements of defence, not against the dismissal of the application to transfer the cases to Kakamega.

## ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If the Hon. Magistrate had jurisdiction to hear Mombasa CMCC No. 373 of 2016 and Mombasa CMCC No. 374 of 2016; and
- (ii) If the Hon. Magistrate erred by striking out the appellants' statements of defence.

11. This court bears in mind the duty of the 1<sup>st</sup> appellate court which was aptly explained by Madan J.A. (as he then was), in **United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd vs East African Underwriters (Kenya) Ltd [1982-88] 1 KLR 639**, as follows:-

*“The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken into account; fourthly, that he failed to take account of considerations of which he should have taken into account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”*

12. The Magistrate's Courts Act, 2015 is silent on the issue of territorial jurisdiction. In determining the above issue, recourse has to be had to the provisions of Section 15 of the Civil Procedure Act, which provides, as follows:-

*“Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction –*

*(a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or*

*(b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or*

*(c) the cause of action, wholly or in part arises.”*

13. The 3<sup>rd</sup> explanation stemming from the above provisions states that:-

*“In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely –*

*(i) The place where the contract was made;*

*(ii) The place where the contract was to be performed or the performance thereof completed;*

*(iii) The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable.”*

14. The plaint in Mombasa CMCC No. 373 of 2016 was filed on 1st March, 2016. Paragraphs 2 and 3 thereof depict that the claim arose from a contract procured by the appellant for services of the respondent, which is demanding an outstanding amount of KShs. 1,197,200/=.

15. The plaint in Mombasa CMCC No. 374 of 2016 was similarly filed on 1<sup>st</sup> March, 2016. The claim is based on contract as in paragraph 3, the respondent avers that its claim against the appellant is for the sum of KShs. 2,125,000/= being the outstanding amount on account of construction works and services rendered to the appellant by the respondent between December, 2014 to April, 2015 or thereabouts.

16. In the two suits, the 2<sup>nd</sup> paragraph of each plaint describes the appellant as the County Government based in Kakamega. The appellant in its two statements of defence admitted the descriptive parts of the said plaints.

17. In this instance, when the Hon. Magistrate found that the Magistrates' Courts Act, 2015 has no provisions for territorial jurisdiction, he should have resorted to the provisions of Section 15 of the Civil Procedure Act to establish if the cases had been properly filed in the Mombasa Chief Magistrate's Court. The said court however conferred jurisdiction upon itself to hear the two cases by invoking the provisions of Section 3 of the Magistrates' Courts Act. The provisions of Section 15 of the Civil Procedure Act were totally in favour of the

appellant when it raised the issue of lack of jurisdiction, before the subordinate court. It is my finding that the Hon. Magistrate erred in law, in view of the clear provisions of Section 15 of the Civil Procedure Act.

18. An invocation of Section 3 of the Magistrates' Courts Act or the provisions of Article 159(2)(b) of the Constitution requiring dispensation of justice without delay, would not confer jurisdiction on the Hon. Magistrate to hear the cases filed in Mombasa. The pleadings in the two cases leave no room for speculation that the causes of action arose from contracts. It is also evident that the appellant carries on business in Kakamega, where its offices are located. The appellant herein did not acquiesce to have the cases filed in Mombasa. The respondents did not seek leave of the court to file the cases in Mombasa. It is evident that the cause of action arose in Kakamega where the contract was made and was to be performed. The payment for due performance of the contract was to be made in Kakamega. I therefore hold that in light of all the foregoing factors, the Hon. Magistrate lacked territorial jurisdiction to hear Mombasa CMCC No. 373 of 2016, Ufanisi Freighters (K) Limited vs County Government of Kakamega and Mombasa CMCC No. 374 of 2016, Trawlers Limited vs County Government of Kakamega.

19. In the case of **The owners of the Motor Vessel "Lilian S" vs Caltex Oil (Kenya) Ltd** 1989 KLR 1, the court stated as follows:-

***"Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect to the matter before it the moment it holds the opinion that it is without jurisdiction...."***

20. The Hon. Magistrate relied on the case of **Ruth Gathigia Kamunya and Another vs George Kimani** [2015] eKLR to arrive at his decision. The said authority addressed a case that was filed in the year 2014 and the applicable law then on the issue of territorial jurisdiction of Magistrates was the repealed Magistrates' Courts Act. The said authority can therefore only apply to cases which were filed before 2<sup>nd</sup> January, 2015. The *ratio decidendi* in the said authority was as such erroneously applied to the circumstances of the cases that were before him which were filed on 1<sup>st</sup> March, 2016.

21. On the issue of striking out of the statements of the defence filed in the two cases, the respondents filed two applications by way of Notice of Motion. These were filed on 19<sup>th</sup> of May, 2016. The applications sought orders for striking out of the statements of defence dated 5<sup>th</sup> April, 2016 for disclosing no reasonable grounds of defence and/or facts constituting a plausible defence.

22. The appellant filed separate replying affidavits in respect to the two applications through Jack Bigambo, the Legal Officer of the County Government of Kakamega, to oppose the said applications.

23. He deposed in paragraph 3 of the replying affidavits that the respondents at the time of serving the complaints and summons on the appellant did not serve the requisite documents in support of the suit other than merely mentioning those in its list of documents. He deposed in paragraph 4 of the said affidavit that failure by the respondents to identify the type, nature and identity of the alleged contract in question placed the appellant in an awkward position and in particular, of tracing the documents alleged to have formed the contract in issue.

24. He further stated that due to the nature and set up of the appellant's numerous departments, a one by one scrutiny of the various departmental documents was required. Attached to the said affidavits were letters marked as exhibit JB1, which the appellant's Advocates on record wrote to the respondents' Advocates on 16<sup>th</sup> March, 2016 asking for the complete complaints as filed in court and the respondents' bundles of documents as enlisted in their lists of documents dated 1<sup>st</sup> March, 2016 but to which lists, no documents were attached. The letters further stated that it was imperative for them to have complete pleadings and accompanying documents to enable them to put in appropriate responses.

25. The said deponent averred that it was not until 29<sup>th</sup> March, 2016 when their Advocates received the documents requested for, from the respondents' Advocates. He further stated that the documents apart from mentioning about construction of a water project at Sitavita, did not include a copy of the contract in issue. The said affidavit goes on to explain that the statements of defence were filed as a search for the relevant documents was undertaken.

26. The respondents' deponent in paragraph 2 of his affidavits deposed that although the complaints were plain and obvious, the statements of defence filed disclosed no reasonable grounds of defence and they were only meant to delay, prejudice and embarrass fair trial as they amount to mere denials despite the respondents' claims. He attached to the affidavit in respect to Mombasa CMCC No. 373 of 2016, copies of bill of quantities, local service order and a copy of invoice and copies of 3 letters to the appellant. He attached to the affidavit in respect to Mombasa CMCC No. 374 of 2016, copies of the local service order and a copy of a completion certificate, a demand letter, a statement of account, an invoice and a reply to the demand letter.

27. The Hon. Magistrate on analyzing the statements of defence filed on 8<sup>th</sup> April, 2016, and particularly paragraphs 3, 4 and 5, found that they were mere denials of the respective paragraphs of the complaint. He relied on the provisions of Order 2 rule 15 of the Civil Procedure Rules in striking out the statements of defence filed in both cases.

28. It is my considered view that if the Hon. Magistrate had considered the depositions contained in the appellants' affidavits and the letters annexed to the said affidavits, in opposition to the applications seeking orders for striking out of the statements of defence, he would have exercised his discretion judiciously. The appellant's affidavits disclosed the difficulties caused by failure on the part of the respondents to serve them with witness statements and bundles of documents in support of the cases the subject of this appeal. This fact is well captured in the letters addressed to the respondents dated 16<sup>th</sup> March, 2016 wherein the appellant requested for copies of the said documents. The documents that were however supplied to the appellant were not adequate thus the filing of the statements of defence on 8<sup>th</sup> April, 2016, without full particulars.

29. In **Giciem Construction Company vs Amalgamated Trade and Services** [1983] KLR 186, the court stated:-

***“As a general principle, where a defendant shows that he has a fair case for defence or reasonable grounds for setting up a defence or even a fair probability that he has a bona fide defence, he ought to have leave to defend. Leave to defend must be given unless it is clear that there is no real substantial question to be tried; that there is no dispute as to the facts or law which raises a reasonable doubt that the plaintiff is entitled to judgment.”***

30. In the two cases the subject of this appeal, the appellant did explain the circumstances under which they drafted and filed the statements of defence on record. In any event, the appellant's deponent in the 2 affidavits stated that they would have amended their statements of defence, with leave of the court.

31. I have considered the submissions of the Counsel and the facts that were laid out before the Hon. Magistrate and the applicable law. It is my finding that the orders for striking out of the statements of defence should not have been granted in the face of the depositions by the appellant. In making the orders herein, I have also considered the fact that the appellant had made an application before Justice P.J. Otieno for transfer of the two cases to Kakamega. The application was however dismissed as by then, the Hon. Magistrate had already struck out the statements of defence and there was nothing capable of being transferred.

32. This court has found that the Hon. Magistrate had no jurisdiction to hear the cases in issue and that he exercised his discretion wrongly by striking out the statements of defence. I therefore allow the appeal in its entirety. I hereby make the following orders:-

(i) That Mombasa CMCC No. 373 of 2016, Ufanisi Freighters (K) Limited vs County Government of Kakamega and Mombasa CMCC No. 374 of 2016, Trawlers Limited vs County Government of Kakamega, are hereby reinstated for hearing;

(ii) That the above two cases are hereby transferred to Kakamega Chief Magistrate's Court for hearing and final disposal;

(iii) The Executive Officer, Mombasa Law Courts will ensure that the said files are expeditiously forwarded to the Executive Officer, Kakamega Law courts;

(iv) The appellant is granted the costs of the two applications in the court below and of the appeal herein.

**DELIVERED, DATED and SIGNED at MOMBASA on this 26th day of January, 2018.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Mr. Masila holding brief for Mr. Sifuma for the appellant

No appearance for the respondents

Mr. Oliver Musundi - Court Assistant