



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 221 OF 2007**

**ERDERMANN COMPANY LIMITED.....APPELLANT**

**- V E R S U S -**

**NYERI MOTORS SERVICES LTD.....1<sup>ST</sup> RESPONDENT**

**MORRIS G. NJAGE.....2<sup>ND</sup> RESPONDENT**

***(An appeal from the ruling and orders of Hon. Mrs. S. Muketi Ag. SPM in Nairobi CMCC No. 5000 of 2006 delivered on 1<sup>st</sup> March 2007.)***

**JUDGEMENT**

1) Erdemann Co. Ltd, the appellant herein, filed a material damages claim against Nyeri Motor Services Ltd and Morris G. Njage, the 1<sup>st</sup> and 2<sup>nd</sup> respondents respectively. It is alleged that the appellant's motor vehicle registration no. KAP 728T was knocked by the respondent's motor vehicle reg. KWN 968 on 18.6.2003 along Embu-Runyenjes road at Gakwegori area causing the appellant's motor vehicle extensive damage. The appellant filed an action before the Chief Magistrate's Court, Nairobi claiming to be paid

a) *Ksh.1,233,620 as a special damage*

b) *Costs*

c) *Interest*

2) The respondents filed a joint statement of defence to deny the appellant's claim. The respondent's further filed a notice of preliminary objection arguing that the trial court lacked the territorial jurisdiction to hear and determine the action. The issue was taken up Hon. Muketi, learned Senior Principal Magistrate who in the end upheld the preliminary and proceed to strike out the entire suit.

3) Being dissatisfied, the appellant filed this appeal and put forward the following ground in its memorandum:

***1. The learned magistrate erred in law in holding that the magistrate's court in Milimani did not have jurisdiction to hear and determine this case.***

***2. The learned magistrate erred in law in failing to consider the evidence before the court that by filing an unconditional memorandum of appearance, the 2<sup>nd</sup> defendant had submitted to the jurisdiction of the court in this suit and hence it was not open to the 2<sup>nd</sup> defendant to abrogate or annul the unconditional memorandum of appearance by which he submitted to the jurisdiction of the honourable court by seeking to have the suit dismissed.***

***3. The learned magistrate erred in law and in fact by failing to find that there was acquiescence and/or submission to the jurisdiction of the court by the defendants.***

***4. The learned magistrate erred in law and in fact by failing to find that there was concurrent jurisdiction in Nairobi, Embu and Nyeri subordinate courts and where there is concurrent jurisdiction it was open to the plaintiff to institute this suit in either of the court that had jurisdiction.***

***5. The learned magistrate erred in law and in fact that by failing to find the plaintiff's suit was a claim for substantial amount of money being kshs.1,233,620.00 and it would be a denial of justice to the plaintiff to have the suit dismissed or struck out without being tried on its merit.***

*6. The learned magistrate erred in law by declining to be bound by an authority of the Court of Appeal of Kenya being Civil Appeal No. 39 of 1980 Kanti & Company Limited –vs- South British Insurance Company Limited Nairobi (1981) KLR submitted to her by the counsel on record for the appellant.*

*7. The learned magistrate erred in law by finding that Section 15 (c) of the Civil Procedure Act must have been intended to resolve situations where subsections (a) and (b) which are the first choices are inapplicable and unresolved.*

*8. The learned magistrate erred in law in finding that the preliminary objection by the 2<sup>nd</sup> defendant carried the day, upholding the same and striking of the suit which striking off is not provided for under the Section 15 and 16 of the Civil Procedure Act, by which provision the 2<sup>nd</sup> defendant application had based his notice of motion.*

*9. The learned magistrate failed to find and hold that on a balance of convenience the court in which this suit was filed had jurisdiction to hear and determine this suit.*

*10. The learned magistrate erred in law by granting an order striking the suit which order had not been sought or applied for by the applicant in the notice of motion dated 16<sup>th</sup> January 2007.*

*11. The learned magistrate erred in law by failing to appreciate and be bound by the law regarding the place of suing and the power of court to transfer a suit from one court to another as provided under Sections 14, 15, 17, 18 and 11 of the Civil Procedure Act Cap. 21 of the Laws of Kenya rather than strike out.*

4) When the appeal came up for hearing, learned counsels recorded a consent order to have the appeal disposed of by written submissions. I have re-evaluated the arguments that were made before the trial court. I have also considered the rival submissions. It is the submission of the appellant that the suit was wrongly struck out because the Nairobi Chief Magistrate's Court had territorial jurisdiction to hear and determine the suit. The appellant further argued that it had a choice to make between Nairobi and Nyeri or Embu courts. In other words the appellant was of the submission that the three courts had concurrent jurisdiction hence none had exclusive jurisdiction to hear the matter. It was also pointed out that Morris Njage the 2<sup>nd</sup> respondent operates a law firm in Embu town hence the suit could still be filed in Embu Law Court. The other interest which was put forward by the appellant is that since the respondents entered an unconditional appearance, the respondents submitted to the jurisdiction of the Nairobi Chief magistrate's Court hence they cannot be heard to challenge jurisdiction. The 1<sup>st</sup> respondent was of the submission that the cause of action having arisen along the Embu-Runyenjes road, the nearest court of law would have been Embu or Meru Law Courts. It is pointed out that the 2<sup>nd</sup> respondent has a branch office in Nairobi with its headquarters in Nyeri in Nyeri county. It was submitted that in the circumstances that the appellant had two options either to file the suit in Nyeri or in Embu Law Courts. The 1<sup>st</sup> respondent urged this court to dismiss the appeal.

5) The 2<sup>nd</sup> respondent is of the submission that the right court to file the action was Runyenjes and not Nairobi since the cause of action arose within the territorial jurisdiction of the aforementioned court. The respondent concurred with the decision of the trial magistrate.

6) Having re-evaluated the material placed before the trial court, it is apparent that it is not in dispute that the 1<sup>st</sup> respondent carries on business in Nairobi apart from Nyeri county. The plaint expressly states that the defendants (now respondents) are sued jointly and severally. The learned Senior Principal Magistrate also noted in her ruling that the 1<sup>st</sup> respondent carries on business in Nairobi. A reading of Section 14 as read together with Section 15 of the Civil procedure Act will show that the appellant was given the discretion to choose the place to sue depending on where the cause of action arose or the residence or place of business of the defendant. In the circumstances, I agree that the learned Senior Principal Magistrate fell into error to strike out the suit. On this singular ground the appeal is allowed.

7) In the end, the order striking out the suit is set aside. The suit is reinstated and to be fixed for hearing on priority basis.

8) In the circumstances of this appeal, a fair on costs is to direct that the same should await the outcome of the suit.

**Dated, Signed and Delivered in open court this 31<sup>st</sup> day of May, 2018.**

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the Appellant

.....for the Respondents