REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 387 OF 2012

LAURA ELISAMA...APPELLANT

VERSUS

DUKE OMWENGA KEANA.................................RESPONDENT

JUDGEMENT

1. Laura Elisama the Appellant herein filed a suit against Duke

Omwenga Keana, the Respondent herein before the Chief Magistrate's court, Nairobi vide the plaint dated 16th June 2010 whereof she sought for judgment in the sum of USD 20,700/=. The Respondent filed a defence denying the Appellant's claim. The Respondent alsoraised a preliminary objection by stating that the suit was fatally defective in that Kenyan courts had no jurisdiction to entertain the suit. The preliminary objection was argued before Hon. Boaz Olao who in the end upheld the preliminary objection. The then learned chief magistrate stated that the Kenyan court had no jurisdiction to hear and determine the suit and proceeded to stay the same.

2. The appellant filed an application to have the aforesaid orders

reviewed and set aside. Honourable Obulitsa, learned senior Principal magistrate heard the application and had the same dismissed. The dismissal order prompted the Appellant to prefer this appeal.

3. On appeal, the Appellant put forward the following ground in

her memorandum of Appeal

1. ***The learned magistrate erred in holding that there was no error apparent on the face of the Ruling of Honourable B. N.Olao, Chief Magistrate, of 19th December, 2011 to warrant a review.***
2. ***The learned magistrate erred in holding that the Order of 19th December, 2011 could not be the subject of a review.***

When the Appeal came up for hearing, learned counsels

recorded a consent order to have the same disposed of by oral

submission.

4. It is the submission of appellant's advocate that the learned

senior principal magistrate erred when he failed to find that there was an error apparent on record which necessitated the order issued by Hon. Olao to be set aside by review. It is argued that Hon. Obulutsa failed to appreciate the input of the provision of Section 15 of the Civil Procedure Act which gives the Resident magistrate's court country-wide jurisdiction. The Respondent is of the view that the aforesaid issue could only be a ground of appeal and not an issue to be dealt with in an application for review.

5. I have carefully perused the ruling delivered by Hon. Olao and

it is apparent that the then learned chief magistrate formed the opinion that the contract between the Appellant and the Respondent was entered into in Juba, southern Sudan. He also stated that the parties must have intended to have it executed in Southern Sudan. Honourable Olao further stated that unlike the High Court the subordinate court has limited jurisdiction hence it had no territorial jurisdiction to hear and determine the suit.

6. I have already stated that the Appellant and the Respondent

appeared before Hon. Obulutsa beseeching him to review Hon. Olao's decision. The recorded proceedings indicates that the Appellant had pointed out in her arguments that the Respondent was residing in Eldoret where he was served with court papers hence the court hadjurisdiction to entertain the matter. The Appellant's motion dated 11.05.2011 was placed before Hon. Obulutsa without the Respondent's response. Hon. Obultsa formed the opinion that Hon. Olao had considered the law and the pleadings before making his decision hence there was no error apparent on the face of record. This decision provoked the filing of this appeal.

7. After a careful consideration of the rival submissions and the

material placed before me, one main question which has arisen for the determination of this court is whether or not there was an issue capable of being set aside by review. The appellant has complained that the learned chief magistrate failed to properly interpret the provisions of section 15 of the Civil Procedure Act. It also agreed the Appellant had alluded that the Respondent resided in Eldoret and that the Plaint states that the agreement was executed in Nairobi. The main ground relied upon by the Appellant is that there is an error of law apparent on the face of the record. What is clear in my mind is that the court will review its decision whenever it considers that it is necessary to correct an evident error or omission. It is interesting to discover the circumstances under which Hon. Olao came to hear and determine the notice of the preliminary objection. The Appellant had initially filed the Notice of Motion dated 11th May 2011 in which she applied for interalia judgement on admission or in the alternative for an order striking out the defence for being scandalous and frivolous. In response to the motion the Respondent raised the notice of preliminary objection which gave rise to Honourable Olao's decision.

8. The basis of Hon. Olao's decision to rule that the agreement

between the parties was executed in Juba, Southern Sudan was a copy of the agreement annexed to the affidavit of Laura Elisama sworn and filed in support of the motion dated 11.5.2011. The question is, where is the omission or error which is alleged to be apparent?

9. According to Hon. Obulutsa, Hon. Olao, the then learned chief

magistrate had considered the law and pleadings before

arriving at his decision. The question is, did Hon. Olao look at

the pleadings? It would appear from the recorded proceedings

and ruling that he did not give due attention to the pleadings.

This, in my view is a serious error which is obvious and

apparent on the face of the record.

10. It is therefore clear that Hon. Obulutsa erred and therefore

came to the wrong conclusion. The learned senior principal

magistrate erred when he dismissed the motion for review on the basis that the appellant should have filed an appeal instead of an application for review. This being the first appellate court, I am enjoined by law to re-evaluate the case that was before Hon. Olao. I have already stated that Hon. Olao did not give much attention to the pleadings but instead he heavily relied on the copy of the agreement attached to the appellant's affidavit filed in support of the motion dated 11.05.2011. I have perused the plaint and the defence. In paragraph 2 of the plaint dated 16.6.2010 the Appellant avers that the respondent is employed by the Truth Justice & Reconciliation Commission. In paragraph 3, the Appellant further avers that she entered into an agreement with the Respondent in Nairobi in which she advanced the Respondent USD 20,700. In his defence dated 9th August 2010, the Respondent denied being an employee of the Truth, Justice and Reconciliation Commission. The Respondent did not specifically deny in his defence the Appellant's assertion that the agreement was executed or signed in Nairobi. It was not possible at that stage to confirm whether the agreement in question was signed in Nairobi or in Juba. It was therefore erroneous for the learned chief magistrate to hold that the agreement was signed in Juba and yet the pleadings did not say so. The other issue which was glaringly clear before the court below is the fact that the respondent in paragraphs 6 and 7 of the defence, specifically denied having entered into an agreement or being indebted to the Appellant. In essence he denied the existence of any agreement between him and the Appellant. The question which begs answers therefore is, on what basis did the learned chief magistrate conclude that there was an agreement which was signed in Southern Sudan to be performed in Juba yet the facts are disputed?

11. With great respect, that was an erroneous decision which

must be interfered with. The evidence or facts the learned chief magistrate relied upon to determine the preliminary objections are still disputed.

12. In the end, I find the appeal to be well founded. It is

allowed. Consequently, the order issued by Hon. Obulutsa

on 28th June 2012 dismissing the 26th April 2012 is aside and is substituted with an order allowing the aforesaid motion as prayed. The plaintiff's motion dated 11th May 2011 is restored to be fixed for interpartes hearing before a competent magistrate other than Hon. Bulutsa.

13. Costs of the appeal to be paid by the Respondent.

Dated and delivered in open court this 19th day of June, 2015

J. K. SERGON

JUDGE

In the present of:

………………………………………. for the Plaintiff

……………………………………….for the Defendant