



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 182 OF 2006

WILSON TSUMA EZEKIEL 1ST APPELLANT

MICHAEL MWANG'OMBE 2ND APPELLANT

FRANKLIN SALIM KONDI 3RD APPELLANT

-VERSUS-

JOYCE LENGARESPONDENT

(Being an appeal against the Decree of Hon. T. Mwangi – SRM at Mombasa in SRMCC No. 2145 of 2003 delivered on the 25th July, 2006)

JUDGMENT

INTRODUCTION

1. Appellant filed in Mombasa Senior Resident Magistrate's Court Civil Suit No. 2145 of 2003 against the Respondent. Appellants' claim in that Court was for declaration that the suit property, that is 3 acres of land Plot NO. 731, Ngerenya Settlement Scheme, Kilifi District, was sold to the Respondent by Appellants' father in breach of the trust in their favour. Appellants prayed for a mandatory injunction compelling Respondent to surrender to Appellants the 3 acres upon refund of purchase price of Kshs. 75,000/-.

2. Respondent filed a Defence and Counterclaim denying the claim and pleading-

“The Defendant (Respondent) states that the suit property is situated in Kilifi District and this Honourable Court does not have jurisdiction to try and determine this suit.”

3. That plea led the Appellants to amend their Plaint where they pleaded-

“The suit property is situated within local limits of the jurisdiction of this Honourable Court.”

4. Respondent did not let that matter rest there. She filed a Notice of Preliminary Objection dated 13th July 2005. Although that Objection had four grounds the Learned Magistrate who entertained it only made a determination on one ground, that is-

“That this Honourable Court lacks Territorial jurisdiction to entertain this suit under Section 12 of the Civil Procedure Act Cap 21.”

5. The Learned Magistrate upheld that objection and proceeded to strike out the suit. It is that striking out that has provoked this appeal.
6. The submissions presented to the Learned Magistrate in support of the Objection by the Learned Counsel for the Respondent was that since the suit property was situated in Kilifi District it ought to have been filed in Kilifi Court and that the Mombasa Senior Resident Magistrate Court had no jurisdiction in accordance with the provisions of Section 12 of the Civil Procedure Act Cap 21. Learned Counsel for Appellant responded by arguing that the Objection was not based on points of Law. Although Learned Counsel relied on two cases I could not see copies of them either in the lower Court’s file or in the Record of Appeal.
7. The Learned Magistrate ruled that since the property was situated in Kilifi District and because there is a Senior Resident Magistrate’s Court in Kilifi the suit should have been filed in Kilifi. The suit was struck out.
8. Appellant presented the following Grounds of Appeal-
 - a. **The Learned Magistrate erred in Law and in fact in failing to consider that the suit could still be transferred to Kilifi Court for hearing.**
 - b. **The Learned Magistrate erred in Law and in fact in failing to appreciate the Law regarding jurisdiction properly.**
 - c. **The Learned Magistrate erred in Law and in fact in failing to consider that the Resident Magistrate’s Court has territorial jurisdiction in the entire Republic.**
 - d. **The Learned trial Magistrate erred in Law and in fact in relying on a Preliminary Objection that was in itself improper.**
 - e. **The Learned Trial Magistrate erred in Law and in fact in failing to consider the arguments put forward by the Plaintiff’s Counsel.**
 - f. **The Learned Magistrate erred in Law and in fact in striking out the Plaintiff’s suit.**

APPELLANTS’ SUBMISSIONS

9. In their submissions Appellants faulted the Learned Magistrate for failing to consider the provisions of Section 15 of the Civil Procedure Act Cap 21 which provides that a suit may be instituted where the Defendant resides. In this case Appellants stated that it is obvious from the Defence filed by Respondent that the Respondent resides and works in Mombasa. That accordingly the Mombasa court had jurisdiction.
10. Further Appellant faulted the striking of their suit which they stated was done without consideration of Section 3(1) and (2) of the Magistrate’s Court Act Cap 10. That Section is in the following terms-
 - i. **There is hereby established the Resident Magistrate’s Court, which shall be a Court Subordinate to the High Court and shall be duly constituted when held by a Chief Magistrate, a Senior Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate.**
 - ii. **The Resident Magistrate’s Court shall have jurisdiction throughout Kenya.**
11. Appellants Learned Counsel submitted that the Learned Magistrate should also have been guided by the overriding principle under Sections 1A and 1B of Cap 21 and also by Article 159(2) (d) of The Constitution of Kenya and thereby should not have struck out the suit. The one answer to that submission is that the suit was struck out on 25th July 2006. By then the overriding principle in Cap 21 had not been enacted and The Constitution of Kenya, 2010 had not been promulgated. The Learned Magistrate could not therefore have been guided on those provisions.

RESPONDENT'S SUBMISSIONS

12. Respondent submitted that it was the Kilifi Magistrate's Court that had territorial jurisdiction on the case and further submitted that since the Mombasa Magistrate Court had no jurisdiction it could not have transferred a suit file without jurisdiction. Respondent on this submission relied on the case **TIMSALÉ KENYA LIMITED –Vs- RONALD NGALA OMOUKA (2010)eKLR** where the Kisumu High Court held-

“3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.

4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.”

ANALYSIS

13. I will proceed to consider all the grounds of appeal in unison because they relate to the finding by the Learned Magistrate that Mombasa Magistrate's Court had no jurisdiction to hear a matter where the land concerned is situated in Kilifi.

14. Although Appellants submitted that Section 15 of Cap 21 was relevant I beg to differ with that submission. When the suit involves property (subject matter) the relevant Section is Section 12. My finding that Section 15 is not applicable here is reinforced by the margin note to that Section which states-

“Other suits to be instituted where Defendant resides or cause of action arises.”

The operative words are **“other suit”** The margin note of

Section 12 provides-

“Suit to be instituted where subject matter situate.”

Section 12 is in the following terms-

12. Suit to be instituted where subject matter situate

Subject to the pecuniary or other limitations prescribed by

any law, suits -

(a) for the recovery of immovable property, with or without rent or profits;

(b) for the partition of immovable property;

(c) for the foreclosure, sale or redemption in the case of a

mortgage of or charge upon immovable property;

**(d) for the determination of any other right to or interest in
immovable property;**

(e) for compensation for wrong to immovable property;

(f) for the recovery of movable property actually under distraint

or attachment, where the property is situated in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situated:

Provided that a suit to obtain relief respecting, or compensation for

wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.” (underlining mine)

15. That Section requires, when the subject matter is immovable property, that the suit be filed within the local limits of where the property is situated. In this case the Appellants in their plaint pleaded the property was in Kilifi. But it is important to note that there is a proviso to that Section. The proviso is to the effect that where what is sought requires personal obedience of the Defendant **(Respondent)** the suit can be filed either within the local limits of where the property is situated or local limits where the Defendant resides. In this case Respondent admitted the description given of her residence in the Plaint, which was Mombasa.

16. In my view the Appellants prayer in their Plaint required the personal obedience of the Respondent who was resident in Mombasa. The Mombasa Magistrate's Court therefore had jurisdiction by virtue of the proviso of Section 12.

17. Appellant did submit that the Preliminary Objection should have been rejected by the Learned Magistrate because it was not based on Law. The Locus Classicus on Preliminary Objection is the case **MUKISA BISCUIT CO. –Vs- WESTEND DISTRIBUTORS LTD (1969)E. 696** where Law, J.A stated-

“So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of the 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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

And at page 701, letter B, Sir Charles Newbold, P. said-

“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.”

18. In my view the Objection raised by the Respondent was based on a pure point of Law and all the parties were in agreement on the facts, that is that the suit property was based in Kilifi. I do therefore reject Appellants submission in that regard.

19. Further I reject Appellants reliance on Section 3(1) and 2 in Cap 10. Although that Section provides that the Resident Magistrate has jurisdiction throughout Kenya specific jurisdiction on certain claims does depend on the provisions of the Law the claim relates to. Accordingly that reliance is rejected.

CONCLUSION

20. In view of my finding the judgment of this Court is as follows-

- i. **The Appeal succeeds and accordingly the order striking out Mombasa SRMCC No. 2145 of 2003 is hereby set aside and is substituted with order dismissing the Preliminary Objection dated 13th July 2005 with costs to the Appellants.**
- ii. **This case shall be returned to Mombasa Chief Magistrate's Court for trial and such trial shall be by any other Magistrate other than Hon. T. Mwangi (SRM).**

DATED and delivered at MOMBASA this 28TH day of AUGUST, 2014.

MARY KASANGO

JUDGE