



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Appeal 126 of 2006

ALI NJENGA.....APPELLANT

-AND-

C.I.S. HAULIERS LIMITED.....RESPONDENT

(Being an appeal from the Ruling of Principal Magistrate P. Ndung'u dated 27th July, 2006 in CMCC No.1563 of 2005 at Mombasa Law Courts)

JUDGMENT

The subject of the Ruling leading to this appeal, was the defendant's Chamber Summons of **14th June, 2006**, which was brought under Orders XXI and IXA of the earlier edition of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya).

The substantive issues in the said application were:

(i) THAT the *ex parte* judgment entered for the plaintiff against the defendant herein on **25th October, 2005** and all the consequential Orders be set aside;

(ii) THAT the defendant be granted leave to file its defence in terms of the draft defence annexed.

The learned Principal Magistrate, after hearing both sides, rendered her Ruling of **27th July, 2006** in the following terms:

*"I heard both parties and have carefully considered the law under which the application is brought as well as the affidavits sworn by the parties. Having done so I order that [the] ex parte judgment entered for the plaintiff against the defendant on **25th October, 2005** and all consequential Orders be and [are] hereby set aside. This, however, is subject to the condition that the defendant deposit a substantial part of the decretal sum, namely Kshs.500,000/= into a joint interest-earning account [in the names] of the Advocates of both parties. The said sum to be deposited within 30 days of this Order. The main reason for*

this is that it appears from the submissions made before me that the defendant deliberately tried to evade Court process and it was not until [the] issuance of [a] Notice to Show Cause that the defendant has woken up.

“[Secondly], the reasons advanced for delay, namely that the defendant does not read newspapers and did not see the adverts relating to this matter, are strange [especially] coming from a business person, and... I find [that] such is really not a defence. Orders sought granted in the terms above-stated, i.e. to say, *ex parte* judgment entered for the plaintiff against defendant and all consequential Orders be and are hereby set aside subject to the defendant depositing within 30 days the amount of Kshs.500,000/=, being part of the decretal sum, in a joint account...[Thrown]-away costs also to the plaintiff/respondent.”

The defendant disagrees with the foregoing ruling, and moves this Court on appeal, contending as follows:

- (i) the lower Court erred in law and in fact, in failing to uphold the defendant’s submissions as well as the contents of the supporting affidavit and the further affidavit;
- (ii) the learned Magistrate erred in both law and fact, in failing to appreciate that the interlocutory judgment as well as the consequential proceedings had proceeded before a Court devoid of jurisdiction;
- (iii) the learned Magistrate erred in law and in fact in failing to appreciate that the previous proceedings by the plaintiff were of no consequence for want of jurisdiction;
- (iv) the learned Magistrate erred in law and fact, by not accepting the defendant’s submissions and by not setting aside the *ex parte* judgment *ex debito justitiae*;
- (v) the learned Magistrate erred in both law and fact by imposing conditions on the defendant requiring the depositing of a substantial amount of money in a joint interest-earning account.

Learned counsel, **Mr. Kamau**, for the appellant, submitted that the suit within the ambit of which the Ruling in question was made, was for the liquidated amount of Kshs.800,000; but the *ex parte* Judgment was entered by **Mr. T. Gesora**, Resident Magistrate on **25th October, 2005**, at a time when he had no jurisdiction to hear a matter of such a pecuniary value.

Counsel submitted that entries on the record should have indicated to the Principal Magistrate that the *ex parte* Judgment in question had been entered without jurisdiction: for another Principal Magistrate, **Mrs. Jaden** had, *suo motu*, recorded this fact.

On the occasion of the mention before the Principal Magistrate, **Mrs. B.T. Jaden** on **14th June, 2006**, **Mr. Kamau**, Advocate, stated thus: “The defendant has come across a newspaper advertisement requiring him to attend Court tomorrow to show cause why he should not be committed to civil jail in satisfaction of the *ex parte* Judgment herein...The claim is for Kshs.800,000/=”. The learned Principal Magistrate certified the matter as urgent and then recorded:

“Noted proceedings so far and the entry of the *ex parte* judgment was done by a Court without jurisdiction. Stay Orders to issue till hearing *inter partes*.”

Counsel submitted that, by s.5(1) of the Magistrates’ Court Act (Cap.10, Laws of Kenya), the pecuniary jurisdiction of a Resident Magistrate is fixed at Kshs.300,000/=. And s.4 of the Civil Procedure Act (Cap.21, Laws of Kenya) provides that:

“Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject matter of which exceeds the pecuniary limits, if any, of its ordinary jurisdiction.”

Counsel proceeded to urge that, for want of jurisdiction, “*the ex parte judgment was null and void and no action could be taken to give implementation to such a judgment*”; and consequently, it was submitted that the *ex parte* Judgment and all attendant Orders should have been nullified for being contrary to law.

Learned counsel, **Ms. Abir** for the respondent, however, contended that “*endorsing the request for Judgment and entering interlocutory Judgment was merely an administrative duty which does not go down to the subject-matter of the suit*” – and so the only relevant consideration is that “the suit was filed in a Court [of] competent jurisdiction.”

Counsel submitted that the impugned *ex parte* Judgment had validity, in the context of the broad provision of s.3A on the Civil Procedure Act (Cap.21, Laws of Kenya) which provides that:

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.”

Jurisdiction is a critical determinant of the competence of a Court to enter upon and determine such matters as may come up for judicial resolution. The *judicial function* is a special public function, as it cannot be arrogated by any arbiter; it must have been conferred as specified in **the Constitution**; it is an element in the sovereign power of the people, donated to the Judiciary by the *express terms* of the Constitution [**Constitution of Kenya, 2010**, Article 1(3)(c)]. This principle is elaborated in Article 159(1) of the Constitution, which stipulates:

“Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.”

Just as no *judicial organ* exists outside the Constitution, it is only the Constitution that donates to such organs the jurisdiction, which is defined in the *Concise Oxford English Dictionary, 11th ed (Rev.) [2009]* as “**the official power to make legal decisions and judgments.**”

Now, specifically in reference to “*Subordinate Courts*” (i.e., Courts below the High Court), the Constitution is clear on *jurisdiction*; Article 169(2) provides that:

“Parliament shall enact legislation conferring jurisdiction, functions and powers on [the Subordinate Courts].”

In view of the *specific terms* of the Constitution, on the question of jurisdiction, I am not in agreement with the submission of learned counsel that:

“...we humbly submit that the Magistrate’s Courts Act (Cap.10, Laws of Kenya) establishes Magistrate’s Courts in Kenya to declare jurisdiction and provide for the procedure of such Courts....”

The critical relevance of jurisdiction, in the assumption of decision-making by a Court, was exceptionally typified by the late *Nyarangi, JA* in *Owners of the Motor Vessel “Lilian S” v. Caltex Oil (Kenya) Ltd* [1989] KLR 1 in these words (p.14):

“Jurisdiction is everything. Without it a Court has no power to make one more step.”

It is not, in my opinion, possible to cure the *ex parte* Judgment made by the learned Resident Magistrate on **25th October, 2005** when he, quite clearly, lacked jurisdiction. Jurisdiction is a specific factor in all respects, and a Court either has it, or it doesn’t. All situations of a dispute or contest between parties, of the kind that requires formal intervention, are public social issues for which the Constitution has established a mode of redress. The Court, as the instrument of this redress, is a formal and official device which cannot be appropriated by any private person; and those, such as Judges and Magistrates, who must provide redress, only do so on the basis of *donated powers*; and these powers are conveyed by the agency of *jurisdiction*.

Learned counsel brought an issue of legal import, which needs to be clarified herein: that entry of an interlocutory Judgment is a *purely administrative act*, which, therefore, should be taken to operate outside the limitations of the law of jurisdiction.

That cannot, in my opinion, be a correct statement of principle or of law. The effect of an interlocutory Judgment is to resolve claims of *right and duty*, and to convey a *binding decree* favouring one party, as against the other. Intrinsically then, an interlocutory Judgment determines controversial questions of entitlement which form the nub of the entire process of litigation. Such is by no means an administrative task; it is a *judicial task* in the best sense of that expression; and an interlocutory Judgment can only issue forth from the pen of the *judicial officer* who, therefore, must have jurisdiction to issue the Orders in question.

I allow this appeal, and make an Order setting aside the Ruling of the learned Principal Magistrate. The *ex parte* Judgment of **25th October, 2005** and all consequential Orders are hereby set aside.

The appellant shall have the costs of this appeal.

Decree accordingly.

SIGNED at NAIROBI

J.B. OJWANG
JUDGE

DATED and DELIVERED at MOMBASA this 20th day of February, 2012.

MAUREEN ODERO
JUDGE