



REPUBLIC OF KENYA

High Court at Mombasa

Civil Appeal 223 of 2010

JOHNSTONE MUSENGI.....APPELLANT/APPLICANT

VERSUS

JOSEPH MWANGI NDIRANGU.....RESPONDENT

JUDGMENT

1. This is an appeal from the ruling of Honourable Yator dated 8th of April, 2010 in CMCC Number 2500 of 2001. In the said ruling Honourable Yator disallowed the Applicant's Preliminary Objection of 5th November, 2009 with costs to the Plaintiff (Respondent herein).

2. The background is that the Plaintiff had obtained judgment in default of appearance on 18th March, 2004. Defendant then applied for, *inter alia*, temporary stay of execution and setting aside of judgment. This was done by a chamber summons application dated 8th January, 2005. By that application the Defendant also sought that the defence be admitted. The first Defendant also, subsequently, raised a Preliminary Objection on the ground that the plaint disclosed no reasonable cause of action as he was not the owner of the subject vehicle at the time of the accident alleged in the plaint. The suit was therefore a nullity.

3. The grounds of appeal are stated in the Memorandum of Appeal as follows:

“

1. ***The learned Resident Magistrate erred in law and fact in making a ruling based upon an application for stay of execution and setting aside ex-parte Judgment, which application was never placed before him as it had been determined conclusively on 27th March, 2007.***

2. ***The learned Resident Magistrate erred in law by failing to state the reasons for his decision.***

3. ***The learned Resident magistrate erred in law and fact when he ordered or awarded the costs of the preliminary objection to the Respondent, yet the same was never conclusively determined at all.***

4. ***The learned Resident magistrate erred in law and fact completely ignoring the preliminary objection raised by the Appellant in its entirety and therefore making a ruling/order which is not based upon the same.***”

The parties filed written submissions on this appeal

4. The Appellant argues that the Honourable Magistrates ruling is based on the application dated

8th February, 2005 yet that application had been disposed off by a consent entered in court in the following terms:

“By consent, the application dated 8th February, 2005 be an is hereby granted with thrown away costs to the Plaintiff in any event.”

Court: Consent of the parties adopted as order of Court.”

On that basis the Appellant seeks judgment in the appeal.

5. The Respondent/Plaintiff's submissions are that the tail end of the Honourable Yator's Ruling shows that it concerned the preliminary objection of 5th November, 2009 and not the Chamber summons of 8th February, 2005. Counsel also argues that the appeal is based on technicalities, is unreasonable and intended to delay the hearing of the main suit.

6. I have perused the record and considered the parties submissions. It is evident and irrefutable that the ruling of the Honourable Magistrate is ambiguous and unclear. By making reference to the application of 8th February, 2005 and the making an **“order that the Preliminary Objection raised herein is disallowed”**, uncertainty is left in the reader's mind, especially when it is evident that that application had earlier been dispensed with. On that ground, I would set aside that part of the ruling that makes reference to the application of 8th February, 2005.

7. The Honourable Yator's ruling does not give reasons for the dismissal of the Preliminary Objection of 5th November, 2009. However, having read the written submissions, of the parties thereon, I note that the objector's grounds were:

- a) the suit discloses no reasonable cause of action on the objector was not the owner of the vehicle
- b) that the cause of action against the 1st Defendant is time barred and
- c) that the suit is not filed in the lowest court or at the correct location contrary to Section 11 and 15 of the Civil Procedure Act.

8. This court's mandate under Section 78 of Civil Procedure Act includes the power to perform and do as nearly as may be the duties of the courts of original jurisdiction. In exercise of that mandate and taking into account the need to ensure expedition in this matter, the court after due consideration of the Preliminary Objection determines that the Objector be and is hereby directed to institute third party proceedings against the person to whom he alleges he had allegedly sold the vehicle.

9. With regard to the objection as to the proceedings being time-barred, this court agrees with the Respondent/Plaintiff that they were brought two months before the statutory limitation period became effective. That ground of the objection is therefore dismissed.

10. On the ground regarding the failure to bring the cause of action to the correct court pursuant to Sections 11 and 16 of the Civil Procedure Act, I find as follows:

While Section 11 requires filing in the court of lowest jurisdiction, that did not happen in this case. I shall therefore treat the objection as an application under Section 18 of Civil Procedure Act for transfer of the suit to the court which has the lowest jurisdiction to hear the matter. This would be the Resident Magistrate's court. I hereby direct that the suit shall be heard in the Resident Magistrate's court.

11. On the ground regarding the locality of the court to hear the matter pursuant to Section 15 of the Civil Procedure Act, I note as follows. The plaint shows that the accident occurred along Ngong Road near Karen in Nairobi. The applicable provision regarding where the suit should have been filed is Section 14 of the Civil Procedure Act. It relates to suits for compensation for a wrong done to the

person. That provision gives the plaintiff the option as to where to file the suit when, as in this case, the wrong was done within the jurisdiction of one court and the defendant resides or carries on business within the jurisdiction of another court.

12. Accordingly, I find that the suit is properly filed by the Plaintiff in the court of the locality in which he had an unfettered option to file the same. Accordingly that limb of the Preliminary Objection fails.

13. The upshot of this court's decision is as follows:

- (a) The Honourable Magistrate's Ruling to the application of 8th February, 2005 is hereby set aside.
 - (b) The 1st Defendant Appellant is at liberty to file a third party notice enjoining the person whom he claims he sold and transferred the subject vehicle to. This shall be effected within forty five (45) days from the date hereof.
 - (c) The Court finds that the suit was not statute barred
 - (d) The suit herein shall be heard by the Resident Magistrate's Court in Mombasa or otherwise at the option of the Plaintiff/Respondent.
14. The costs of the appeal shall be borne by each party equally, but the costs in the lower court on the Preliminary Objection shall be treated as costs in the cause.

Orders accordingly.

Dated, signed and delivered this 21st day of December, 2012.

**R.M. MWONGO
JUDGE**

Read in open court

Coram:

Judge: R.M. Mwang

Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....