



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

(Coram: Ojwang, J.)

CIVIL APPEAL NO. 33 OF 2010

- BETWEEN -

1. STEPHEN MBILO
2. PAUL NGEI ISIKA
3. JAMES K. MWOKA
4. TRUSTEES OF AFRICA INLAND

....DEFENDANTS/APPELLANTS

CHURCH (KENYA

5. MUNICIPAL COUNCIL OF MOMBASA

-VERSUS-

1. JOHN KUTNA
2. DALU MVURYA
3. JANE WACEKE

.....

PLAINTIFFS/RESPONDENTS

4. KONGOWEA ACTIVE SELF-HELP GROUP

JUDGMENT

What is before the Court is the learned Magistrate's ruling on the plaintiff's application by Chamber Summons, which was brought under Order XXXIX, rules 1 and 2 of the Civil Procedure Rules then in force. The applicant in that instance, had sought an order of injunction restraining the 1st, 2nd, 3rd and 4th defendants from effecting development projects on the suit land, LR. No. 1408/I/MN pending the hearing and determination of the suit. The respondents had raised the preliminary objection that the Court lacked the pecuniary jurisdiction to hear and determine the application and, indeed, the suit; the respondents asked that the entire proceedings be struck out with costs.

Although the ruling, brief as it is, does not set out and analyse the relevant issues of merit, the Court made reference to its consideration of the arguments of counsel, and its examination of the several affidavits and the annexures, as the basis of the orders which it made; those orders are as follows: (i) the defendants' preliminary objection was disallowed; (ii) the suit was passed on to a Court having the requisite pecuniary jurisdiction; (iii) there would be no order as to costs.

The ruling is contested in the grounds set out in the memorandum of appeal, dated **2nd March, 2010**; and these are as follows:

- (1) *the learned Magistrate erred in disallowing the preliminary objection and not finding that the*

Court lacked pecuniary jurisdiction to deal with the matter;

(2) *the learned Magistrate erred in law in making the orders of 6th October, 2009 when he lacked jurisdiction to make these;*

(3) *the learned Magistrate erred in directing that the suit filed herein be placed before a Court with pecuniary jurisdiction to try and determine the suit _ a direction which was beyond his powers;*

(4) *the learned Magistrate impliedly conceded that the Court lacked jurisdiction to deal with the suit, by directing that it be placed before a Court having the pecuniary jurisdiction;*

(5) *the learned Magistrate erred in not awarding the costs of the preliminary objection to the defendants/appellants;*

(6) *the learned Magistrate erred in not striking out the plaintiffs' application and the entire suit, with costs to the appellants.*

The appellants asked that their appeal be allowed, and the Resident Magistrate's ruling of **6th October, 2009** be reversed and set aside; they prayed that an order be made striking out or dismissing the respondents' application of **2nd September, 2009** and the entire suit, with costs to the appellants; and they asked for the costs of this appeal.

Learned counsel for the appellants submitted that, from the affidavit evidence given by 1st appellant, the suit premises have a value of Kshs. 80,000,000/=, in addition to the cost of construction which amounted to some Kshs. 14,000,000/= — while the Resident Magistrate's Court had only the limited pecuniary jurisdiction of Kshs. 500,000/=. Counsel urged that "*the only Court which was seized with jurisdiction to hear and determine the matter as filed is the High Court*". Counsel submitted that the suit had been filed in an incompetent Court, and so it was an incompetent suit: and the only valid order the Resident Magistrate's Court could make was "*to strike out the application and the entire suit as was sought by the appellants in their preliminary objection*". This argument was attributed to a general principle, of which judicial notice is to be taken, that "*once the issue of jurisdiction is raised before a Court, the Court must determine whether or not it is seized with jurisdiction; [and] if it is not, it must down its pen and not proceed with the matter*".

On those premises, learned counsel urged that the learned Magistrate had impliedly conceded that the Court lacked the jurisdiction to act on the suit by directing that it be transferred to a Court with the applicable pecuniary jurisdiction: the Court in that case lacked the jurisdiction to hear and determine the suit.

Learned counsel submitted that, by virtue of s. 18 of the Civil Procedure Act (Cap. 21, Laws of Kenya), only the High Court had the jurisdiction to transfer a suit from one Court to another; and by s. 4 of that Act, a Court may not hear and determine a suit that exceeds its pecuniary jurisdiction.

Counsel submitted that the learned Magistrate was in error, in declining to award costs of the preliminary objection and those of the suit to the appellants: for the preliminary objection was wholly meritorious.

Counsel cited several High Court decisions, to buttress his submissions; one of these was by this Court, **Boniface Waweru Mbiyu v. Mary Njeri & Another**, Nairobi H.C. Misc. Application No. 639 of 2005 [2005]eKLR. The relevant passage in that decision reads as follows:

"The entry point into any Court proceedings is jurisdiction. If a Court lacking jurisdiction to hear and determine a matter overlooks that fact and determines the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question....."

“I will, in agreement with the decision in *Kagenyi v. Musiramo & Another* [1968] E.A.43, state here that the High Court will decline to assume jurisdiction in relation to any matter *which has been filed before a Court or tribunal lacking jurisdiction*. Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client ... [The] matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court.”

The other cases cited are in complete agreement: **Charles Wainaina Njehia v. Barclays Bank of Kenya**, Eldoret High Court Misc. Application No. 249 of 2005 [2006]eKLR (**Ibrahim, J**); **Bishop Christopher Ndungu v. Andrew Abungu**, Nakuru H.C. Misc. Civil Application No. 540 of 2004 (**Kimaru, J**).

Learned counsel, **Mr. Magolo** for the respondents, concentrated his submissions to perceived procedural defects in the appeal as filed, and it is only in this regard that he cited a case-decision as authority: **Musa Odhiambo Odongo v. Roseline Atieno Obuola**, Kisii H.C. Civil Appeal No. 211 of 2001. Upon a scrutiny of the said decision, I did not find it to embody a focused challenge to the gravamen of the appeal.

The merits of the appeal beckon straight, from a reading of the ruling which is the subject of appeal. That ruling did not address the issue of **jurisdiction**, which the appellant herein raised in a preliminary objection. This is how the jurisdiction point was made, in the Notice of Preliminary Objection, dated **17th September, 2008**:

“TAKE NOTICE that on the 1st October, 2008 when the plaintiff’s application dated 2nd September, 2008 ... is fixed for hearing, the 1st, 2nd, 3rd and 4th defendants will raise a preliminary objection on the ground that this Honourable Court has no pecuniary jurisdiction to hear and determine the said application as well as the suit herein, and the said defendants will seek prayers that the said application and this suit be struck out with costs.”

It is to be stated that any Court or tribunal before which a contest to jurisdiction is raised, has its very first legal and judicial task defined: it must deliberate upon the question, and record a ruling as to whether or not it has jurisdiction; and if it holds that it lacks jurisdiction, then it must dismiss the matter placed before it.

Now the learned Magistrate, with respect, did not comply with that firm rule, but instead, proceeded to make certain orders which had the effect of obstructing its view on the jurisdictional issue. Although that Court held that it had disallowed the preliminary objection, it then proceeded as if it **had** jurisdiction: for it ordered the proceedings before it to be **transferred** to another Court. That, with much respect, was an error, and it only confirms that the Court acted without jurisdiction.

Learned counsel for the respondent, in his long submission, has followed the very path taken by the Court below: failing to address the question of **jurisdiction**.

The failure by the Court to appreciate the question of jurisdiction, led it to still another error, with regard to costs; the Court made no order as to costs — suggesting that the matter before it had no clear winner on the merits.

So clear-cut is the issue of jurisdiction, the party who wins the argument on that score, has merit on his side, and ought, in general, to be awarded costs; more so indeed where the jurisdictional issue leads to loss by the plaintiff of both the interlocutory application and the main suit.

The merits of this case distinctly stand in favour of the appellants; they were entitled to have the plaintiff’s application and suit struck out, for lack of jurisdiction.

I allow the appeal; I set aside the learned Magistrate’s ruling of **6th October, 2009**; I strike out the

respondent's application dated **2nd September, 2009**; and I strike out the respondent's suit. The respondent shall bear the appellant's costs in respect of the respondent's application of **2nd September, 2009**; of this appeal; and of any preparatory steps for the suit itself.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 25th day of February, 2011.

J. B. OJWANG
JUDGE