REPUBIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL 166 OF 2007

ASSOCIATED WAREHOUSING LTD....……..…..……APPELLANT

-AND-

CLARKSON & SOUTHERN LTD. ……..……..……RESPONDENT

(Being an Appeal from the Ruling and Order of Mombasa Resident Magistrate, Mr. M.O. Obiero, delivered on 21st September, 2007 in Civil Suit No. 2501 of 2007)

JUDGMENT

Under the suit by plaint dated ***7th September, 2007***, the 1st defendant (appellant herein) filed an application by Notice of Motion dated ***11th September, 2007***, and the learned Resident Magistrate after hearing counsel, made certain Orders:

(i) he discharged ex parte orders given earlier;

(ii) he allowed the plaintiff's oral application to withdraw the suit;

(iii) he ordered the plaintiff to "pay to the 1st defendant costs to the extent of the disbursements and costs of attendances for the said…application."

The 1st defendant was aggrieved by the Ruling, and filed a memorandum of appeal bearing the following grounds:

(i) the learned Magistrate erred in law in allowing the suit to be withdrawn on an oral application when no notice of withdrawal had been filed and served, as required by Order XXIV, Rule 1 of the Civil Procedure Rules;

(ii) the learned Magistrate erred in fact by not considering that the Magistrates' Courts had no jurisdiction to hear and determine the suit whose value of subject-matter was Kshs.80,000,000/=;

(iii) the learned Magistrate erred in law by refusing or failing to strike out the suit with costs to the appellant;

(iv) the learned Magistrate erred in law by failing or refusing to order costs of the suit to be paid to the appellant;

(v) the learned Magistrate erred in law by holding that the appellant who had been served with a Court Order should not have defended itself before service of summons and the plaint;

(vi) the learned Magistrate may have been influenced in denying the appellant costs as he was the person who had issued eviction orders ex parte;

(vii) the learned Magistrate misapprehended or failed to apply the proviso to s.27(1) of the Civil Procedure Act;

(viii) the learned Magistrate erred in law and in fact by failing to hold that the appellant had defended the suit by filing an application to strike out the suit on the ground of want of jurisdiction;

(ix) the learned Magistrate erred in law and in fact by denying the appellant costs on the ground that the respondent had only served the Court Order and had not served the application, the plaint and the summons to enter appearance;

(x) the learned Magistrate erred in law by failing to hold that he had no jurisdiction to hear any application to withdraw the suit whose subject-matter is Kshs.80,000,000/=.

The appellant prayed that the appeal be allowed, the learned Magistrate's decision of ***21st September, 2007*** set aside, and an Order made striking out Mombasa RMCC No. 2501 of 2007.

The relevant passages in the learned Magistrate's Ruling of ***21st September, 2007*** may be set out here:

"My humble opinion is that striking out the suit and withdrawal of the same amounts to one and the same thing. Further, the withdrawal in Court will not cause any prejudice to 1st defendant who is duly represented. It would be in the interest of justice that the plaintiff be allowed to withdraw the suit orally in Court, rather than insisting on the issue of notice of withdrawal being served and filed. As such I do allow the application for withdrawal and this suit is hereby marked as withdrawn."

The learned Magistrate, as indicated in the foregoing passage, considered that the suit was duly withdrawn; and he proceeded on that basis to settle the issue of costs. He proceeded to hold:

"It is my humble opinion that a party is entitled to the costs of the entire suit where such a party has been served with the plaint and summons to enter appearance; the reason being that a party can only file a memorandum of appearance and defence when the plaint and summons to enter appearance have been served. In this matter, the defence and the memorandum of appearance were filed on *11th September, 2007* ***while the orders were granted on*** *7th September, 2007* ***which was a Friday. The summons to enter appearance, plaint and application have not been served and the time within which the same ought to have been served had not lapsed…Counsel for the plaintiff did not serve the same upon realizing that there was another matter before the High Court relating to the same subject-matter between the same parties…Counsel for the plaintiff obviously must have been mitigating on the issue of costs, which I …think [was] a very reasonable action on the part of counsel for the plaintiff."***

The foregoing reasoning led the learned Magistrate to the Order that 1st defendant was *"entitled to costs [only] to the extent of the disbursements and costs of attendances [in connection with] the application."*

In this appeal, the appellant was represented by learned counsel ***Mr. Kinyua,*** while the respondent was represented by learned counsel, ***Mr. Munyithya.***

Mr. Kinyua submitted that, in another case in respect of the same suit property featuring herein, Mombasa HCCC No.218 of 2007, ***Sergon, J*** had issued injunctive orders restraining the respondent from interfering with the appellant's quiet possession. Those Orders were made on ***7th September, 2007*** and coincided with *ex parte* Subordinate Court Orders granting a mandatory injunction against the appellant, and in respect of the same property. This incident, counsel urged, raised a question of the respective jurisdictions of the Resident Magistrate's Court and the High Court.

Counsel submitted that the pecuniary jurisdiction of Magistrates' Courts is set out in the

Magistrates' Courts Act (Cap.10, Laws of Kenya), and is limited and does not exceed Kshs.3,000,000; whereas the subject matter in the instant case is a beach hotel valued at Kshs.80,000,000/=.

Counsel submitted that the respondent had filed two matters relating to the same property, on ***7th September, 2009***: Resident Magistrate's Court Civil Suit No. 2501 of 2007, and, in the same Court, an application by Chamber Summons under ss.3A and 63(c) and (e) of the Civil Procedure Act (Cap.21) and Order XXXIX of the earlier edition of the Civil Procedure Rules. The learned Magistrate made *ex parte* orders on ***7th September, 2007*** on the strength of an agreement for sale of the suit premises to the respondent at Kshs.31,000,000/=. The appellant applied before the learned Magistrate, coming with a valuation report showing the value of the suit premises as Kshs.80,000,000/=, for a discharge of the said Orders; but the Court declined the application and instead, heard the suit and made orders denying the appellant costs.

Learned counsel submitted that "*the powers of a Magistrate or a Judge faced with a suit filed without jurisdiction are limited to striking it out*", and "*such a suit cannot be withdrawn"; "the Magistrate or Judge cannot go into the merits and cannot hear any other application including an oral application to withdraw."* Counsel submitted that "*the Magistrate had no jurisdiction to hear and determine an oral application for the withdrawal of the suit."*

Mr. Kinyua submitted that the learned Magistrate "*had no discretion in the matter of costs"*, for the appellant had filed a memorandum of appearance, a statement of defence, and an application to strike out the suit. Counsel had taken instructions on the *ex parte* order, the plaint and the application, and made photocopies of the whole file and of various documents, apart from attending Court to file and prosecute the application; but the Magistrate only allowed costs to the extent of disbursements and costs of attendances for the application.

Counsel submitted that the learned Magistrate misinterpreted the law when he held that "*a party can only file a memorandum of appearance and defence when the plaint and summons to enter appearance have been served*": for at the point any Court Order is made or signed, there must already be a *plaint*, and the *application;* and "*why would the respondent serve only the ex parte Order [but] sit on the plaint and the application if not for improper motives*?" The governing rule for the service of *ex parte* Orders, was Order XXXIX, Rule 3(3), and this provided:

"In any case where the Court grants an *ex parte* ***injunction the applicant shall within three days from the date of the order, serve the order, the application and the pleading on the party sought to be restrained."***

But in the instant matter, *"the respondent served the Order without the application and the plaint"*; and when, to deal with that impropriety on the part of the respondent, the appellant photocopied the whole file, the appellant "*was criticized for having filed the appearance, defence and application before service of pleadings and the application."* Counsel urged that such a position entailed a mischief: "*the Magistrate allowed the respondent not only to rely upon but to benefit from its own calculated mischief."*

Learned counsel contended that the learned Magistrate, in this instance, had very well known that he lacked jurisdiction, and by proceeding to assume jurisdiction and to make Orders prejudicial to the appellant, he had removed himself from the *immunity for judicial officers* conferred by s.6 of the Judicature Act (Cap.8, Laws of Kenya).

Counsel asked for the costs of this appeal, in addition to costs in the Magistrate's Court, the same to be paid on the higher scale. He stated that the costs involved in the Magistrate's Court suit had been at least Kshs.1,200,000/= – but what that Court ordered was only about Kshs.5000/=. Counsel urged, besides, that this was a case in which the respondent strived to steal a march on the applicant, by befouling the judicial process to secure the rapid eviction of the appellant, as a strategy enabling the respondent to prosecute a suit from the vantage-point of being in possession.

To ***Mr. Kinyua***'s vivacious argument and submissions, learned counsel, ***Mr. Munyithya*** for the

respondent came to respond. The essence of counsel's riposte was that: (i) the appellant had invoked no case-authorities, but had focussed on "*matters of fact";* (ii) the appeal itself carried no prayer for costs, even though this later became a primary claim; (iii) no prayer had been made regarding the mischief contemplated by s.6 of the Judicature Act (Cap.8), even though the appellant was now asking for Orders in that regard. Counsel submitted: "*Our reply is that the appellant cannot be awarded what it never pleaded in its Memorandum of Appeal."*

On the second contention by ***Mr. Munyithya***, I find that there was, indeed, an appeal on the question of costs; it was contended that: "*the learned Magistrate erred in law by failing or refusing to order costs of the suit to be paid to the appellant"; "the learned Magistrate erred in law and in fact by denying the appellant costs on the ground that the respondent had only served the Court Order and had not served the application, the plaint and the summons to enter appearance."*

As regards the mischief contemplated in s.6 of the Judicature Act, again, I do not find the appellant's case to be unfounded: for the memorandum of appeal asserts that the learned Magistrate had no jurisdiction to proceed and determine the matter, and such is an issue of relevance in interpreting s.6 of the Judicature Act.

On the point that the appellant did not rely on past judicial decisions, this is not a relevant issue, as this appeal entails matters of both law and fact in respect of which this Court *bears the task* of interpretation and determination.

Counsel does not contest the appellant's position, "*that a party in a withdrawn action is entitled to costs"*; but he maintains that the Court's decision in this instance was not contestable, because "*the trial Court has….discretion to deny costs."*

Mr. Munyithya also conceded the appellant's position: "*that the summons and plaint had not [been] served upon the appellant as at the time the lower Court case was withdrawn.*" Counsel proceeds to state pertinent facts from the Court file as follows:

"(a) The lower Court case was filed on 7th September, 2007 and the *ex parte* ***Order granted;***

"(b) On *12th September, 2007****, five days later, the appellant appeared in Court with the application dated*** *11th September, 2007* ***to set aside the Orders of*** *7th September, 2007****. The trial Magistrate ordered the application to be served and [parties] to come for*** *inter partes* ***hearing on*** *13th September, 2007****, the next day.***

"(c) On *13th September, 2007****, at the*** *inter partes* ***hearing, the respondent applied for leave to withdraw the lower Court suit under Order XXIV, Rule 1 [of the Civil Procedure Rules]. In his [oral] application counsel for the respondent informed the trial Magistrate that the appellant had not been served with any pleadings except the Court order. In reply, the appellant's counsel submitted that the only remedy available was to strike out the lower Court suit with costs. On this date, the trial Court discharged the*** *ex parte* ***Order and set the date for Ruling.***

"(d) On *21st September, 2007****, the trial Magistrate delivered a well-reasoned Ruling. He allowed the application to withdraw [the] suit, and gave costs to the extent of disbursements and attendances."***

Other than learned counsel's own evaluation (especially in paragraph (d) above), I find no contest to the basic facts as recounted above. From those facts, however, ***Mr. Kinyua*** urged that there was a censurable failure on the part of the Court, in interpreting the law, especially the law relating to jurisdiction; and that the foregoing fact-scenario discloses mischief in resolving the matters in contention.

Mr. Munyithya submitted that the appeal entailed only three issues, namely: whether the trial

Magistrate had the jurisdiction to allow an oral application to withdraw the suit; whether the appellant was entitled to costs; to what extent costs were allowable.

Counsel cited Rule 52 of the Advocates (Remuneration) Order which provides:

"…the costs awarded by the Court on any matter or application shall be taxed and paid as between party and party unless the Court in its discretion otherwise directs."

From this provision, counsel urged that even though costs follow the event, "*the trial Court has [a] discretion on the amount payable and the mode of payment."*

Counsel submitted that the appellant had not shown that the trial Magistrate "*did not exercise his discretion properly*." Learned counsel cited certain authorities in support of the respondent's position. In ***Mariga v. Musila*** [1984] KLR 251 the Court of Appeal thus held (at p.253):

"Under the Civil Procedure Act, s.27, costs are in the discretion of the Court and, subject to the proviso to that section that the costs of an action shall follow the event unless the judge shall for good reason otherwise order, there is no principle which requires that a judge in a case must direct that the successful defendant shall recover his costs from the unsuccessful defendant. Unless the lower Court had not exercised its discretion judicially, the appellate court would not interfere with its decision regarding the costs."

Of this judicial discretion in respect of costs, ***Kasango, J*** in another decision, ***Essential Mountain Links Limited vs. Securities Nominees Limited & Another***, Nairobi MCC Misc. Civ. Appl. No. 370 of 2005 [2006] eKLR, thus stated:

"The discretion afforded by s.27 of the Civil Procedure Act must be judicial discretion. In the exercise of that discretion…the Court can consider the conduct of the parties and also the matters that may have led to the filing of the action in the Court…"

Mr. Munyithya submitted that "*the Court had power to allow the oral application";* and urged that the appeal herein is unmerited and should be dismissed.

Although the direct object of the appellant's case is ***costs,*** this is linked, firstly, to the question whether the Magistrate's Court had jurisdiction to entertain the respondent's case at all – whether by way of hearing, or allowing withdrawal of, the same; and secondly, to the question whether the respondent tried to obtain mandatory injunctions on the basis of a suit and an application that had not been served as required by law – and if so, who bears the appellant's costs for actions taken to thwart the mischief?

I have taken note of the terms of Order XXXIX, Rule 3(3) of the earlier edition of the Civil Procedure Rules: as the Court had granted an *ex parte* injunction to the respondent on ***7th September, 2007***, the law required that by ***10th September, 2007*** the respondent should have served (i) the Order, (ii) the application leading to the Order, and (iii) the pleadings in the main cause under the umbrella of which the Order had been sought and obtained.

Up to ***11th September, 2007*** the respondent had not complied with the terms of Order XXXIX, Rule 3(3). This was highly prejudicial to the appellant herein; because in the Orders of ***7th September, 2007*** it had been thus directed:

"2. THAT this Honourable Court hereby issues a temporary Order in the nature of a *mandatory injunction* ***against the defendants jointly and severally, their agents, servants, employees, assigns or any other person or party acting through them directing them to forthwith cease their occupation and subsequent acts of trespass or any other manner or interference with the plaintiff's quiet possession of the suit property being subdivision No.13476 (Original Number 871(1) of Section 1, Mainland North of Mombasa CR No. 13476 pending the hearing and determination of this application***.

"3.THAT the Officer Commanding Bamburi Police Station and/or any other Police Officer appointed by him do enforce and/or execute and/or ensure compliance [with] this Order.

"4. THAT the said application be served upon the defendants/respondents and be heard *inter partes* ***on*** *21st September, 2007."*

The Magistrate's Orders are for the eviction of the appellant herein, but they are not served within the terms of Order XXXIX, Rule 3(3); and they call for ***inter partes*** hearing *14 days into the future*. When would the appellant be expected to know of the said Orders? Certainly, *more than three days* after they were issued – any time between *4 – 14 days*. By that time the Police Officers acting by virtue of the Court's Orders, would have evicted the appellants from the suit property and entrenched the respondent in possession. It is precisely this scenario that ***Mr. Kinyua*** urged to have been mischievous and possibly, suggesting collusion between the learned Magistrate and the respondent. If such would be a legitimate suspicion, what is for certain is that a situation so oppressive to the appellant, and so much in derogation from justice and equity, was in direct breach of the terms of Order XXXIX, Rule 3(3) of the Civil Procedure Rules. If bad faith need not necessarily be attributed to the Magistrate's Court, in that regard, it is to be held that such is a valid ground for an appeal, that *must* succeed.

Was the appellant required by law to yield to eviction on the strength of the said mandatory *ex parte* orders, and helplessly wait to be served with the eviction Orders any time *4 – 14 days later*, and then turn up in Court for an *inter partes* hearing on a definite *fait accompli*? Not at all; for equity aids the vigilant; and in this case, the appellant, being confronted with error or mischief or both, urgently perused and photocopied the Court file as a whole and, on that basis, came before the Magistrate's Court with an urgent application on ***11th September, 2007***. At this stage, I am unable to see any circumstances in which a lawful exercise of judicial discretion would deny the appellant's costs in respect of the application of ***11th September, 2007.*** I hold, consequently, that the appellant would be entitled to the said costs, if the respondent were to be allowed to withdraw his suit, the basis of the earlier *ex parte* orders.

The central issue in this appeal is *jurisdiction*: did the learned Magistrate have the jurisdiction to entertain Mombasa RMCC No. 2501 of 2007, to hear both written and oral applications under it, or to make the Orders he made?

The governing law is the Magistrates' Courts Act (Cap.10, Laws of Kenya), s.5(1) of which provides:

"Subject to any other written law the resident magistrate's Court shall have and exercise jurisdiction and powers in proceedings of a civil nature in which the value of the subject matter in dispute does not exceed one hundred thousand shillings, or three hundred thousand shillings where the court is held by a principal or a senior resident magistrate and five hundred thousand shillings where the court is held by a chief magistrate or a senior principal magistrate…"

The appellant has annexed with the record of appeal a valuation of the suit property by M*/s. Datoo Kithikii Limited, Valuers, Estate Agents, Managing Agents and Development Consultants* dated ***5th September, 2007***: insurance replacement value is given as Kshs.51,000,000/=; forced-sale value as Kshs.56,000,000/=; mortgage value as Kshs.68,000,000/=; and open-market value as Kshs.80,000,000/=.

Such an order of value-estimate, clearly, surpasses the pecuniary jurisdiction of any category of Magistrates' Courts; it is the typical case for the High Court, with its unlimited civil jurisdiction. I will, therefore, uphold the submission by ***Mr. Kinyua*** that the learned Magistrate had no jurisdiction to entertain, save for the purpose of disclaiming jurisdiction, Mombasa RMCC No. 2501 of 2007. Since this fact was so obvious, a question may be raised regarding the advice of counsel who rendered service to the litigant.

The law of jurisdiction has been held, in Kenya's judicial experience, to be virtually inexorable. In ***Owners of the Motor Vessel "LillianS" v. Caltex Oil (Kenya) Ltd*** [1989] KLR 1, ***Nyarangi, JA*** thus stated (at pp.14-15):

"***I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step***."

By the law of jurisdiction, the learned Magistrate had no competence to entertain Mombasa RMCC No.2501 of 2007; could not hear and determine any application – *ex parte* or *inter partes* – under the same; and could not proceed to hear an oral application under such suit, or formal application, and proceed to give a Ruling and issue Orders. However, the learned Magistrate had the competence to pronounce his Court to be devoid of jurisdiction, and to free himself of all judicial proceedings in the relevant matter.

This Court, apart from allowing the appeal on the question of jurisdiction, now takes upon itself the task of making the necessary Orders, as follows:

(1)The learned Magistrate's Ruling of *21st September, 2007* ***is declared null.***

(2) All the Orders made by the learned Magistrate on *21st September, 2007* ***and issued on*** *3rd September, 2008* ***are hereby annulled.***

(3)The respondent shall bear the appellant's costs in respect of Mombasa RMCC No. 2501 of 2007 and all ensuing applications up to and including the date of delivery of this Judgment, and these costs shall be paid on the higher scale.

(4)Mombasa RMCC No. 2501 of 2007, Clarkson & Southern Ltd v. Associated Warehousing Ltd. & Two Others is hereby struck out and dismissed with costs in the terms of Order No. (3) herein.

Orders accordingly.

SIGNED at **NAIROBI** …….

J.B. OJWANG
JUDGE

DATED and **DELIVERED** at **MOMBASA** this 7th day of December, 2011.

H.M. OKWENGU
JUDGE