



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS

Civil Appeal 792 of 2003

MWAURA MBURU.....1ST APPELLANT

MIGAA COFFEE ESTATE.....2ND APPELLANT

VERSUS

J.N.K (Minor suing thro' his father and next friend P.K.K)... RESPONDENT

(An appeal from the ruling of Hon. Mr. G.M. Njuguna S.R.N. on 15th October, 2003 in Kiambu PMCC No. 832 of 1993)

J U D G M E N T

1. This appeal arises from a suit which was filed in the Principal Magistrate's Court at Kiambu by J.N, a minor suing through his father and next friend P.K.K, (hereinafter referred to as the respondent). He had sued Peter Mwaura Mburu and Migaa Coffee Estate, (hereinafter referred to as 1st and 2nd appellants), respectively.
2. The respondent sought general and special damages arising from personal injuries suffered by him in a road traffic accident involving the 2nd appellant's motor vehicle registration No. KXC 533. The respondent contended that the accident was caused by the negligence of the 1st appellant for which 2nd appellant was vicariously liable.
3. The appellants filed a joint defence in which they admitted the occurrence of the accident, but denied

that the 1st defendant was negligent, or that the respondent was a passenger in the 2nd appellant's motor vehicle. The appellants further denied that the respondent suffered any injuries as a result of the accident.

4. On 10th June, 1999 when the suit came up for hearing, Ms. Kibukosya who was appearing for the appellants raised an objection to the hearing of the matter contending that the cause of action arose in Thika. The Senior Resident Magistrate before whom the matter was scheduled to be heard then ruled that the Court had no jurisdiction to entertain the suit in accordance with section 15 of the Civil Procedure Act.

5. On 12th August, 1999 the respondent filed Misc. Civil Application No. 1023 of 1999 in the High Court seeking an order to have Kiambu RMCC No. 832 of 1993 transferred to the Chief Magistrate's Court at Thika, for hearing and final determination. For some unexplained reasons, that application remained pending.

6. On 25th February, 2003, the appellants moved the Kimbu Court under Order L Rule 1 and Order XVI Rule 5(d) of the Civil Procedure Rules for dismissal of the respondent's suit for want of prosecution. At that stage, the respondent moved to prosecute the High Court application for transfer of the suit to Thika. The application came up for hearing before Mbitto, J. on 7th April, 2003.

7. The appellants' counsel objected to the hearing of the High Court application contending that the appellants' application for dismissal of the respondent's suit was coming up for hearing on 17th April, 2003, whereupon the Judge ruled that the application for dismissal of the respondent's suit should be dealt with before the High Court application is heard.

8. On 17th April, 2003, the appellant's application for dismissal of the respondent's suit came up for hearing before the Senior Resident Magistrate Kiambu, who referred the parties to the order made on 10th June, 1999 to the effect that the Court had no jurisdiction to deal with the matter.

9. On 24th July, 2003, the appellants' counsel appeared before the Senior Resident Magistrate again insisting that due to the order made by Mbitto, J on 25th February, 2003, his application for dismissal of the respondent's suit should be heard. The Magistrate then directed that the application be fixed for hearing.

10. On 25th September, 2003, the appellants' counsel argued the application for dismissal of the respondent's suit, following which the Senior Resident Magistrate delivered a ruling on 15th October, 2003 holding that since he had no territorial jurisdiction to entertain the suit, he also had no jurisdiction to hear the application for dismissal of the suit. It is this ruling that the appellant is aggrieved of on the ground that the trial Magistrate erred in holding that he had no jurisdiction to entertain the application.

11. In support of the appeal Mrs. Githae who appeared for the appellants has argued that on 10th June, 1999 when the trial Magistrate indicated that he had no jurisdiction to hear the matter, he ought to have struck out the suit. Mrs. Githae submitted that under Section 17 of the Civil Procedure Act, the Court had

jurisdiction to hear the matter. She urged this Court to invoke Section 78(2) of the Civil Procedure Act, and Order XLI Rule 27 of the Civil Procedure Rules, and grant the orders which were sought in the lower Court for dismissal of the respondent's suit for want of prosecution.

12. Mr. Mutahi who appeared for the respondent submitted that it was the appellants who raised the issue of jurisdiction before the trial Court, making it impossible for the respondent to proceed with the hearing of the suit. Mr. Mutahi submitted that the respondent has obtained orders from the High Court for transfer of the suit to Thika Law Courts and was ready to have his suit heard. He maintained that the application for dismissal of the suit for want of prosecution which was filed by the appellants in the Kiambu Court could not be entertained as the Court had already ruled that it had no jurisdiction to hear the matter.

13. I have carefully perused and considered the proceedings in the lower Court as well as the submissions made before me. It is not disputed that on the 10th June, 1999, the Senior Resident Magistrate's Court Kiambu ruled that he had no jurisdiction to hear this matter. No appeal was lodged against that order. The appellants cannot now challenge the order which was made by the Court on 10th June, 1999 under a disguise that it is challenging the order made on 15th October, 2003.

14. It is apparent that on 10th June, 1999, the Court did not dismiss the suit notwithstanding the fact that it held that it had no jurisdiction to hear the suit. Clearly the Court left a window open for the respondent to make an appropriate application for transfer of the suit to an appropriate Court for hearing.

15. The appellants not having challenged the order of 10th June, 1999, it is too late in the day for the appellants to complain. I find no merit in this appeal and do therefore dismiss it with costs.

Dated and delivered this 20th day of November, 2009

H. M. OKWENGU

JUDGE

In the presence of: -

Ms. Mburu holding brief for Githae for the appellants

Gitahi for the respondent

Eric, court clerk