



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**

**Civil Appeal 109 of 2006 & 89 of 2006**

**ATIQ MOHAMED MOHAMED NAAMAN (Suing as the**

**Duly appointed aged for and on behalf of**

**Abubakar Abdalla Mohamed).....APPELLANT**

**VERSUS**

**HEMED SALIM .....RESPONDENT**

**J U D G M E N T**

Atiq Mohamed Naaman, the Respondent herein, filed the amended plaint dated 15<sup>th</sup> November 2005 in which he prayed for the eviction and for mesne profits against Hemed Salim, the appellant herein, before the Chief Magistrate's court. The appellant filed a defence in which he denied the Respondent's claim. The Respondent took out a summons dated 9<sup>th</sup> March 2006 in which he sought for interlia the appellant's defence to be struck out and for entry of summary judgment. The summons was argued before Mr. Adika, learned Resident Magistrate. In the end the learned Resident Magistrate allowed the application with the result that the defence was struck out and with an order entering summary judgment in favour of the Respondent. Being aggrieved with that decision, the appellant preferred this appeal.

On appeal, the appellant put forward a total of four (4) grounds in his memorandum of Appeal. However when the appeal came up for hearing, Mr. Khatib, learned advocate for the appellant argued two main grounds. First, is that the defence raises triable issues. One of the triable issues is that the learned trial Resident Magistrate had no pecuniary jurisdiction to hear and determine the suit in respect of the property valued over Kshs.1,200,000/- yet his pecuniary jurisdiction is fixed at Kshs.500,000/-. Secondly, that the learned Resident Magistrate erred when he failed to consider the evidence tendered by the appellant; Mr. Wachira learned advocate for the Respondent opposed the appeal on the ground that there was no case which was maintainable before the learned Resident Magistrate. It was pointed out that the beneficiaries of the estate of Shariff Ali Bin Abubakar including the appellant had sold plot no. Mombasa/Block XXXIV/42 and that title has been issued to the Respondent. It is also his argument that the title has not been challenged. Mr. Wachira further argued that there was no challenge against the Resident Magistrate's pecuniary jurisdiction.

I have considered the submissions of both learned counsels. I have also reconsidered the arguments made for and against the Chamber Summons dated 3<sup>rd</sup> September 2006 before the learned Resident Magistrate. What is apparent is that the learned advocates raised in their arguments the issue touching on the pecuniary jurisdiction of the learned Resident Magistrate. The appellant put the value of the property at Kshs.1,200,000/-. This figure was not contested by the Respondent. It is also clear that Mr. Adika, the learned Resident Magistrate did not determine the issue despite it having been argued before him. It is also not denied that the learned Resident Magistrate's pecuniary jurisdiction is fixed at Kshs.500,000/- which is way below the value of the property. It is obvious that the learned Resident Magistrate erred when he struck out the defence and entered summary judgment yet there was such a triable issue. It has been argued by Mr. Wachira that such an issue was not raised in the defence hence the learned Resident Magistrate arrived at the correct decision. I find that arguments to be attractive but the same is not tenable in that the issue concerning the pecuniary jurisdiction of the Chief Magistrate's Court could not

be raised in the defence because this court takes judicial notice of the fact that the maximum pecuniary jurisdiction of a Chief Magistrate's court is fixed at Kshs.3,000,000/-. The pecuniary jurisdiction of the learned Resident Magistrate was specifically challenged. That challenge has merit. It was a triable issue which the learned Resident Magistrate should have considered.

For the above reasons I am convinced that the appeal must be allowed which I hereby order. The order striking out the defence and entering summary judgment is set aside and substituted with an order dismissing the Chamber Summons dated 3<sup>rd</sup> September 2006. Costs of the appeal and that of the summons before the subordinate court are given to the appellant.

**Dated and delivered at Mombasa this 5<sup>th</sup> day of June 2008.**

**J.K. SERGON**

**J U D G E**

In open court in the presence of Mr. Khatib for the appellant and Mr. Wachira for the Respondent.