



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Civil Appeal 65A of 1989**

**ROBERT BAYA TUMU .....APPLICANT**

**VERSUS**

**MDIGO MBAJI .....RESPONDENTS**

**RULING**

Mudigo Mbaji, the Respondent herein, filed an action before the District Magistrate’s court, Kaloleni in which he claimed for delivery of vacant possession of some land and for costs of Kshs.1000/- from Robert Baya Tumu, the appellant herein. After fully hearing the case, Mr. J.C. Nyundo, the then D.M.II gave judgment in favour of the Respondent as prayed on the 31<sup>st</sup> day of July 1989. Being aggrieved the appellant filed this appeal to upstage the decision. When this appeal came up for hearing, the Respondent’s advocate raised a preliminary objection which is to the effect that

“The appeal contravenes the provisions of Section II of the Magistrates Act Chapter 10 Laws of Kenya

is the submission of the Respondent that the appeal should have first been filed before a District Magistrate’s court of the 1<sup>st</sup> Class hence it is incompetently before this court.

In response to this submission the appellant is of the view that the preliminary point has no merit in that the Respondent has not shown that Mr. J.C. Nyundo D.M. II had been designated to serve as a third class magistrate.

I have anxiously considered these competing arguments. It is the argument of the Respondent’s counsel that Mr. J.C. Nyundo D.M. II held powers of a third class magistrate hence his decision should have been challenged before a Resident Magistrate’s court which is the equivalent of a “Magistrate’s court of the first class” pursuant to section 2 of the Magistrates’ Court’s Act (Cap.10 Laws of Kenya). Section 6 Of Chapter 10 is quite explicit when it comes to the powers held by District Magistrates. Section 6 reads:

**“A District Magistrate shall have power to hold a magistrate’s court of such class as designated by the Judicial Service Commission.”**

It was therefore incumbent upon the Respondent’s advocate to show that Mr. J.C. Nyundo held the position of a District Magistrate, third class. This kind of evidence was missing hence the preliminary objection must fail.

Even assuming that the preliminary objection properly established, I do not think that the appeal will be

rendered fatally defective. This court's jurisdiction is not ousted by the provisions of section 11 of the Magistrate's courts Act. What Prejudice would the Respondent suffer if the appeal is heard by this court? In my humble view the Respondent will suffer no prejudice at all. The preliminary point raised herein are the kind of issues which should be dealt with at the stage of taking directions under order XLI rule 8 B of the Civil Procedure Rules.

I can only infer that the Respondent's intent was to cause further delay in the finalization of this appeal.

For the above reasons the preliminary objection is ordered dismissed with costs to the Appellant.

**Dated and delivered at Mombasa this 9<sup>th</sup> day of February 2007.**

J.K. SERGON

J U D G E

In open court in the presence of Mrs Makone h/b Mututi for respondent.

N/A for applicant