



**REPUBLIC OF KENYA**

**HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL APPEAL 581 OF 2002**

**JAMES MUGO MWANGI .....APPELLANT**

**V E R S U S**

**GARIEL MBURU MAINA .....RESPONDENT**

**(From the Original Civil Suit PMCC NO. 188 of 2000)**

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

This is an appeal from the order of the lower court dated 17<sup>th</sup> September, 2002. That order was made purportedly pursuant to an application by chamber summons dated 4<sup>th</sup> June, 2002 made by the defendant (the Respondent in this appeal). In it he sought the main orders that there be stay of execution of decree, that interlocutory judgment entered on 27<sup>th</sup> June, 2000 and the final judgment entered on 26<sup>th</sup> March, 2002 be set aside, and that the defendant be served with summons to enter appearance and copy of the plaint or be granted leave to file defence.

There are eight grounds of appeal. They all amount to one main complaint, and that is, that ALEX ANAMBO, Principal Magistrate, had no jurisdiction to hear the application by chamber summons dated 4<sup>th</sup> June, 2002 as the same had already been dismissed by another magistrate and had not been reinstated.

I have considered the submissions of the learned counsels appearing. I have also carefully perused the record of the lower court, both the original one and the typed proceedings. The plaintiff (who is the Appellant in this appeal) sought special damages before the lower court on account of loss occasioned by a road accident involving his motor vehicle and the Respondent's motor vehicle. It appears that the defendant did not enter appearance or file defence. The plaintiff filed a request for judgment. The matter appears to have then been set down for "formal proof". It came up for such "formal proof" on 19<sup>th</sup> February, 2002 when the plaintiff and three (3) witnesses testified. On 26<sup>th</sup> March, 2002 judgment was entered for the plaintiff for the total sum of KShs. 194,900/00 with costs and interest.

The defendant then filed an application by chamber summons dated 10<sup>th</sup> May, 2002. He sought therein the very same that he would subsequently seek in the chamber summons dated 4<sup>th</sup> June, 2002. Preliminary objection was raised to that earlier application by notice dated 31<sup>st</sup> May, 2002 upon the ground that the same was incurably defective. It would appear that the defendant reacted to this notice of preliminary objection by filing the application dated 4<sup>th</sup> June, 2002.

When the earlier application dated 10<sup>th</sup> May, 2002 came up for hearing on 13<sup>th</sup> June, 2002 the learned counsel for the defendant sought to withdraw it in order to proceed with the latter application dated 4<sup>th</sup> June, 2002. Counsel for the plaintiff objected to this upon the ground that the latter application was filed while the former was still in the court record, and that therefore the latter application was incompetent and not properly before the court. The court (MARY KIPTOO, Senior Resident Magistrate) upheld that objection and dismissed the application dated 4<sup>th</sup> June, 2002 (though she should have struck it out instead).

On 23<sup>rd</sup> July, 2002 the parties were before the same learned magistrate again; this time it was for hearing of the earlier application dated 10<sup>th</sup> May, 2002. The plaintiff's preliminary objection to the application raised by notice dated 31<sup>st</sup> May, 2002 was then argued. In a ruling delivered on 6<sup>th</sup> August, 2002 the learned Senior Resident Magistrate upheld the preliminary objection; she dismissed the application (though, again, she should have struck it out).

On 9<sup>th</sup> September, 2002 the parties then appeared before Alex Anambo, Principal Magistrate, purportedly for hearing of the application by chamber summons dated 4<sup>th</sup> June, 2002. Both learned counsels proceeded on the basis that the application that was dismissed by the Senior Resident Magistrate on 18<sup>th</sup> June, 2002 was the one dated 10<sup>th</sup> May, 2002. But they were clearly wrong; the record of the court shows that the application that was dismissed on that day was the one dated 4<sup>th</sup> June, 2002. It was dismissed upon the ground that it was filed while the previous similar application dated 10<sup>th</sup> May, 2002 was still on record, and that therefore it was incompetent and not properly before the court. As we have already seen the application of 10<sup>th</sup> May, 2002 was subsequently dismissed on 6<sup>th</sup> August, 2002. I have already observed that these two applications should have been struck out, not dismissed. But nothing turns on this.

There is no evidence on the lower court record that the application of 4<sup>th</sup> June, 2002 was ever reinstated. So, the learned Principal Magistrate, Alex Anambo, purported to hear an application that was already disposed of. He should not have done so. As a factual reality there was no longer before him an application dated 4<sup>th</sup> June, 2002 for him to hear. As it happened, the Principal Magistrate allowed the non-existent application; he had no jurisdiction to do so. The orders he granted on 17<sup>th</sup> September, 2002 were made in error as he had no jurisdiction to grant them. They must be set aside.

In the event this appeal is hereby allowed. The orders of the lower court of 17<sup>th</sup> September, 2002 are hereby set aside. The Appellant shall have the costs of this application. Orders accordingly.

**DATED AND DELIVERED IN NAIROBI THIS 20<sup>TH</sup> DAY OF JULY 2007**

**H. P. G. WAWERU**

**J U D G E**