REPUBLIC OF KENYA

IN THE HIGH COURT AT KITALE

CIVIL APEAL AT 33 OF 2005

LUMBASI KHISA SIMIYU ==========APPELLANT

V E R S U S

JANE ATAHI ========== RESPONDENT

J U D G M E N T

This appeal arises from the ruling delivered by the learned Senior Resident Magistrate on 24/10/2005.

The said ruling was made in respect of a preliminary objection which had been raised by the Defendant, (who is the respondent herein), challenging the court's jurisdiction to entertain the suit.

It was the considered view of the learned Senior Resident Magistrate that the magistrate's court at Kitale lacked the geographical jurisdiction to hear and determine the suit. Therefore, the court proceeded to strike out the suit with costs.

When prosecuting the appeal, the appellant said that at the material time, she was a resident of Kitale Municipality, which is within Trans-Nzoia District, and thus within the geographical jurisdiction of the magistrate's court, Kitale.

The appellant submitted that when the preliminary objection was being argued, there did arise questions as to whether or not Kitale Union Primary School, at which the appellant was reportedly teaching, was in Kitale Municipality.

As far as the respondent was concerned, there was no school within the Municipality of Kitale, by the name Kitale Union Primary School. If anything, the respondent emphasized that the only school which had a name that was close to that cited by the appellant, was Union Primary School, Trans Nzoia.

It is the appellant's contention that the question as to whether the school in Kitale was Kitale Union Primary School or Union Primary School, Trans Nzoia, was a matter of fact, which required to be proved by way of evidence.

The appellant invited this court to give consideration to the description of the parties as appearing in the pleadings. It was the appellant's submission that once the respondent did admit the description of the parties, as specified in the Plaint, it was wrong of the court to have arrived at a finding that was inconsistent with the said admission.

However, the respondent drew my attention to the contents of the verifying affidavit, in which the appellant said that she was resident in Turbo.

Upon a perusal of the verifying affidavit, I found that the appellant did not state that she was resident in Turbo, as asserted by the respondent herein. This is what the appellant said in his verifying affidavit;

" ***I, LUMBASI KHISA SIMIYU of P.O. BOX 781, TURBO do make oath and state as follows; …….***"

Whilst Turbo may be Lugari District, as stated by the respondent herein, the appellant did not say that he was resident at Turbo.

Secondly, it is clear from the Plaint that the appellant gave the respondent's postal address as being, P.O. BOX 199, WEBUYE. The town of Webuye is in Bungoma District, and the respondent submitted that she was resident at Webuye.

When the respondent filed her defence she, inter alia, stated that the Chief Magistrate's Court, Kitale, did not have the geographical jurisdiction to determine the suit. For that reason, the respondent did place the appellant on notice, that she would raise a preliminary objection founded on her perception that the court lacked of jurisdiction.

In determining the preliminary objection, the respondent believes that the magistrate's court based its decision on the pleadings. As far as the respondent was concerned, that court did not need to delve into any evidence, in order to be able to determine the preliminary objection.

It is evident from the record of the proceedings that as at the time when the preliminary objection was argued, the affidavit of service showing that the respondent had been served with the Plaint and Summons, at Kitale Union Primary School, was not on the court file.

The reason for that is simple. The preliminary objection was argued on 19/9/2005, whilst the affidavit of service was filed in court on 29/11/2005.

Therefore, I understood the respondent to have been saying that the contents of that affidavit were not taken into account in the ruling by the magistrate's court.

But then again, the respondent submitted that even if the said affidavit were taken into account, the contents thereof were false. That contention was founded upon the respondent's view that there was no school in Kitale which goes by the name Kitale Union Primary School.

To my mind, the issue as to whether or not there was a school within Kitale Municipality which goes by the name Kitale Union Primary School, is a matter of evidence. Similarly, if the only primary school within the Municipality of Kitale whose name is close to the one at which the defendant was allegedly served, was Union Primary School Trans Nzoia, is a matter to be proved through evidence.

Being relatively new to the Municipality of Kitale, I do not know, from my own personal knowledge, what the factual position is.

Accordingly, I could not accept the respondent's contention to the effect that it was false for the process server to have stated that he had served the defendant at Kitale Union Primary School.

Of course, I am also not in a position to accept the contention of the process server, unless and until either he or the respondent were to lead evidence on the issue.

In the same vein, simply because the postal address of the plaintiff was in Turbo (as stated in the verifying affidavit); or if the defendant's postal address was in Webuye (as stated in the Plaint), those facts would not necessarily imply that the parties were resident in the towns within which their postal

addresses are to be found.

One way of demonstrating that a person was not necessarily resident in the town at which his postal address is located is to be found in the contents of paragraph 2 of the Plaint, as read with paragraph 2 of the Defence.

In the Plaint, the defendant is described as being;

*" **a female adult and a civil servant and carrying out her duties of teaching at Trans Nzoia District."***

In her defence, the defendant admitted the;

*" **names and descriptions of the parties save that her address of service for purposes of this suit is care of M/S B.N. Munialo & Co., Advocates, Vision Gate House, P.O. Box 1531, KITALE."***

Although the respondent submitted that by the above-cited admission, she only admitted being an adult of sound mind, that is not borne out by the express wording of the defence.

Indeed, I do hold that by the admission, the respondent was admitting that she was an adult female, who was a civil servant, working as a teacher in Trans Nzoia District.

If any part of that description was inaccurate, the respondent should have said so in her defence, but she did not do so.

In the course of the hearing of the appeal herein, the respondent invited the court to ignore the authority which the appellant had cited before the magistrate's court. That request was based on the fact that the copy of the authority, which was made available to the learned magistrate was neither signed by the judge nor was it certified as a true copy of the original. As far as the respondent was concerned, the said authority was therefore not a legal document.

Finally, the respondent asked me to strike out the appeal, as it was incompetent. Its alleged incompetence was based on the failure by the appellant to attach, to the record of appeal, the Decree being appealed against.

The respondent relied on two authorities to back her contention that if the decree being appealed against was not attached to the record of appeal; the appeal should be struck out, on the ground that it was incompetent.

In the case of ***WILLIE Vs MUCHUKI & 2 OTHERS [2004] 2 KLR 357***, the Hon. Kimaru Ag. J. (as he then was) reiterated the legal position to the effect that a preliminary objection consists of a point of law which is argued on the assumption that all the facts pleaded by the other side are correct.

In this case, the appellant had pleaded that the respondent was a civil servant, working as a teacher within Trans-Nzoia District. Therefore the respondent's preliminary objection would need to have been argued on the assumption that she was a teacher working within Trans Nzoia District. And if that be the case, then there would have been no room for the respondent adducing evidence, at the stage of her preliminary objection, to show that she was not working within Trans Nzoia.

In ***MUIRURI V KIMEMIA [2002] 2 KLR 677***, the Court of Appeal made it abundantly clear that a preliminary objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

Therefore, it was not open to the learned magistrate to base her decision on facts either presented by the respondent or facts that were within the personal knowledge of the presiding judicial officer. The court should have presumed that the respondent was a civil servant, working as a teacher within Trans

Nzoia District.

And if that is the position, the court would have jurisdiction to hear and determine the suit.

It is noteworthy that the appellant had drawn the attention of the learned magistrate to the decision of the Hon. Ringera J. (as he then was) in ***MOHAMMED SHABAN V GEORGE MWANGI KARIUKI, BUNGOMA HCCC NO.13 OF 2002.*** In that case, the learned judge did hold that pursuant to the provisions of Section 3 (2) of the Magistrate's Court Act, a court of the resident magistrate has jurisdiction throughout Kenya.

A resident magistrate's court is defined to include a Senior Resident Magistrate's Court.

The learned judge held that such a court is not subject of the local territorial jurisdiction contemplated by section 15 of the Civil Procedure Act. He also said that;

*" **There may be good sound administrative reasons for filing suits in the administrative Districts in which the defendant resides or where the cause of action arose but those reasons cannot oust a statutory jurisdiction."***

The learned magistrate doubted the authenticity of the authority as it had not been certified.

I know of no legal requirement that if a party cites an unreported decision, as an authority to back his submissions, he can only rely on a certified copy thereof.

Incidentally, when the matter was before the learned magistrate, the issue as to the authenticity of the authority was two-fold. It was founded upon the lack of certification and also the lack of the judge's signature.

To my mind, there is no legal requirement that before an authority can be cited in court, it needs to be signed by the judge who pronounced it.

Therefore, the lack of certification and of the judge's signature were not good reasons for the learned magistrate failing to derive guidance from the authority.

As it is the respondent herein who raised the issue, the onus was upon her to demonstrate that the authority was not authentic.

The only other proper ways for disregarding the authority in question would have been for the court to either seek to directly verify its authenticity, or alternatively, by giving time to the appellant to provide proof of authenticity.

In a nutshell, the learned magistrate should not have assumed that the authority was not authentic.

For all those reasons, it is clear that the substantive appeal is well merited.

Notwithstanding that fact, the respondent asked me to strike out the appeal on the grounds that it was incompetent.

In the case of ***KENYA SEED COMPANY LIMITED Vs ANNE CHANDAI, KITALE HCCA NO.7 OF 2000,*** the ***Hon. Karanja J***., held that the provisions of Order 41 rule 1A of the Civil Procedure Rules were very clear. She said;

*" **The decree or order appealed against must be filed and the same must be a certified copy. Failure to include a certified copy of the decree or order, whether in an appeal before the High Court or the Court of Appeal, renders the appeal incompetent and the same must be struck out."***

And in the case of ***GABRIEL RUGIRI & ANOTHER VS ERASTUS SIMIYU BUTALA, KITALE HCCA NOS. 16 & 17 OF 2004,*** I had occasion to express myself thus;

*" **By virtue of the provisions of O. XLI rule 1A of the Civil Procedure Rules, a certified copy of the decree or order appealed against, is to be filed with the memorandum of appeal."***

The appellant told the court that the two above-cited decisions were correct. However, he nonetheless believes that having filed a copy of the ruling itself, that was sufficient. That was even more so because, as far as the appellant was concerned, it was not open to the respondent to challenge the record of appeal whereas she had, on 10/5/06, when directions were being given by the court, confirmed that the record was in order.

Having perused the record of the proceedings on 10/5/2006 I verified that the respondent herein had confirmed to the court that

*" **all the documents are in order."***

Ordinarily, an estoppel would operate to bar the respondent from disputing the documents which she had earlier accepted as being in order. However, an estoppel could not be called into play, so as to preclude the provisions of the law from taking effect. In other words, just because a party said that an otherwise invalid document was valid, would not serve to validate the said document.

In this instance, the appeal is incompetent because the decree was not filed with the memorandum of appeal. That incompetence cannot have been cured by the respondent's earlier confirmation, that all the documents are in order.

Accordingly, I find and hold that the appeal is incompetent. It is therefore struck out. However, I order that each party will bear his own costs because of what the respondent had told the court on 10/5/2006. My said decision on costs is also influenced by the fact that the substantive appeal was otherwise well merited.

Dated and Delivered at Kitale, this 28th day of November, 2007.

FRED A. OCHIENG

JUDGE