



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 783 OF 2003

ZIPPORAH NDUNGE KANYANYAPLAINTIFF

VERSUS

JULIUS KIMAITA THIOGURA.....DEFENDANT

RULING

The Respondent filed suit on the 3.7.2000 in the Senior Principle Magistrate's court a Milimani Commercial Case. The cause of action being a road traffic accident arise along Canary/Shamata Road, somewhere in Central Province.

The Defendant alleged that the Magistrate courts had no jurisdiction to try this case on territorial jurisdiction as per Section 15 of the said act. The reasons being that the cause of action arose in Nyadama and the Defendant lives and resides in Kagema.

It seems the Respondent stated that he was in fact seeking higher awards and instead of filing suit in the said Magistrate or High Court filed the same in the said residents magistrates court – commercial courts.

A Preliminary objection was raised that the court lacked jurisdiction. This objection was upheld by the magistrate who in fact stated that the court lacked jurisdiction but did not proceed to make any further orders.

The parties by consent transferred the suit to the High Court at Nairobi.

When it came for hearing, this court too stated that it lacked jurisdiction but gave an opportunity for the parties to address the court on this point namely:-

“1. Whether the court has jurisdiction to hear the case before it.

2. Whether this trial court can fault the consent order of another judge

2. Whether the case of Kageni vs Musano (1968) E.A. 43 is applicable in the present case.”

The advocate for the Respondent states he holds a lawful order of the High Court consenting to transfer the case to the High Court. The advocate for the Defendant claims though a consent may have been entered into when such order or decree amounts to an illegality the consent be reserved. He referred to the **Wasike v Wamboko case 1988 KLR 429** whereby the consent judgment in that case was inter alia – was found under section 67 (2) not to be an absolute bar in challenging a “decree passed with the consent of parties where parties seek to prove that the decree was invalid *abi initio* and should be rescinded”.

Can this court challenge the consent Order of another Judge? I believe the effect is not challenging the

consent order but in effect a situation where the court on being seized that it has no jurisdiction to hear a suit it must recognize that the said consent is invalid ab initio

It is without a doubt that the Respondent was finishing for a court would give him a higher award. He is free to do so provided he does so within the High Court in Kenya which has limited jurisdiction to hear cases.

The suit should have therefore been just filed in the High court and not a magistrates court.

I am permitted, suo moto, to strike out a plaint if it is incompetent. I do so on grounds that this court has no jurisdiction to hear this suit. The Plaintiff must indeed file a fresh suit out of time. I grant him leave to do so.

I grant the costs of this suit to the Defendant.

Dated this 30th day of July, 2004 at Nairobi.

M. ANGAWA

JUDGE

Gitau J.H. Mwara & Co. Advocates for the plaintiff

Gacheru J and Co. Advocates for the defendant