



Prime Trading Limited v Nittin Shah t/a Smart World Cosmetics (Civil Appeal E225 of 2022) [2024] KEHC 9278 (KLR) (Civ) (15 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9278 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E225 OF 2022

H NAMISI, J

JULY 15, 2024

BETWEEN

PRIME TRADING LIMITED APPELLANT

AND

NITTIN SHAH T/A SMART WORLD COSMETICS RESPONDENT

(Being an Appeal from Ruling of Hon. G. Sogomo, Principal Magistrate delivered on 18th March 2022 in Milimani CMCC NO. E 6738 of 2020)

JUDGMENT

Introduction

1. This appeal arises from a Ruling delivered on 18th March 2022 with respect to a Preliminary Objection raised vide Notice dated 7th January 2021. The grounds of the Preliminary Objection are that:
 - i. The Honourable Court has no jurisdiction to try this suit since the Defendant's residence and place of business is in Nanyuki. Also the cause of action arose in Nanyuki, Laikipia county;
 - ii. That the Plaintiff is aware of the same as pleaded in the Plaint;
 - iii. That the objection is based on sections 12, 14 and 15 of the Civil Procedure Rules;
 - iv. that the suit be dismissed as it is frivolous and otherwise an abuse of court process.
2. The Preliminary Objection was canvassed by way of written submissions. The 2 Records of Appeal dated 13th September 2023 and 11th April 2024 filed by the Appellant do not contain copies of submissions with respect to the Preliminary Objection. Similarly, there are no copies of submissions by either party in the lower court file before me. I, therefore, rely on the trial Magistrate's observation in his Ruling that the Appellant herein did not file submissions in respect of the Preliminary Objection.



3. The Appellant, being dissatisfied by the Ruling, filed a Memorandum of Appeal dated 11th April 2022 on the following grounds:
 - i. The Learned Principal Magistrate erred in law and in fact in failing to consider the Appellant's submissions that were on record as can be seen from the E-filing platform;
 - ii. The Learned Principal Magistrate erred in law and in fact by condemning the Plaintiff unheard when he disregarded the Plaintiff's submissions on record hence infringing on the Appellant's right to fair hearing as guaranteed in Article 50 of *The Constitution*;
 - iii. The Learned Principal Magistrate erred in law and in fact by misapprehending and misapplying the provisions of *Civil Procedure Act* particularly section 15 and by so doing arrived at a wrong decision;
 - iv. The Learned Principal Magistrate erred in law and fact by assuming facts not in the pleadings and hence arrived at a wrong decision;
 - v. The Learned Principal Magistrate erred in law and fact by disregarding facts that ought to have been considered and arrived at a wrong decision with respect to where the cause of action arose, to wit Nairobi where the suit was filed;
 - vi. The Learned Principal Magistrate erred in law and fact by wilfully ousting its jurisdiction and hence prejudicing the Appellant's right to fair hearing and access to justice;
 - vii. The Learned Principal Magistrate erred in law and fact by sustaining the preliminary objection when there was no sufficient evidence supplied by the Respondent to support his objection;
4. On 15th May 2024, directions were given to parties to file their written submissions. The Appellant filed his submissions dated 5th June 2024 and the Respondent's submissions are dated 13th June 2024.

Brief Facts

5. The Appellant instituted proceedings against the Respondent for the sum of Kshs 82,556/=, being general damages with respect to breach of contract by the Respondent. The Appellant's case is that on 28th June 2019, the Respondent, who resides and works for gain in Nanyuki, approached the Appellant, who is based in Nairobi, and requested the supply of cosmetics worth Kshs 33,867/-. A subsequent order of cosmetics worth Kshs 24,301/- was made on 20th September 2019. In an attempt to defray the amounts due and owing to the Appellant, the Respondent issued a cheque of Kshs 33,866/-, which was returned by the Bank unpaid.
6. No statement of Defence had been filed by the Respondent by the time of the Ruling on the Preliminary Objection.
7. I have considered the Memorandum of Appeal, Record of Appeal as well as submissions by the parties. The issues for determination can be narrowed down to two: Whether the cause of action arose within the jurisdiction of the Magistrate Court and whether the Magistrate's decision to uphold the preliminary objection was correct.



Analysis & Determination

8. In the case of *Hassan Ali Joho & Another -vs- Suleiman Said Shahbal & 2 Others*, the Supreme Court cited the leading decision on preliminary objections, *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* [1969] EA 696, where the court held as follows:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

9. Further, in *Independent Electoral & Boundaries Commission -vs- Jane Cheperenger & 2 Others* [2015] eKLR, the Supreme Court made the following observation relating to preliminary objections:

“The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

10. The issue being disputed relates to the territorial jurisdiction of the Magistrate court as expressly provided for at section 15 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya. Section 15 provides that:

Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction –

(c) the cause of action, wholly or in part, arises

11. Further on, explanation 3 provides that in suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely-

- i. The place where the contract was made;
- ii. The place where the contract was to be performed or the performance thereof completed
- iii. The place where in performance of the contract any money to which the suit relates was expressly or impliedly payable

12. In their submissions, the Appellant relied on the case of *Josephat Njuguna Karugu -vs- Margaret Nduta Ngugi & 2 Others* [2021] eKLR in which the Court stated:

“Therefore, the Court find and holds that grounds 1,3,4 and 5 are not pure points of law as they are not capable of disposing of the matter preliminarily without calling evidenced, probing it and the Court to ascertaining facts from elsewhere and therefore the same are



not properly raised preliminary objection. See the case of Quick Enterprises Ltd -vs- Kenya Railways Corporation, Kisumu HCC No. 22 of 1999, where the Court held that:

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings”

13. From the Plaintiff filed by the Appellant, it is admitted that the Respondent resides and works for gain in Nanyuki. It is also clear that there was a contract between the parties for supply of goods to the Respondent. What is not apparent from the face of the Plaintiff is the place where the contractual relationship began and where the goods were to be supplied. In other words, the place where the contract was to be performed or the performance completed.
14. The illustration (a) given at Section 15 (c) gives two options where a plaintiff can file suit. It states:

Illustration.—(a) A is a tradesman in Nairobi. B carries on business in Mombasa. B by his agent at Nairobi buys goods of A and requests A to deliver them to Mombasa by rail. A may sue B for the price of the goods either in Nairobi, where the cause of action has arisen, or in Mombasa, where B carries on business.
15. In view of the foregoing, it would, therefore, be difficult for a court to ascertain the territorial jurisdiction without ascertaining facts from elsewhere. The magistrate court would have to evaluate the evidence before it to determine where the cause of action arose. This fact is not readily available from a cursory glance at the pleadings. I, therefore, find and hold that the Magistrate court in Nairobi has jurisdiction to hear the matter herein.
16. Bearing in mind the pecuniary jurisdiction, I make the following orders:
 - i. The appeal is hereby allowed;
 - ii. This matter in the lower court is hereby reinstated and transferred to the Small Claims Court to be heard and determined on merit;
 - iii. The Adjudicator should proceed forthwith to hear the matter on a day-to-day basis and conclude this matter as soon as practicable;
 - iv. Costs of the Appeal assessed at Kshs 40,000/= are awarded to the Appellant.

DATED AND DELIVERED AT NAIROBI THIS 15 DAY OF JULY 2024.

HELENE R. NAMISI

JUDGE

In the presence of:

...Mr. Manyara for the Appellant

...N/A..... for the Respondent

