



**Gari & another v Pandya Memorial Hospital (Civil Appeal  
051 of 2021) [2023] KEHC 2285 (KLR) (17 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2285 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 051 OF 2021  
F WANGARI, J  
MARCH 17, 2023**

**BETWEEN**

**KUKAA MWANGOVYA GARI ..... 1<sup>ST</sup> APPELLANT**

**SARAH DZOMBO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PANDYA MEMORIAL HOSPITAL ..... RESPONDENT**

*(Being an appeal from the ruling and orders of the Hon. Francis Kyambia,  
Chief Magistrate Court at Mombasa in SRMCC No. 2072 of 2021)*

**JUDGMENT**

1. This is an appeal against the ruling and delivered by Hon. Francis Kyambia, Chief Magistrate on March 29, 2021. The appellants being dissatisfied with the said ruling have preferred this appeal.
2. The appellants in their Memorandum of Appeal preferred seven (7) grounds of appeal in urging this court to set aside the ruling and orders made on March 29, 2021 deduced into two (2) grounds as hereunder;
  - a. The learned magistrate erred in law and in fact in delivering the ruling on the Notice of Motion dated March 9, 2021, when the matter was scheduled for a mention, thus denying the appellants the opportunity to be heard.
  - b. The learned Magistrate erred in law and in fact by holding that the preliminary Objection dated March 4, 2021 had been overtaken by events, arising out of the holding that the learned Magistrate Hon CN Ndegwa had transferred the primary suit to his court.



3. Directions were taken and the appeal was disposed of by way of written submissions, where both parties duly complied and relied on various decisions in support of their rival positions.
4. As the first appellate Court, it is now well settled that the role of this court is to revisit the evidence on record, evaluate it and reach its own conclusion in the matter. (See the case of *Selle & Ano v Associated Motor Boat Co Ltd* [1968] EA 123. This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the Trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings. This was the holding in *Mwanasokoni v Kenya Bus Service Ltd.* [1982-88] 1 KAR 278 and *Kiruga v Kiruga & Another* [1988] KLR 348.
5. I have carefully perused and understood the contents of the pleadings, proceedings, ruling, grounds of appeal, submissions and the decisions referred to by the parties. To be able to ascertain whether the ruling ought to stand or otherwise, I will carefully revisit the record.
6. The Respondent vide a plaint dated November 6, 2019 and filed on November 20, 2019 sought for judgement against the appellants for a sum of Ksh 12,517,713/=, being outstanding hospital bills. The appellants filed their statement of defence dated December 23, 2019 and filed on the same date. Reply to defence dated January 17, 2020 was filed on January 20, 2020. The matter came up for pre-trial on February 25, 2021 before Hon CN Ndegwa, Senior Principal Magistrate. In the presence of Ms Vanani advocate for Plaintiff/ Respondent and Ms Katana advocate holding brief for Lewa advocate for Defendants/ Appellants, the learned magistrate directed as hereunder;
 

“I have noted that the defendants have raised the issue of jurisdiction under Section 7 of the Magistrates Court Act No 26 of 2015. I have also noted that the bills that are the basis of the plaintiff’s suit add to slightly over 15 million which is beyond the pecuniary jurisdiction of a Senior Principal Magistrate. I therefore direct that the matter be heard by Hon Kyambia Chief Magistrates, whose jurisdiction is up to 20 million. Mentioned on March 29, 2021.”
7. Before the date of the mention, the Plaintiff/ Respondent filed a Notice of Motion dated March 9, 2021 and filed on March 10, 2021. The plaintiff sought leave to amend the heading of the plant to read ‘Chief Magistrate’s Court’ case instead of ‘Senior Resident Magistrate’s Court’ case. The application was based on the ground that there was a typographical error (a copy and paste error) at the time of preparation of the plaint.
8. The defendant/Appellants filed Notice of Preliminary Objection dated March 4, 2021 and filed on March 5, 2021 on the basis that the suit was a non-starter in law and void ab initio as it offended the provisions of Section 7 of the *Magistrate Court’s Act* No 26 of 2015, as the Senior Resident Magistrate’s Court in which it was filed lacked jurisdiction to hear and determine it. They also did file a response to the application via a Replying Affidavit dated March 26, 2021 and filed on March 29, 2021.
9. The Plaintiff/Respondent filed their Grounds of Opposition to the Defendant’s Preliminary Objection, which was dated March 9, 2021 and filed on March 10, 2021. The respondent stated that the Preliminary Objection raised was a technical object and Article 159 of *the Constitution* was applicable, and Order 2 Rule 14 of the *Civil Procedure Rules*.
10. On March 29, 2021, the parties herein as represented by the advocates as was the case on February 25, 2021, appeared before Hon Kyambia Chief Magistrate. Ms Vanani advocate for the Plaintiff/ Respondent stated that they had filed an application to amend their plaint. Ms Katana advocate holding brief for Lewa advocate for the Defendants/Appellants stated that they had filed a Preliminary Objection on the issue of pecuniary jurisdiction.



11. Hon F Kyambia Chief Magistrate (though wrongly indicated as SPM in the proceedings) ruled as hereunder;

“I have listened to the parties. The Preliminary Objection filed by the defendants, has been overtaken by events the moment Hon. Ndegwa Senior Principal Magistrate referred this matter to this court on account of lack of pecuniary jurisdiction. On the application for amendment of the plaint, the same is straight forward and I do not see the prejudice the defendant shall suffer if the application is allowed. I do hereby allow the same. The matter is fixed for hearing on June 28, 2021.”

It is this ruling that precipitated the present appeal.

### **Appellants’ submissions**

12. I have perused through the written submissions by the appellant and the authorities in support. In summary, the appellants submitted that by allowing the Notice of Motion by the respondents seeking to amend the plaint, and dismissing the appellants’ Preliminary objection, during a mention date, the Honourable Magistrate denied the parties an opportunity of being heard, which offended Article 50 of *the Constitution* on the right to be heard. The appellants relied on the case of *Central Organization of Trade Unions (K) v Cabinet Secretary, Ministry of Labour Social Securities and Services & 2 Others* [2014] e KLR.
13. On Hon. C.N Ndegwa SPM, transferring the matter to Hon. Kyambia CM, the appellants submitted that he did not have pecuniary jurisdiction pursuant to Section 7 of the Magistrate’s Court Act. The magistrate did not have powers to transfer the matter. The appellants relied on the case of *Owners of the Motor Vessel Lillian s” v Caltex Oil (Kenya) Limited* [1989]KLR 1. The submitted that only the High Court had the powers to do so under Section 18 of the *Civil Procedure Act*.
14. The appellants prayed that the appeal be allowed, the ruling dated March 29, 2021 be set aside and the file be placed before the Senior Resident Magistrate for hearing and determination. They also prayed for costs of this appeal.

### **Respondent’s submissions**

15. For the Respondent, it was submitted that the title of the Plaint was erroneously described the matter as ‘Senior Resident Magistrate’s Court’ instead of ‘Chief Magistrates’ Court’ hence it was a typographical error. This led to the application seeking for the amendment of the plaint. On the transfer of the matter from Hon Ndegwa SPM to Hon Kyambia CM, the respondent submitted that both magistrates had the pecuniary jurisdiction to deal with the matter based on the claim. The decision to transfer was not challenged and both parties presented themselves before Hon Kyambia on the mention date as directed.
16. The responded further submitted that the ruling of the court did not prejudice the appellants, and it was in line with Article 159 of *the Constitution* and the overriding objective of the *Civil Procedure Act*. They relied on the case of *Stephen Boro Githia v Family Finance Building Society & 3 others* among others in support of their case. They prayed that the appeal be dismissed with costs.



## Analysis and determination

17. After considering the pleadings, proceedings, submissions and the law, I find that the following are the issues for determination: -
- a) Whether the learned Magistrate was in exercise of his discretion by directing the matter be heard by a magistrate with jurisdiction.
  - b) Whether the Learned Magistrate exercised his discretion judiciously in allowing the application for amendment and dismissing the preliminary objection, on a mention date;
18. On Civil jurisdiction of a magistrate, Section 7 of the *Magistrates' Court Act* provides as hereunder;
- (1) A magistrate court shall have and exercise such a jurisdiction and powers in proceedings over a civil nature in which the value of the subject matter does not exceed-
    - a. twenty million shillings, where the court is presided over by a chief magistrate;
    - b. fifteen million shillings, where the court is presided over by a senior principal magistrate;
    - c. ten million shillings, where a court is presided over by a principal magistrate;
    - d. seven million shillings, where the court is presided over by a senior resident magistrate; or
    - e. five million shillings, where the court is presided over by a resident magistrate.
19. Hon. Ndegwa was a Senior Principal Magistrate with a pecuniary jurisdiction of Kshs 15,000,000/=. The plaintiff's claim was therefore beyond his pecuniary jurisdiction. Upon realizing the same after the defence raised the issue of jurisdiction in their statement of defence, Hon Ndegwa directed that the matter be heard by Hon Kyambia Chief Magistrate, who had the pecuniary jurisdiction of Kshs 20,000,000/=.
20. The provisions of Section 18 of the *Civil Procedure Act*, empowers the High Court *inter alia*, to transfer matters from one Magistrates Court to another Magistrates' Court, upon the application of the parties or on its own motion. Hon. Ndegwa did not transfer the matter from one Magistrates Court to another, but only directed that the matter be placed before Hon. Kyambia, within the same Magistrates Court ie Mombasa Magistrates Court, which is a court of competent jurisdiction for hearing and determination. I find that Hon Ndegwa SPM was right within his powers to have the file placed before Hon Kyambia. It's also important to note that both parties adhered to the directives of the court and appeared before Hon. Kyambia during the mention date on March 29, 2021.
21. On the second issue, it is a fact that Hon Kyambia allowed the Notice of motion seeking to amend the plaint, and also dismissed the preliminary objection on pecuniary jurisdiction, on ground that it had been overtaken by events. Ordinarily, a court should not unleash orders during a mention date. It may be construed as depriving a party an opportunity to be heard. As submitted by the appellants, the Superior Courts have pronounced themselves that a matter cannot be heard on a mention date unless the parties consent to it.



22. The general power to amend pleadings draws from Section 100 of the *Civil Procedure Act*. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with criteria set out under Order 8 Rule 3 of the *Civil Procedure Rules*.
23. The Court of Appeal outlined the principles in amendment of pleadings in *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR (cited by the Appellant) as follows: -
- “The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12<sup>th</sup> Edition, in the case of Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No 149 of 1991 as follows: -
- “The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”
24. Similarly, in *Halsbury’s Laws of England*, 4<sup>th</sup> Ed (re-issue), Vol 36(1) at paragraph 76, it states the following about amendments of pleadings: -
- “...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.
25. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.
26. In this case, the trial magistrate cautioned himself and stated that there would be no prejudice occasioned by the defendants if the application to amend the plaint is allowed. The amendment did not introduce a new or an inconsistent cause of action. I agree with the trial magistrate that there was no prejudice occasioned to the defendants by having the orders which were issued in their presence during a mention date.



27. Under the dispensation of the Kenya Constitution, 2010, we have been mandated that in exercise of the judicial authority, we ought to be guided by the laid down principles in Article 159 of the Constitution. Article 159 2(d) provides;

(2) “In exercising judicial authority, the courts and tribunals shall be guided by the following principle-

(d) justice shall be administered without undue regard to procedural technicalities”

The above is echoed in the Civil Procedure Rules. Order 2 Rule 14 provides;

“No technical objection may be raised to any pleading on the ground of any want of form.”

28. The Courts also have a duty to further the overriding objective of the Civil Procedure Act. It is provided in Section 1A and 1B as hereunder;

#### 1A. Objective of Act

(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

#### 1B. Duty of Court

(1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and

(e) the use of suitable technology.

29. From the above provisions of the law, I find that the trial magistrate was in exercise of his discretion and there is no indication that the said exercise was done in bad faith while granting leave to amend the plaint albeit on a mention date, as the amendment was to correct an error in the heading of the plaint hence no substantial orders made.

30. On the Preliminary Objection, the rightfully directed that it had been overtaken by events based on the discussion on the first issue, where it is found that Hon Ndegwa was in exercise of his discretionary powers to have the file placed before a magistrate with competent jurisdiction.

31. Following the foregone discourse, the upshot is that the following final orders do hereby issue: -



a. The Appeal is hereby dismissed and the orders issued by Hon Francis Kyambia on March 29, 2021 are upheld.

b. Going by the circumstances giving rise to the claim, each party to bear

c. File be placed before the Chief Magistrate for hearing and disposal of the matter.

Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY OF MARCH, 2023.**

.....

**F. WANGARI**

**JUDGE.**

**In the presence of:**

Ms Katana Adv. h/b for Lewa Adv. for the Appellant

Ms Vanani Adv. for the Respondent

**Guyo, Court Assistant**

