HK v TW (Civil Appeal E846 of 2021)
[2023] KEHC 22478 (KLR) (Civ) (21 September 2023) (Judgment)

Neutral citation: [2023] KEHC 22478 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E846 OF 2021

AA VISRAM, J

SEPTEMBER 21, 2023

BETWEEN

HK .... APPELLANT

AND

TW .... RESPONDENT

(Being an Appeal from the entire Order and Ruling delivered on 26th November, 2021 by Hon. A. N. Makau (Ms.) Principal Magistrate in Misc. Civil Application No. E1054 of 2021)

JUDGMENT

1. This appeal emanates from the ruling of the principal magistrate delivered on November 26, 2021 dismissing the appellant's preliminary objection dated August 3, 2021 contending that there was no valid suit before the magistrate, and therefore the matter ought to be stuck out. The said PO was dismissed provoking this appeal.

2. The appellant set out the following grounds of appeal in its memorandum of appeal dated December 24, 2021:-

   a. The learned magistrate erred in law and in fact when she disallowed the appellant's notice of preliminary objection dated August 3, 2021 objecting that there was no suit known in law to found the basis of a stand –alone interlocutory motion by the respondent herein.

   b. The learned magistrate erred in law when she failed to find as objected to by the appellant herein, that she was in law and procedurally divested of jurisdiction to entertain the respondent's stand –alone interlocutory proceedings without the substratum of a suit and hence, *inter alia* no fair trial could ensue as contemplated by the *Civil Procedure act*.

c. The learned magistrate erred in law when she ignored and failed to take into account the mandatory provisions of section 19 of the *Civil Procedure Act* which circumscribes the lodging of suits before a civil court such as before her, and she thereby allowed an incompetent proceeding by the respondent to subsist, to the prejudice of the appellant.

d. The learned magistrate erred in law and in fact in holding that the respondent had satisfied the grant of the lodging of a proper suit via the stand-alone interlocutory motion when in fact and in law there was no proceeding in the form of a suit that could proceed to trial, as only a stand –alone interlocutory motion was lodged by the respondent.

e. The learned magistrate erred in law and in fact in failing to appreciate the thrust and substance of the appellant's preliminary objection dated August 3, 2021 which implicates the appellant's constitutional right to a fair trial under article 25(c) of the *Constitution* of Kenya and which right she thereby abridged.

f. The learned magistrate erred in law and in fact by failing to find that absent a suit known in law, the respondent's stand-alone interlocutory motion dated July 19, 2021 could not act as a substitute to the main suit contemplated under section 19 of the *Civil Procedure Act* and/or order 37 of the *Civil Procedure Rules* to found a fair trial once the motion is spent.

g. The learned magistrate erred in law and in fact in failing to find that there was no basis to adjudicate on an interlocutory stand-alone notice of motion dated July 19, 2021 as lodged by the respondent without the substratum of a substantive suit thereon.

h. The learned magistrate erred in law and in fact in irrationally finding for the respondent's grossly incompetent proceedings and dismissing the appellant's preliminary objection.

i. In assessing the merits of the appellant's preliminary objection dated August 3, 2021 as a whole, as against the appellant's elaborate submissions pointing out the incompetence of the proceedings dated July 19, 2021, the learned magistrate was clearly wrong in the exercise of her discretion, in consequence of which the appellant has been visited with injustice.

j. The learned magistrate erred in law and in fact in failing to consider the weight of the appellant's submissions tendered in court in support of the preliminary objection dated August 3, 2021, yet all the decisions cited by the appellant in his submissions supporting the said PO were binding on the learned magistrate pursuant to the doctrine of *stare decisis*.

k. The learned magistrate exercised her discretion wrongly and perversely in dismissing the appellant's notice of preliminary objection dated August 3, 2021.

3. The appeal was disposed of by way of written submissions, which were filed by the appellant only.

4. The appellant submitted that the respondent in this case had attempted to commence proceedings against him under the *Prevention of Domestic Violence Act*, Act No 2 of 2015 (the Act), by filing a notice of motion miscellaneous civil application dated July 19, 2021, under a certificate of urgency, without first filing a substratum plaint, originating summons, or petition as a primary proceeding. No witness statement, list of documents, or summons to enter appearance were served on him, or have been served on him to date. Accordingly, he submitted that there was only an interlocutory motion before the lower court, and thus, no suit within the meaning of the *Civil Procedure Act*.

5. Based on the above, the proceedings before the lower court were fatally defective. He relied on section 19 of the *Civil Procedure Act* and the decision of the High Court in *Proto Energy Limited v Hashi Energy Limited* (2019) eKLR at paragraph 14, where the court stated as follows:-

> "Order 3 rule (i) (ii) provides that every suit shall be instituted by way of a plaint. As a general rule a suit can only be instituted by way of a plaint, petition or an originating summons. A notice of motion is not legally recognized as an originating process. A notice of motion can only be filed within a property instituted suit. The applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of motion renders the entire suit defective"

6. Further to the above, he relied on the decision High Court in *Rajab Kosgei Magut v Nuru Jepleting Choge* (2020) eKLR, where the court stated as follows:-

> "I am also of the view that an applicant cannot use short cuts to access justice where there are laid down procedures to be followed...... Having considered the preliminary objection and the submissions therein, I find that the preliminary objection has merit and is therefore upheld. The applicant's application dated May 19, 2020 is hereby struck out with costs to the 1st respondent."

Analysis and Determination

7. As this is the first appeal, this court is called upon to analyze and re-assess the evidence on record and reach its own conclusions bearing in mind that it neither saw nor heard the witnesses testify (see *Selle v Associated Motor Boat Co* [1968] EA 123). In *Kiruga v Kiruga & another* [1988] KLR 348, the Court of Appeal observed that;

> "An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence on the case generally."

8. The primary issue for determination is whether the proceedings before the lower court were incompetent on the basis that there was no substantive suit before the court?

9. Section 19 of the *Civil Procedure Act* states:-

> Every suit shall be instituted in such manner as may be prescribed by rules.

10. Order 3 of the *Civil Procedure Rules* states:-

    (1) Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

11. Order 5 specifies the actions to taken relating to the issue of summons and time to enter appearance. And further, order 3, rule 2 sets out the documents to accompany a suit in the following terms:-

> " Documents to accompany suit [order 3, rule 2]
>
> All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—
>
> (a) the affidavit referred to under order 4 rule1(2);
>
> (b) a list of witnesses to be called at the trial;
>
> (c) written statements signed by the witnesses excluding expert witnesses; and
>
> (d) copies of documents to be relied on at the trial including a demand letter before action: Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under order 11."

12. Looking at the record, it is evident, that to date, none of the above steps or mandatory provisions have been complied with. The rules as stated above are not optional and cannot be wished away, see *Proto Energy* (supra).

13. Further, in *Samuel Chege Thiari & another v Eddah Wanjiru Wangari & 3 others* [2018] eKLR, the court held as follows:-

> " In the end, I find that the applicant is not properly before this court as there is no suit upon which the notice of motion can stand. The court cannot invoke its inherent jurisdiction to cure that defect."

14. In *Adala v Anjere* [1988] eKLR the Court of Appeal stated:-

> " There is no procedure whereby a claim of any sort can be commenced by chamber summons. Applications are for interlocutory matters in the suit. Any claim has to be commenced by a plaint or where the rule provides, by an originating summons. The defendant has to file a defence or an affidavit in answer to that claim....... These are the steps the respondent should have taken rather than applying wrong procedure as he did. We feel that the High Court was wrong, while trying to sympathize with the respondent accepted the wrong procedure for entering judgement upon which execution could follow."

15. Finally, I am satisfied that the error on the part of the respondent is substantive in nature, rather than merely procedural, and therefore, incapable of being cured by article 159 (2) (d) of the *Constitution* of Kenya, which relates to procedural technicalities.

16. Based on the reasons above, I find that the appeal is with merit and is allowed with costs. The orders of this court are as follows:-

    a. The order dated November 26, 2021 issued by Hon A. N Makau (Ms) Principal Magistrate in Misc civil application No E1054 of 2021 is hereby set aside.

    b. The respondent's proceedings initiated by way of notice of motion dated July 19, 2021 before the subordinate court are incompetent before the court and hereby struck out.

c. The respondent shall bear the costs of the appellant's notice of preliminary objection dated August 3, 2021 before the lower court in civil application No E1054 of 2021 and costs of this appeal.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 21ST DAY OF SEPTEMBER 2023

ALEEM VISRAM

JUDGE

In the presence of;

.................................For the Appellant

................................For the Respondent