



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 32 OF 2019

DIAMOND TRUST BANK KENYA LIMITED.....APPELLANT

-VERSUS-

SANLAM GENERAL INSURANCE LIMITED.....1ST RESPONDENT

ROYAL HISHAM KENYA LIMITED.....2ND RESPONDENT

(Being an Appeal from the Ruling and order of the Chief Magistrate's Court of Kenya

at Mombasa dated and delivered on the 4th February 2019 by Hon. E Muchoki

in Mombasa CMCCC No. 1227 of 2018)

JUDGMENT

1. This appeal challenges the ruling dated and delivered on the 4.2.2019 in Mombasa CMCC **No.1227 of 2018 (O.S)**. in the decision, the trial court found that it had the requisite jurisdiction to deal with the Plaintiff's originating summons in light of order 37 rule 19. It dismissed with cost the Defendant's notice of motion dated 19.10.2018 that sought to have the Plaintiff's Originating summons dismissed for being an abuse of the Court process and the striking out of third party proceedings against the third party.

2. The Appellant being dissatisfied with the above decision has now moved this Court through a Memorandum of Appeal dated 21.2.2019 and filed in Court on the 25.2.2019. The memorandum of Appeal has raised 10 grounds of appeal.

3. The Appeal was directed to be canvassed by way of written submissions which were filed by both sides then highlighted on the 25.11.2019.

Submissions

4. Mr. Shah, Learned Counsel for the Appellant, submitted that the trial Court lacked jurisdiction to entertain the 1st Respondent's suit since order 37 is specially reserved for the high Court or courts of equal status as order 37 rules 16,17,18 and 20 all make reference to a Judge and not a magistrate.

5. Mr. Shah further submitted that an insurance contract and prayers of a declaration under the insurance (Motor Vehicle Third Party Risks Act) are not contemplated under order 37 and therefore, urged that the unrestricted use of originating summons should be frowned upon. For authority, reliance was placed on the decisions of the Court in **Owners of motor vessel Lillian S vs Caltex (1989) eklr, Kibutiri v Kibutiri (1983)KLR 1 and albert karume vs Kungu Katabaki (2015)eklr** as well as the provisions of section 3, cap 2, section 2, cap 21 Order 37 as cap 405, laws of Kenya for the position that an Originating summons is only returnable before a judge and that without jurisdiction a court cannot move

6. Counsel also submitted that no party has moved the trial Court to have the originating summons converted into a Plaint pursuant to Order 37 Rule 19 and that even the Court on its own motion did not convert the originating summons into a Plaint. He added that in the circumstances of the case and its facts, the Court could not convert the originating summons to a Plaint as the suit was wrongly commenced. Therefore, a suit filed contra-statute cannot be saved by the oxygen principle or the provisions of Article 159 of the Constitution. The same ought to have been struck out.

7. On the striking out of the third party proceeding, Counsel submitted that the entire process was illegal and defective as commencing third

party proceedings under an originating summons is not possible. Therefore, the leave granted to issue a third party notice was irregular.

8. Mr. Kwaya learned Counsel for the 1st Respondent submitted that what the Appellant is challenging is the discretion of the trial Court yet it has not brought any evidence to this Court to demonstrate that the magistrate misdirected himself and as a result, he arrived at a wrong decision.

9. Mr. Kwaya submitted that the provisions of Section 2 of the Civil procedure Act supersede the definition provided under Section 3 of the Interpretation and General Provisions Act, and therefore order 37 of the civil procedure Act can is not a preserve of the High Court and Courts of equal status.

10. On the issue of whether the proceedings were wrongly initiated vide an originating summons, Counsel submitted that the proceedings at the lower Court could be deemed initiated vide a Plaint and proceed to be determined on merits if no prejudice would be suffered and in this case it has not been demonstrated that any prejudice will be suffered. Reliance was placed in the case of **Meriba vs. Meriba Civil Appeal No.188 of 2002(2007)**, where it was held that in appropriate cases proceedings commenced by originating summons may be continued as though the same begun by Plaint.

11. Mr. Ambwere Counsel for the 2nd Respondent submitted that the issue of striking out the third party proceedings has not been raised in the grounds of Appeal. Consequently, the Appellant should not be allowed to raise new issue in its submissions.

Analysis and Determination

12. There are essentially two issues in this appeal; **Whether an Originating summons is returnable before the magistrates 'court and if the trial Court was clothed with jurisdiction to determine suits brought under order 37 of the civil procedure.** I consider the question of jurisdiction to be all important and I would start with it

13. In any litigation, jurisdiction is central. A court of law cannot validly take any step without jurisdiction. The Supreme Court stated **In the Matter of Interim Independent Electoral Commission [2011] eKLR** as follows:

[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

14. Under **Section 19 of the Civil Procedure Act** and Order 3 rule 1, the law provides that every suit shall be instituted in such manner as maybe prescribed by rules but the primary mode is by a plaint. Before the trial court the appellant as defendant took the view that a suit filed by way of an OS before a magistrate's court did not lie before that court because an OS is only returnable before a judge and that the claim pleaded was not one Order 37 permit to be pleaded by way of an OS.

15. In the case of **Cyril J. Haroo & Another v. Uchumi Services Limited & 3 Others [2014] eKLR** , it was observed:-

“Where a party, whether intentionally or by mistake, moves the court contrary to the provisions of the law, the court may call upon such a party to move the court appropriately by nullifying what was filed contra-statute in the first place. A proper suit may be filed again.

A suit filed contra-statute cannot be saved by the oxygen principle or the provisions of article 159 of the Constitution. In the case of Siasa Pasua & 2 Others vs Mbaruk Khamis Mohamed & Another (2012) e KLR Ojwang J. (as he then was) had this to say about the provisions of Article 159(2)(d) of the Constitution.

‘the obligation placed upon the courts by the constitution's requirement (Article 159(2)(d), that they render justice without undue regard to procedural technicalities, does not, in my opinion, negate the orderly scheme of litigation provided for by the Civil Procedure Rules; and the law in respect of Originating Summons is by no means nullified.’

16. That same position was reiterated in the case of **Tecla Mwake Nyange v Mutuku Kilewe [2014] eKLR**, to the effect that:

“The Court would allow amendment, to bring the matter in dispute under the relevant applicable law and have the matter heard and determined on its merits. This court cannot therefore proceed to determine the issues herein as the matter has not been brought under the correct law, which is currently in operation.”

17. This Court has considered the provisions of **Order 37 of the Civil Procedure Rules** and the authorities cited by the parties. Order 37 specifies those specific issues that are to be determined by way of an Originating Summons. The legislature did not leave it to the parties or the court to determine what these simple matters are to be. The law expressly set them out in Order 37 Rule 1 of the Civil Procedure Rules. However, the law itself realizes that these simple issues set out in Order 37 Rule 1 that are to be dealt with by way of Originating Summons may mutate to be complex and therefore gives a redress by granting the Court the discretion to order such a suit to be tried as if commenced

by way of Plaintiff. This discretion is set out in Rule 19 of that Order and may be exercised at the application of a party or by the court proceeding suo motto. However, an OS must be properly before the court before it can be converted into a plaintiff.

18. This Court is also satisfied the claims under Section 10 (4) of the insurance (Motor Vehicle Third Party Risks Act) Cap 405 Laws of Kenya are not contemplated under Order 37 rule 1 to be initiated and prosecuted by way of an Originating summons. Therefore, the Originating Summons as filed falls outside the scope and tenure of the provisions of *Order 37 and* bringing of the aforementioned matter by way of originating summons was improper, irregular and fatally defective. I find the suit was only suited to have been commenced in accordance to Order 3 rule 1 of the Civil Procedure Rules, by way of a plaintiff.

19. I therefore find that the Court was not properly moved nor clothed with the requisite jurisdiction to hear the dispute placed before it. Furthermore, the said originating summons having been incompetently presented before the court, the trial court had no power to consider converting it into a Plaintiff as contemplated under Order 37 rule 19.

20. On the challenge that an OS does not lie for return and determination before the magistracy, I consider the same to have been improperly taken. It needs to be noted that the procedure of litigating by way of Originating summons is founded upon the civil procedure Rules, a subsidiary legislation under the Act. The act leaves no doubt in its definition of a judge to include any presiding officer of the court. On a daily basis, our magistracy deals with applications for extension of time to file suit and all are by originating summons. I do find that an originating summons is returnable before any court provided there exists the jurisdiction to entertain the matter.

21. The upshot of the foregoing is that I allow the Appellant's Appeal and set aside the Ruling delivered on the 4.2.2019 and the Appellant's Application dated 19.10.2018 is allowed. The 1st Respondent remains at liberty to agitate its claim through an ordinary civil suit. I award the costs to the appellant

Dated, signed and delivered at Mombasa this 8th day of May, 2020.

P J O OTIENO

JUDGE