



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAHURURU

HCCA.NO. 89 OF 2017

(FORMERLY NAKURU HCCA NO 76 OF 2016)

(Appeal Originating from Nyahururu CM's Court

Civ.No.200 of 2014 by: Hon. A.P. Ndege – S.R.M.)

GITHAMBO TEA FACTORY.....APPELLANT/RESPONDENT

VERSUS

ENCORE HOLDINGS LTD.....RESPONDENT/APPLICANT

RULING

The appellant, Githambo Tea Factory Co Ltd, filed a suit against Encore Holdings Ltd, (the respondent) CMCC.200/2014 for a sum of Kshs.2,060,800/= together with costs and interest for breach of contract of sale of land. The appellant paid a sum of Kshs.2,060,800/= to the respondent's Bank Account which was 10% of the purchase price. The respondent failed to surrender the completion documents arguing that they needed to renegotiate the price. The appellant sought a refund of the deposit and filed the suit in the lower court.

The case was heard by the trial magistrate, Hon. Ndege and after closure of the respondent's case, the magistrate rendered a ruling to the effect that the court did not have jurisdiction to hear the matter because it was filed in the wrong court. He struck out the plaint and defence *suo motto*.

The appellant was aggrieved by the said ruling and filed this appeal citing the following grounds;

- 1. That the magistrate erred in law and fact in construing the appellant's cause of action;**
- 2. That the learned trial magistrate erred the law in denying himself pecuniary jurisdiction to determine a claim of a sum of Kshs 2,060,800/=;**
- 3. That the trial magistrate erred in moving himself *suo motto* to strike out the pleadings upon determining that he lacked pecuniary jurisdiction to determine the case without calling on the parties to decide what to do with the case;**
- 4. That the magistrate erred in his failure to down the tools and proceed no further upon determining that he lacked jurisdiction to determine the dispute pursuant to the decision of "*The owners of Motor Vessel Lillian 'S' vs. Caltex Kenya Ltd (1989) KLR*";**

The appellant therefore prays that,

- 1. The appeal be allowed and the ruling of the trial magistrate be set aside and pleadings be reinstated;**
- 2. That the court do determine the dispute of the parties on the basis of the evidence on record;**
- 3. That the appellant be awarded the costs of the appeal and costs in the lower court.**

Lucy Mwai advocate filed submissions in support of the appeal and Miss Macharia who appeared on behalf of the appellant argued that the trial court misconstrued the claim be Kshs.20,000,000/= instead of Kshs.2,060,800/= which was claimed in the plaint; that in their defence,

the respondent had admitted that the court had jurisdiction to entertain the matter after they filed a defence instead of going for arbitration; that at the time the suit was filed the court had pecuniary jurisdiction of Kshs.4,000,000/=.

On grounds 3 and 4, counsel argued that the court moved *suo motto* to strike out the proceedings relying on the decision in the “***Owners of Motor vessel ‘Lilian’s’, versus Caltex Oil Kenya Ltd (1989) KLR***”. On the question of jurisdiction, it was submitted that the court had heard the parties, gave them a date for judgment, yet, once the court has no jurisdiction, it should down its tools; that therefore, the court had no jurisdiction to strike the suit out but call the parties to decide on the next move. The appellant therefore prays that this court set aside the Lower Court’s order striking out the plaint and defence and determine the dispute between the parties based on the evidence on record.

The appeal was opposed and Mr. Wakaba counsel appearing for the respondent filed a reply to the memorandum of appeal and submissions dated 6/04/2018 and 17/4/2018 respectively. He submitted that the court had to interpret the whole contract between the parties which was valued for Kshs.20,000,000/= and thus the court’s interpretation was not in error because the court did not have jurisdiction over Kshs.20 million but Kshs.4 million.

Counsel further submitted that there was no final determination made on the merits of the case by the lower court and this court cannot make any determination based on the lower court records; that since the lower court had no jurisdiction to record the evidence, the prayer to reinstate the pleadings and this court to determine the suit is not possible; counsel submitted that the appellants should have filed another suit in a court with jurisdiction.

I have considered the grounds of appeal, the oral submissions by counsel. The record in the lower court shows that the magistrate took the evidence of both the plaintiff and defendant and reserved the case for judgment. Instead of a judgment, the magistrate read a ruling that he lacked pecuniary jurisdiction to entertain the matter and proceeded to make the orders under challenge.

It is true that the claim in the plaint is for Kshs.2,060,800/= which is 10% of the contract sum of the land that was the subject matter of the suit. At paragraph 3 of the plaint, the purchase price of the land was said to be Kshs.20,608,000/= of which the appellant had paid 10% as the deposit before the parties disagreed on payment of the balance and the respondent allegedly refused to complete the contract. The defendant was alleged to have been in breach of the contract whose value was Kshs.20,608,000/=. Although the appellant was only claiming Kshs.2,060,800/= being the 10% deposit, the jurisdiction is determined by the value of the contract and I am satisfied that the magistrate did make the proper finding that the court could not determine the suit arising from a contract whose value was Kshs.20,608,000/=. At that time, the magistrate had a pecuniary jurisdiction of Kshs.7,000,000/= and therefore he had no jurisdiction to entertain this matter.

The court had fully heard the matter. I am surprised that it took the trial court so long to realize that it had no pecuniary jurisdiction in the matter yet the value of the contract was pleaded in the plaint and I believe the plaintiff testified to the same. The court should have realized that it lacked jurisdiction at once and made the decision to down its tools.

In the case of the ***Owners of motor vessel ‘Lilian’s’ (supra)*** the then East African Court of appeal held as followings:

“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, court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

Jurisdiction is therefore the authority by which the court decides on matters that are litigated before it.

In this case, I have observed that the court failed to recognize the fact that it had no jurisdiction in the matter before hearing the parties. Even the defence did not recognize the fact that the issue for determination was breach of a contract worth Kshs.20,608,000/=. From a reading of the ***‘Lilian’s Case’*** once the court awoke to the fact that it had no jurisdiction in the matter, it had no right to take another step and decide what to do with the case. The fact of the court striking out the proceedings was outside the court’s jurisdiction because it had no jurisdiction to take another step in the matter. I agree with the appellant that the court erred in going ahead to take the step of striking out the pleadings in the case. Further, the court should have asked the counsel on record what steps to take next or simply have the case transferred to a court with jurisdiction.

Whether the court can make a determination based on the evidence recorded by the magistrate, the answer is in the negative. Those proceedings recorded by the trial court were so recorded without jurisdiction. Besides, the matter is before me on appeal against the ruling of the lower court as there is no determination made on the proceedings recorded. This court will reject the invitation by the appellant to make any determination based on the lower court proceedings.

Having found that the order to strike out the pleadings was made in error, I hereby allow the appeal, set aside the said order and direct that the pleadings in the lower court be and are hereby reinstated. I direct that the matter be transferred to the High court for hearing and determination. The matter be registered afresh in the high court and the same be placed before the judge for directions on the way forward. Each party will bear costs of this appeal and lower court.

Dated, Signed and Delivered at Nyahururu this 11th day of October, 2018.

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R.V.P Wendoh

JUDGE

Present:

Mr. Chege holding brief for Mr. Mathea for respondent

Ms. Wamithi holding brief for Ms. Mwai for applicant

Court Assistant - Soi