REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NANYUKI

CIVIL APPEAL NO. 12 OF 2015

ABDISATAR SHEIKH HASSAN ……..……. APPELLANT

versus

KATHERINE RUSSEL ……..……..……. RESPONDENT

(Being an appeal against ruling and order in Nanyuki Chief Magistrate's Court Civil Case No. 37 of 2012 delivered by Hon. J. N. Nyaga – Chief Magistrate on 17th October 2012)

JUDGMENT

1. The appellant, **ABDISATAR SHEIKH HASSAN**, was on 5th February 2012 driving his motor vehicle registration No**. EX 03 KN 05 Nissan Patrol** along Nanyuki/Meru road. The respondent **KATHERINE RUSSEL** on that same day, same time and on the same road was driving a **Bedford Lorry registration No**. **62 KE 77**. The two vehicles collided. The appellant filed a case before the Nanyuki Chief Magistrate's Court (**Civil Case No. 37 of 2012**) alleging negligence on the part of the respondent. The appellant sought compensation for material damage totalling Kshs.1,883,810. The appellant sought judgment for that amount.

2. The respondent filed a memorandum of appearance under protest in that Civil Case No. 37 of 2012. The respondent further filed a Notice of Motion in that case seeking the striking out of the appellant suit. The respondent sought that striking out on the grounds that she was a British national who at the material time of the accident was working for British Army Training Unit – Kenya (BATUK) a department of the United Kingdom Ministry of Defence and consequently that the court had no jurisdiction to entertain the matter on the basis of sovereign immunity; that the respondent was on duty during the time of the accident and was driving BATUK's motor vehicle; that he respondent in driving that vehicle was in the course of duty on behalf of BATUK; and that the appellant's claim was incompetent, frivolous, vexatious and an abuse of the court process.

3. At the hearing of the Notice of Motio and in support of the above grounds the respondent cited the case of **LILIAN –V- CALTEX (K) LTD [1986-1989] E.A. 305** whose holding was:-

> ***"The question raised before the Judge in the court below as a question of jurisdiction which, once raised either by a party or by the court of its own motion, must be decided forthwith on the evidence placed before the court. It is immaterial whether the evidence is scanty or limited. Jurisdiction is everything. Without it a court has no power to take one more step in the proceedings."***

This holding cited was in support of the application made challenging jurisdiction of the court before any other steps were taken.

4. The respondent also relied on the case **MINISTRY OF DEFENCE OF THE GOVERNMENT OF UNITED KINGDOM –V- NDEGWA [1983] KLR** where the court of appeal held:-

> ***"It is a matter of international law that our courts will not entertain an action against certain privileged person and institutions unless the privilege is waived. Such person and institution include foreign sovereigns or head of state and government, foreign diplomats and their staff, consular officers and representatives of international organisations such as the United Nations Organisations (UNO) and Organisation of African Unity (OAU). It is not all acts of foreign sovereign or government that this principle applies to; the immunity is not absolute but restrictive and the test is whether the foreign sovereign or government is acting in a government capacity under which it can claim immunity, or a private capacity, under which an action may be brought against it."***

Respondent submitted that she was in the course of her duty of BATUK when she drove the motor vehicle and consequently that she enjoyed the immunity similar to that of the United Kingdom Ministry of Defence.

5. Respondent also cited the case **NYERI HCCC NO. 77 OF 2005 JIMMY NDIRANGU & ANOTHER –V- RQMS(T)** where the court upheld that immunity in respect to an employee of the British Army unit.

6. The appellant opposed the Notice of Motion. Firstly the appellant submitted that the respondent's reliance on Order 2 Rule 15(1)(a), (b) and (c) was in error. That the respondent could only have relied on one of the sub rules of Rule 15 but not the three as she did.

7. Further appellant relied on the case **DT DOBIE & COMPANY (KENYA) LTD –V- MUCHIRA [1982] KLR** where the Court of Appeal held:-

> ***"As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously."***

8. The learned magistrate by his considered Ruling made a finding that the appellant's suit was barred by the Principal of sovereign immunity and concluded that the court had not jurisdiction to hear the matter. The learned magistrate proceeded to dismiss the appellant suit. It is that dismissal that provoked this appeal.

9. The appellant has presented the following grounds of appeal:

> ***1. That the learned trial magistrate erred in law by failing to appreciate the principals applicable to striking out of pleadings and thereby arrived at an erroneous conclusion.***
>
> ***2. That the learned trial magistrate erred in law and fact on his finding that the court lacked jurisdiction to entertain the matter in view of sovereign immunity.***
>
> ***3. That the learned trial magistrate erred in law on his interpretation of provisions of order 2 rule 15 of Civil Procedure Rules.***
>
> ***4. That the learned trial magistrate erred in law and fact by admitting contested evidence and thereby arrived at an erroneous conclusion.***
>
> ***5. That the learned magistrate erred in law and fact by failing to analyse all the issues raised by the appellant.***
>
> ***6. That the learned trial magistrate erred in law by failing to take into account the overriding objection under the Civil Procedure Act and the constitution of Kenya.***

10. Those grounds raise two main issues for consideration. The first issue is whether the Kenyan court has jurisdiction to adjudicate the appellant's case against the respondent; and the second issue is whether the learned magistrate applied the correct principles in dismissing the appellant's case.

11. In regard to the first issue it is important to state that the respondent annexed to the Notice of Motion, before the Chief Magistrate's Court, a Memorandum of Understanding (MOU) between the Government of the Republic of Kenya and the Government of the United Kingdom of Great Britain and Northern Ireland. That MOU main aim was to enhance defence cooperation to exchange experience and knowledge for the mutual benefits of the Kenyan Government and the government of the United Kingdome. Under **Section 6.1** of the MOU the visiting forces of the United Kingdom are required to respect the Laws, customs and traditions of the host Nation, which in this case is Kenya. But it is **Section 6.2, 6.3** and **6.4** that will require interrogation in order to determine whether the Kenya court has jurisdiction to adjudicate over the appellant's case. Those sections provide:-

> ***"6.2 a. British service authorities may exercise, within Kenya or on board any British ship or aircraft all criminal and disciplinary jurisdiction conferred on them by the law of the United Kingdom over members of the British Visiting Forces, their Civilian Component and dependants.***
>
> > ***b. Kenyan Civil and British Service Authorities may exercise jurisdiction over members of the British Visiting Forces, their Civilian Component and dependants with respect to alleged offences committed in Kenya and punishable by the Law of Kenya.***
>
> ***6.3 In case where the right to exercise jurisdiction is concurrent, British Service authorities will have the primary right to exercise jurisdiction if:***
>
> > ***a. The alleged offence is against the property or security of the United Kingdom, or against the property or person of another member of the British Visiting Forces, their Civilian Components and dependants; or***
> >
> > ***b. The alleged offence arises out of an act or omission in the course of official duty.***
>
> ***6.4 In any other case, the Kenyan authorities will have the primary right to exercise jurisdiction with respect to the alleged offence committed in Kenya and punishable by the Laws of Kenya. If the party having the primary right decides not to exercise jurisdiction, it will notify the authorities of the other party in writing as soon as practicable. The authorities of the Party having the primary right may give sympathetic consideration to a request from the authorities of the other for a waiver of its right in cases where the other party considers such waiver to be of particular importance."***

12. A careful reading of sections 6.2, 6.3 and 6.4 in my view shows that the jurisdiction referred to, thereof, is the criminal law jurisdiction. This becomes clear when one considers statements in those sections that state ***"offences committed in Kenya and punishable by the Law of Kenya."*** The word *"offences"* is repeated in section 6.3 and 6.4. The word *"offences"* connotes a crime. The word is defined in the Black's Law Dictionary, eighth edition as:-

> ***"1. A violation of the law; a crime, often a minor one.***
>
> ***'The terms 'crime', 'offence', and 'criminal offense' are all said to be synonymous, and ordinarily used interchangeably. 'Offense' may comprehend every crime and misdemeanour, or may be used in specific sense as synonymous with 'felony' or with 'misdemeanour', as the case may be, or as signifying a crime of lesser grade, or an act not indictable, but punishable summarily or by the forfeiture of a penalty."***

It becomes more poignant that what those section refer to is a criminal offence because those very section state "*offence punishable"*. It is only under the criminal jurisdiction that an offender is punished. If my

summation is correct then it follow that the appellant's suit before the Chief Magistrate, which was civil in nature, was not covered by those section of the MOU that talk about immunity to BATUK. In my view the personnel of BATUK based in Kenya have the same responsibility and obligation under the Kenya Civil Law, just like any other Kenya citizen. It further follows that the respondent had a duty of care over all the other road users while she drove the Bedford Lorry. She had an obligation not to act negligently. If she did act negligently she was subject to the same law that applied to other Kenyans. That obligation she had is not reduced by the fact that she was, if at all, in the course of her duty while she drove the Lorry.

13. This case is distinguishable from the case JIMMY M. NDIRANGU & ANOTHER – V - BAKER (supra). In that case the plaintiffs sued Baker, an employee of BATUK seeking for mandatory injunction for Baker to restore them into occupation of BATUK camp in Nanyuki for them to carry on business of selling curios. It was clear that Baker had no authority to restore the plaintiffs at BATUK camp. Such an injunction could only be issued to the British army which was under the British Ministry of Defence, which the court in the case of NDIRANGU (supra) found had sovereign immunity.

14. In this case the respondent was obligated to drive the Lorry exercising due care for other road users and failure to do so civil liability would arise. This is supported by the holding in the case **NANYUKI HCCRA NO. 34 OF 2015 SGT CATHERINE ELIZABETH RUSSEL –V- REPUBLIC**. In that Criminal Appeal case the same respondent in this Civil Appeal appealed to the Nanyuki High Court against an order that she should be criminally prosecuted for the offence of careless driving contrary to section 49(1) of the Traffic Act Cap 403. The Nanyuki High Court in that Criminal Appeal case held:-

> ***"It is clear that from that section [section 49(1) Cap 403] that the offence is directed at the driver of a vehicle and not the vehicle, which vehicle in the case of the appellant (respondent herein) was said to bear British registration number."***

It is important to note that the Nanyuki HCCRA No. 34 of 2015 is the subject of an appeal before the Court of Appeal and a stay has been granted by the Court of Appeal staying criminal prosecution of the respondent.

15. In response to the first issue identified above I find that the Kenyan court has jurisdiction to adjudicate over the appellant's case before the chief magistrate's court. In that regard I find that the trial magistrate erred in dismissing the appellant's suit.

16. In considering the second issue identified above I will first consider the appellant submissions that the respondent should not have relied on all the subsections of Rule 15(1) of order 2. **Order 2 Rule 15(1)(a) (b)** and **(d)** that the respondent relied upon provide:-

> ***"15.(1) at any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that-***
>
> ***a. it discloses no reasonable cause of action or defence in law; or***
>
> ***b. it is scandalous, frivolous or vexatious; or***
>
> ***c. …….***
>
> ***d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."***

The appellant submitted that the use of the disjunctive "or" in that order means that a party cannot rely on more than one subrule of that order. In my view appellant's submissions is in error. The use of the word "or" at the end of each subrule above does not connote one and not the other. In my view the order 2 Rule 15(1) (a) (b) and (d) is clear that the use of the word "or" means "and". In other words a pleader can plead the provisions of Rule 15(1) (a) and (b) and (d) together as the respondent did. When the whole

order 2 rule 15 (1) (a) to (d) is read it is clear that the pleader can elect to plead any or all of those subrules; together or separately.

17. I have also considered the care with which a court should consider striking out pleadings as set out in D. T. Dobie case (supra) and in my perusal of the trial court's Ruling I am satisfied the learned magistrate did not offend the principles set out in D. T. Dobie case (supra).

18. The respondent through her written submission sought the finding by this court that the order of trial court for substituted service of the summons, on the respondent, should be set aside. The simple answer to that submission is that the order of substituted service was not the subject of this appeal and consideration of the same is out of bounds.

19. In the end the appellant's appeal succeeds, the dismissal of the appellant's suit is hereby set aside and the Nanyuki **CMCC NO. 37 of 2012** I hereby reinstated. The appellant is awarded the costs of this appeal and the costs of the Notice of Motion dated 14th May 2012 filed in Nanyuki CMCC No. 37 of 2012.

20. It is so ordered.

DATED AND DELIVERED THIS 2ND DAY OF FEBRUARY 2017

MARY KASANGO

JUDGE

CORAM

Before Justice Mary Kasango

Court Assistant: Njue

For appellant: …….

For Respondent: ……...

COURT

Judgment read in open court.

MARY KASANGO

JUDGE