REPUBLIC OF KENYA

IN THE HIGH COURT OF KENY AT MIGORI

CIVIL APPEAL NO. 23 OF 2016

HILLARY TURURI MWITA..APPELLANT

-VERSUS-

ISMAIL NYASIMI……………………...............................RESPONDENT

(Being an appeal from the ruling and order by Hon. D. K. Kemei, Senior Principal Magistrate (as he then was) in Migori Senior Principal Magistrate's Civil Suit No. 102 of 2012 delivered on 18/04/2016).

JUDGMENT

1. The appellant herein, **HILLARY TURURI MWITA,** was the Plaintiff in **Migori Senior Principal Magistrate's Civil Suit No. 102 of 2012 (**hereinafter referred to as ***'the suit***'). He sued the Respondent herein, **ISMAIL NYASIMI,** for compensation out of some physical injuries he sustained while aboard a motor vehicle belonging to the Respondent which was involved in an accident.

2. Pleadings were closed and the suit was fully heard. The appellant testified and produced exhibits and called two witnesses; a **Dr. Aggrey Idagiza Akidiva (PW2)** who produced a medical report on the extent of the injuries sustained by the appellant and a police officer **No. 55842 PC Stephen Chebor (PW3)** who produced a Police Abstract in confirmation that the accident occured. The Respondent neither testified nor called any witnesses.

3. The parties filed written submissions and the suit was for judgment. The trial court in its judgment delivered on 30/09/2015 struck out the suit for want of prosecution after finding that it did not have territorial jurisdiction over the suit.

4. The appellant did not appeal against that judgment, but filed a **Notice of Motion** dated **28/10/2015** (hereinafter referred to as ***'the application')*** seeking review of the judgment. The prayers in the application were tailored as follows: -

> ***1. That this Honourable court be pleased to review the Judgment dated and delivered on 30th September, 2015 which dismissed the applicant/plaintiff's suit for want of prosecution and instead substitute it with an award of Kshs. 150,000 with 100% liability for the plaintiff/applicant against the defendant.***
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> ***2. That this honourable court be pleased to review it's holding on jurisdiction in which he held that, it lacks geographical jurisdiction and instead substitute it with an order that it has geographical jurisdiction to hear and determine the matter.***
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> 3. ***That cost of this application be in the cause.***

5. The application was opposed and by a ruling delivered on 18/04/2016 the lower court dismissed that application. It is that dismissal which prompted this appeal. The appellant filed a Memorandum of Appeal dated 17/05/2016 on 19/05/2016 and preferred three grounds of appeal as under: -

> ***1. That the learned trial magistrate erred in law and fact when he failed to consider the evidence, reasons and grounds given by the appellant in support of his application for review thereby reaching to wrong conclusion that the appellant ought to have filled and appeal rather than appeal for review under order 45 of the Civil Procedure Act.***
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> ***2. That the learned trial magistrate erred in law and fact when he ruled that review under order 45 can only be brought based on an erred of facts and not on law.***
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> ***3. That the learned trial magistrate was biased against the appellant.***

6. The appeal was canvassed by way of written submissions. Both parties filed very comprehensive submissions and referred to several decisions on the subject.

7. I have carefully and keenly read and understood the proceedings and the judgment of the lower court as well as the grounds and the parties' submissions on appeal.

8. As stated earlier on above, the genesis of the application was the judgment. The trial court while writing the judgment rightly referred to the parties’ submissions then on record. It was the Respondent who had raised the issue of jurisdiction for the first time in his submissions. I have looked at the Plaint in the suit. **Paragraph 13** of the Plaint has it that the lower court had the jurisdiction to hear and determine the suit. The Respondent filed a Defence and at **paragraph 14** admitted that the lower court had the jurisdiction over the suit but denied the cause of action. Since no issues were framed by the parties, the suit went on for hearing based on the state of the pleadings.

9. When the trial court was confronted with the issue of jurisdiction while writing the judgment, he rightly pointed out that such an issue is so cardinal and ought to be determined. ***But how did the trial court handle the issue?*** I can see the predicament the trial court found itself in dealing with the issue at such a time. The court nevertheless went ahead and determined the issue in favour of the Respondent and struck out the suit allegedly for want of prosecution.

10. It is not in doubt that the issue of jurisdiction had been admitted by the Respondent in his defence. The Defence was also not amended to deny the issue. That being so, that issue did not need any proof but the trial court had the discretion to require that issue to be proved otherwise than by such admission. That is in accordance with **Section 61** of the **Evidence Act**, Chapter 80 of the Laws of Kenya which provides that: -

> ***‘61. No fact need be proved in any civil proceedings which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit or which by any rule of pleadings in force at the time they are deemed to have admitted by their pleadings.***
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> ***Provided that the court may in its discretion requires the facts admitted to be proved otherwise than by such admission.’***

11. The trial court can be said to have relied on the **proviso** to **Section 61** of the Evidence Act. In that case, the trial court ought to have called upon the parties and given them an opportunity to address it on the issue. It was not late in the day. The way it now stands is that the Respondent sneaked a contrary late-minute issue through his submissions, which issue he had admitted in his pleading, and the court unilaterally relied on that issue to dispose of the suit. The Appellant was not given an opportunity to present his position on the issue. He was therefore condemned unheard.

12. But even after finding that it had no jurisdiction, the court went ahead and instead struck out the suit

not for want of jurisdiction **but** for want of prosecution. Respectfully, there was absolutely no basis for striking the suit for want of prosecution. The law is very clear. A suit can only be dismissed for want of prosecution based on clear provisions of the law but not struck out for want of prosecution. Likewise, there was no application or notice by the court on which the 'striking out for want of prosecution' could be based on. Needless to say, the suit was at judgment stage.

13. The trial court may have had very good intention not to vest himself with jurisdiction which he believed he did not have, but since the issue had been agreed by the parties, that issue was not available for determination unless in compliance with the provisions of **Section 61** of the Evidence Act and the **Constitution of Kenya**. The court overstepped and dealt with an issue that was not properly before it and used that issue to determine the suit. The trial court hence committed a reversible error. (See the Court of Appeal decision in of **Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR**, **G.P. Jani Properties Limited vs. Dar es Salaam City Council (1966) EA 281,** **Jones vs. National Coal Board (1957) 2 QB 55** among many others).

14. ***How could that error then be rectified?*** Simply put; by way of an appeal or review. The Appellant opted to file a review application instead. The application was premised on **Section 80** of the **Civil Procedure Act** Chapter 21 of the Laws of Kenya and **Order 45** of the **Civil Procedure Rules**. Since the provisions of Section 80 of the Civil Procedure Act are replicated in **Order 45** of the Civil Procedure Rules, I will only reproduce **Rule 1 (1)** of **Order 45** which is tailored as follows: -

> ***'(1) Any person considering himself aggrieved-***
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> ***(a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or***
>
> ***(b) By a decree or order from which no appeal is hereby allowed,***
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> ***And whom from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desire to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.'***

15. The Appellant's contention is that the trial court committed an error or mistake apparent on the face of the record warranting the grant of the orders in the application and that the lower court erred in holding that allowing the application will be tantamount to sitting on its own appeal. The Appellant relied on the decisions in the cases of **Habib Javer Manji & Another vs. Singh (1962) EA 557**, **Court of Appeal at Nairobi Civil Appeal No. 211 of 1996 National Bank of Kenya Ltd vs. Ndungu Njau (1997) eKLR**, **Court of Appeal at Nairobi Civil Appeal No. 264 of 1996 Nairobi City Council vs. Thabiti Enterprises Ltd** and the **Court of Appeal at Nairobi Civil Appeal No. 240 of 2011 Hon. Daniel Toroitich arap Moi, CGH vs. Stephen Muriithi & Another.**

16. The Respondent supported the finding of the court that the only avenue that was available to the Appellant was to file an appeal and not review as in doing so the court will be sitting on an appeal over its own decision. He relied on the decisions of **Court of Appeal at Nairobi Civil Appeal No. 211 of 1996 National Bank of Kenya Ltd vs. Ndungu Njau (1997) eKLR,** **Arbuthont Export Services Ltd vs. Manchester Outfitters Suitting Division Ltd & Another, Nairobi HCCC No. 22252 of 1989 (unreported)**, **Pancrast T. Swai vs. Kenya Breweries Ltd (2014) eKLR** and **Allarakhai vs. Aga Khan (1968) EA.**

17. To me, the error that was subject of the application was how the trial court handled the issue of jurisdiction at the time of writing its judgment and not the finding *per se* of the court that it lacked jurisdiction in the matter. Had the issue been fairly addressed by all the parties and the court rendered itself that it had no jurisdiction then I would fully agree with the Respondent, the trial court as well as the

relevant decisions that the only avenue then available to the Appellant would have been lodging an appeal on the way the court rendered itself on the point of the law. However, the position is different herein. The issue is not a point of law. It is a simple factual issue on how the trial court handled the jurisdictional issue which was not properly before it. That factual error or mistake is so apparent on the face of the record and could easily be cured by a review application or an appeal. The Appellant was hence within his right to lodge a review application and the trial court, with tremendous respect, erred in treating the application as instead challenging a point of law. The appeal has but to succeed on this point and the ruling made on 18/04/2016 be and is hereby set-aside.

18. I would have referred this matter back to the lower court for consideration of the jurisdictional issue. I instead chose not to since the suit has been in court since 2012 and that jurisdictional issue is so well settled in law. There is a chain of well-founded decisions on the issue including that of ***Hon. Justice Aaron Ringera***, as he then was, when he summed it up so well in the unreported case of **Mohamed Shaban vs. George Mwangi Karoki, High Court at Bungoma, Civil Application No. 13 of 2002** as follows: -

> ***'After weighing the rival submissions, I take the following view of the matter Section 3(2) of the Magistrate's Court Act provided that a court of the resident Magistrate (which is defined to include a Senior Principal Magistrate's Court) has jurisdiction through Kenya. Such a court is not the subject of the local territorial jurisdiction contemplated by section 15 of the civil procedure Act, in my opinion, section 15 of the Civil Procedure Act applied only to courts lower than the resident magistrate court. I am fortified in that view by the fact that the magistrate court Act Cap 10 of the Laws of Kenya, was enacted in 1967 long after the Civil Procedure Act. The legislature was therefore aware of the provisions of section 15 of the Civil Procedure and the hallowed rule of statutory construction that where two provision in different statutes conflict, the provision in the latter statute is deemed to amend the earlier provision must be applied. Accordingly I find that the Bungoma Court had jurisdiction to entertain the suit and the rule that a suit filed in a court without jurisdiction is a nullify and cannot be transferred is inapplicable in the circumstances of this case. There may be good sound administrative reasons for filing suits in the administrative Districts in which the defendant resides as the cause of action arose but those reasons cannot oust a statutory jurisdiction.'***

19. The trial court was hence vested with the appropriate territorial jurisdiction over the suit and that is why the Respondent so admitted in his defence. If the trial court was still determined to enforce its administrative duty and ensure that the suit was heard by a court where the Defendant resides or the cause of action arose, which it had the discretion to do so, the trial court would instead of striking out the suit, have made appropriate orders or directions including, but not limited, to bringing the matter before the High Court for such orders. The order striking out the suit is equally set-aside.

20. In its judgment, the trial court determined the liability and assessed damages based on the facts and the law. He found the Respondent wholly liable and settled for Kshs. 150,000/= as General Damages. I have also reconsidered the rival submissions then before the trial court and I am satisfied that the findings were both factual and legally supported. The prayer by the Appellant in the application that he be awarded that amount is hence merited.

21. As the appeal succeeds, I hereby make the following orders: -

> **a) The appeal hereby succeeds and the finding of the learned magistrate dismissing the Notice of Motion dated 28/10/2015 with costs be and is hereby set-aside accordingly;**
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> **b) The judgment of the trial court delivered on 30/09/2015 is hereby reviewed by substituting the finding that the trial court did not have jurisdiction to hear and determine the suit with a finding that the trial court had the jurisdiction to hear and determine the suit and further the order striking out the suit for want of prosecution is reviewed with a finding that the suit was properly before the court and was legally proved.**

c) Judgment for the Appellant against the Respondent is hereby entered at 100% liability and Kshs. 150,000/= on General Damages together with Kshs. 4,000/= as Special Damages;

d) The sum of Kshs. 150,000/= shall attract interest at court rates from the date of delivery of the judgment by the lower court whereas the sum of Kshs. 4,000/= shall attract interest as from the date of filing of the Plaint;

e) The Appellant shall have costs of the suit, of the application as well as costs of the appeal.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 6th day of June 2017.

A. C. MRIMA

JUDGE