



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO 93 OF 2011

JEDIDAH KATWA KWEYU.....APPELLANT

VERSUS

JOHN NJOROGE NGIGE.....1STRESPONDENT

KENYA POWER & LIGHTING CO. LTD.....2ND RESPONDENT

**(An Appeal arising out of the Ruling and Order of B. Jaden CM delivered on 18th May 2011 in
Machakos Chief Magistrate's Court Civil Case No. 355 of 2010)**

JUDGMENT

The Appellant moved court through a Memorandum of Appeal dated 15th June 2011, wherein she has proffered an appeal against the ruling and order of the Honourable Chief Magistrate B. Jaden (as she then was) dated 18/5/2011 given in **Machakos Chief Magistrate's Court Civil Case No. 355 of 2010**. The grounds of appeal are as follows:

1. That the learned magistrate erred in law and in fact by allowing the Defendant's application.
2. That the learned trial magistrate erred in law and in fact by striking out the Plaintiff's case for want of prosecution.
3. That the learned magistrate erred in law and in fact by failing to consider the authorities and submissions of the Appellant.
4. That the learned magistrate erred in law and in fact by failing to find that the Magistrate's court has jurisdiction countrywide.
5. That the learned magistrate erred in law and in fact by failing to be guided by
 - a. Magistrates' Court Act Chapter 10 laws of Kenya
 - b. The new Civil Procedure Rules, 2010.
 - c. The new Constitution of the Republic of Kenya

The Appellant prays for orders that this appeal be allowed, the ruling and consequential orders of the subordinate court be set aside and the suit in the lower court be reinstated for hearing on its merits. Other orders sought are that the costs of the appeal be awarded to the Appellant and such other or further relief as this Court may deem just and expedient to grant.

The Facts

The brief facts of this Appeal are that the Appellant had instituted a suit in the lower court by filing a Plaint dated 11.03.2010. She stated therein that on or about 18/2/2008, she was walking at Pipeline Estate near Rainbow Butchery when the employees of the Respondents recklessly threw down a metal bar 10

meters away, as they were repairing a transformer, causing the same to hit the Appellant causing her severe bodily injuries. The particulars of injuries were:

- a. Loss of two upper teeth
- b. Deep cut wound on upper lip
- c. Rapture and bleeding gums.

She thereby instituted this suit for damages on an account of negligence.

However, during the pendency of the suit in the lower Court, the Defendants therein who are the Respondents in the present appeal filed a Notice of Motion, in which they prayed that the suit be struck out for want of jurisdiction. The learned magistrate granted the orders after the hearing of the application. It is this ruling of the magistrate that is being appealed against.

The Issue and Determination

The issue for determination in this appeal is whether the Chief Magistrates Court at Machakos had jurisdiction to hear and determine the Appellant's suit in the lower court. The Appellant and Respondents canvassed this issue by way of written submissions. The Appellant in submissions dated 19.5.2015 argued that the application in the lower court did not further the overriding objectives of the Civil Procedure Act and Rules to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. In addition, that in the spirit of Section 159(2) of the Constitution as regards technicalities, the Respondents did not demonstrate in their affidavit or state any prejudice they may suffer if the suit is heard and determined in full before the lower court in Machakos.

On the issue of jurisdiction, the Appellant submitted that the Respondent did not point out any provisions that barred the lower court from trying this suit. The Appellant cited section 14 of the Civil Procedure Act as apt in the case, as she resides and works for gain at Athi River, within the jurisdiction of the lower court as indicated in her replying affidavit. Finally, the Appellant stated that section 3(2) of the Magistrate's Courts Act grants the Resident Magistrates court jurisdiction to receive, entertain and try all suits all over the Republic of Kenya.

The Respondents filed submissions dated 12.6.2015, in which they argued that there was no connection that was established in the pleadings of the Plaintiff with the filing of suit in Machakos. Secondly, they stated that the Civil Procedure Act governs the place of suing in civil matters. They noted that sections 14 and 15 of the Civil Procedure Act provide the options of the place of filing a suit to be where the defendant resides or carries on business or where the cause of action accrued. Thus, the suit ought to have been filed in Nairobi. In that regards they relied on the decisions in **Onesmus Mwanza Mutual vs Daima Bank Limited,(2004) eKLR**, **Diyo Nyamawi Diyo vs Kennedy Ragiri Isoe, Mombasa Civil Suit No. 19 of 2004**, and **Simon Kiarie vs Samwel Muigai Thuku, (2005) e KLR (Nairobi HCCA No. 332 of 2004)**. Finally, they submitted that the issue of jurisdiction is substantial and not a procedural technicality as to invoke Article 159(2) of the Constitution. The Respondents prayed therefore for the appeal to be dismissed.

The applicable law as regards this appeal is section 3(2) of the Magistrate's Courts Act and sections 14 and 15 of the Civil Procedure Act. Section 3(2) of the Magistrates Court's Act provides that *the Resident Magistrate's Courts shall have jurisdiction throughout Kenya. The place of institution of suits for compensation for civil wrongs committed to a person or to movable property is governed by section 14 of the Civil Procedure Act which provides as follows:*

“Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts.”

Section 15 of the Civil Procedure Act likewise provides that for other suits the place of institution is where the Defendant resides or where the cause of action arose. It is evident that there appears to be a conflict between the provisions of the Magistrate's Court Act and the Civil Procedure Act as regards the place of filing suit in civil proceedings in relation to Resident Magistrate's Courts.

Aburilli J. had occasion to address in great length this apparent conflict as regards the territorial limits on the jurisdiction of Magistrates court in **Ruth Gathigia Kamunya & another v George Kimani** [2015] eKLR. I shall reproduce the learned Judge's findings verbatim for their full effect:

“...it is worth noting that the Civil Procedure Act, in its long title it is expressed that “An act of Parliament to make provision for procedure in Civil Courts.

In other words, it is not the legal instrument that confers jurisdiction upon Magistrate's Courts since the jurisdiction of Magistrate's courts is governed by the Magistrate's Courts Act Cap 10 Laws of Kenya which express in the long title “An Act of Parliament to establish Magistrates Courts to declare the jurisdiction and provide for the procedure of such courts; to provide for appeals in certain cases and for purposes connected therewith or incidental thereto”.

The date of commencement of the Magistrates Courts Act is 1st August 1967 whereas that of the Civil Procedure Act is 31st January 1967 whereas that of the Civil Procedure Act is 31st January 1924.

Therefore, in as much as Section 15 of the Civil Procedure Act appear to be in conflict with Section 3 (2) of the Magistrate's Court Act the rules of Statutory interpretation provide that where there is a conflict between two statutes, assuming there is any, then the Magistrate's Courts Act is deemed to have amended the Civil Procedure Act.

Thus, how would the Resident Magistrate's Court which is defined Under section 2 of the Magistrate's Court Act to include Senior Resident Magistrate, Principal Magistrate, Senior Principal Magistrate and Chief Magistrates Court, have jurisdiction throughout Kenya, whereas section 15 of the Civil Procedure Act dictate that suits shall be instituted in whose local jurisdiction the cause of action arose?

Ringera J (as he then was) in a decision in Mohamed Sitaban Vs George Mwangi Karoki CA No. 13/2002 expressed himself thus, concerning the above perceived conflict:

“Section 3 (2) of the Magistrate's Courts Act provides that a court of the Resident Magistrate (which is defined to include a Senior Principal Magistrate's Court has jurisdiction throughout Kenya. Such a court is not the subject of the local 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 Magistrates' Court. I am fortified in that view by the fact that the Magistrate's Courts 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 Act and the hallowed rule of Statutory construction that where two provisions in different statutes conflict, the provisions 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 suit filed in a court without jurisdiction is a nullity and cannot be transferred is inapplicable in the circumstances of this case. There may be sound administrative reasons for filing suits in administrative Districts in which the Defendant resides as the cause of action but those reasons cannot oust the statutory jurisdiction”.

A similar situation arose in Doshi Enterprises Ltd vs Oriental Steel Fabricators & Builders NRB HCC 627/2001 where Mwera J, cited with approval by Odunga J in Justus Kyalo

Mutunga Vs Labh Singh Harnam (2012) eKLR in the Doshi case (Supra) Mwera J was of the opinion that the filing of a case outside the jurisdiction of both parties contrary to the mandatory provisions of section 15 of the Civil Procedure Act does not make it a nullity because Section 15(b) of the Act adds that a court may give leave for the filing away from the local limits or the defendant may acquiesce in such institution.

Similarly, in John Wekesa Maraka Vs Patrick Wafula Otunga, opined that:

“I do not think Section 15 of the Civil Procedure Act was meant to apply to Resident Magistrates Court. Most probably it was intended to apply to District Magistrates’ Courts defined under Section 6 of the Magistrate’s Courts Act. Even if it were to be said that the provision of Section 15 were to apply to the Resident Magistrate’s Court, the position in my view will not change because the law is well settled that where there is a conflict of between two statutes, the provision in the latter statute would be deemed to have amended the earlier provision. The Magistrates Courts Act was enacted later than the Civil Procedure Act. It is therefore evidently clear that the Webuye Court had jurisdiction to entertain the suit. The learned Senior Resident Magistrate therefore misapprehended the point when she held that she had no jurisdiction to hear the matter. For the above reasons, the appeal must succeed.”

The learned judge in the above case overturned the Magistrate’s order striking out the suit for want of territorial jurisdiction and restored the plaint and remitted it back to Webuye Resident Magistrate’s Court for hearing and determination. I have no reason to depart from the above decisions of my predecessors and add that in this case, as the suit in Thika was not instituted before a subordinate court to the Resident Magistrate’s court, and as the substantive law that confers jurisdiction on Magistrate’s Court is the Magistrate’s Courts Act Cap 10 and not the Civil Procedure Act, it is manifestly clear that Thika Chief Magistrate’s Court has the territorial jurisdiction to hear and determine the suit as instituted”.

I adopt the sentiments of the learned Judge, and hold that the same findings also apply to the apparent conflict between section 3(2) of the Magistrate’s Court Act and section 14 and 15 of the Civil Procedure Act in the present appeal. I also note that this was position held by Visram J. (as then was) in **Simon Kiarie vs Samwel Muigai Thuku, (2005) e KLR (Nairobi HCCA No. 332 of 2004)**, which decision was relied upon by the Respondents. The learned Judge opined in his judgment that the place of where a suit is to be filed is an administrative decision that is determined by logistical reasons and convenience, but otherwise the Resident Magistrates Court have territorial jurisdiction throughout Kenya.

The Appellant’s appeal herein is accordingly allowed for the foregoing reasons, and the ruling of B. Jaden CM (as she then was) delivered on 18th May 2011 in Machakos Chief Magistrate’s Court Civil Case No. 355 of 2010 and all consequential orders be and are hereby set aside. Further, that Machakos Chief Magistrate’s Court Civil Case No. 355 of 2010 be and is hereby reinstated for hearing.

The Appellant has also sought any other orders that this Court may deem fit and expedient to grant, and I note in this regard from the pleadings filed in the lower court that both parties to the suit are resident in Nairobi, including their advocates on record. It is thus my view that it is administratively convenient and would save on costs for both parties to the suit, as envisaged in section 1A & 1B of the Civil Procedure Act, if the suit was heard in Nairobi. I accordingly also order that **Machakos Chief Magistrate’s Court Civil Case No. 355 of 2010** be and is hereby withdrawn from Machakos Chief Magistrate’s Court and transferred to the Milimani Commercial Chief Magistrate’s Court, Nairobi for further hearing and determination.

Each party shall bear their costs of this appeal.

It is so ordered.

DATED AT MACHAKOS THIS 6TH DAY OF OCTOBER 2015.

P. NYAMWEYA

JUDGE