



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

CIVIL APPEAL NO. 1 OF 2013

GABRIEL MATHU NGUNGI APPELLANT

V E R S U S

MIRIAM WANGUI NJOROGE RESPONDENT

(From the rulings dated 30/6/2009 D. W. Mburu Resident Magistrate and 10/7/2009 M. Gicheru – Chief Magistrate).

JUDGMENT

The respondent filed a suit against the appellant in the Chief Magistrate’s Court at Garissa on 18th May 2009 through a plaint dated 5th May 2009, asking for injunctive orders and costs. He also contemporaneously filed a Chamber Summons dated 5/5/2009 seeking injunctive orders pending hearing of the suit.

The appellant filed a defence to the suit, as well as a replying affidavit to the application both dated 21/5/2009.

On 8th June 2009 the appellant also filed a preliminary objection which was in the following terms:-

“TAKE NOTICE that the respondent shall during the hearing raise a preliminary point of law to the effect that the court lacks jurisdiction to hear and determine the suit and the suit is frivolous and an abuse of the court process and should be struck out”

This preliminary objection was argued by counsel on both sides on 6th June 2009. In a ruling delivered on 30th June 2009, the preliminary objection of the appellant was dismissed by the court. Consequently, the court later heard the Chamber Summons and granted injunctive orders on 10/7/2009.

Dissatisfied with the decision of the court dismissing the preliminary objection, and the granting of injunctive orders, the appellant has appealed to this court through counsel Odero Osiemo & Company on the following grounds:-

- 1. The learned Resident Magistrate erred in law and in fact by holding that the subordinate court had jurisdiction to hear and determine the suit when the subordinate court is expressly barred under the Public Procurement and Disposal Act 2005.***
- 2. The Learned Resident Magistrate erred in law and in fact by granting temporary orders and consequently confirming the same when the subordinate court had no jurisdiction to hear and grant orders as prayed in the Chamber Summons dated 5th May 2009.***

3. ***The learned Resident Magistrate erred in law and fact by proceeding to hear and granting orders in a matter whose pecuniary jurisdiction is beyond the court.***
4. ***The learned Resident Magistrate erred in law and fact by holding that the tendering process had been concluded and the work had been fully completed when there was no evidence on record to prove the same.***

The parties counsel by consent, filed written submissions to the appeal. Ms. Odero Osiemo & Co. Advocates for the appellant filed their written submissions on 12th October 2015, while M/s Daniel Orege & Company Advocates for the respondent filed their submissions on 14th October 2015.

Counsel for the appellant argued that the case was contractual in nature and that the issue was who should receive payment from the proceeds of the tender. Counsel submitted that the tender was awarded under the Public Procurement and Disposal Act 2005, and that as such, any question arising therein could only be determined by the Public Procurement Administrative Review Board established under section 25 of the Act. Counsel contended that the entitlement to payment to any party herein could only be determined by the procuring entity and not any other body. Counsel relied on section 93(1) and 100 of the Act.

Counsel emphasized that section 5 provided that in case of any conflict between the Act or regulations there under and any other Act or regulation, the Public Procurement and Disposal Act 2005 and Regulations would prevail.

Counsel also submitted that the Resident Magistrate did not have jurisdiction to entertain the matter as the contractual amount involved was Kshs 1,400,500/=, since the Resident Magistrates court did not have such pecuniary jurisdiction.

Counsel argued also that the court was wrong in deciding that the tender process had been completed as no completion certificate was provided by the respondent, and no final accounts had been supplied.

Counsel submitted further that duress was applied on the appellant which was proved or confirmed by the averments in the respondent's plaint herein.

In response, counsel for the respondent, on the other hand,

submitted that under Section 5 of the Magistrates Court Act (cap 10) a Resident Magistrate had jurisdiction to deal with matters whose monetary value was Two Million shillings. Therefore, in counsel's view, the Resident Magistrates court had jurisdiction to entertain the matter.

Counsel relied on the case of ***Giella –vs- Cassman Brown Ltd(1973)EA 358*** and submitted that the respondent had satisfied the requirements for the grant of a temporary injunction.

Counsel argued further that this appeal was misconceived as the law did not provide for an appeal avenue. Counsel relied on the provisions of Order 39 Rule 4 of the Civil Procedure Rules and the case of ***Thande –vs- Housing Finance Ltd (2007) 1EA 386***. Counsel submitted that the appellant should have first made an application for leave to appeal under section 75 and 76 of the Civil Procedure Act,(cap. 21), before filing this appeal and as such the appeal was incompetent.

Counsel also relied on the case of ***Taperu –vs- Roitei (1968) EA 618*** where the court said that the High Court could not exercise inherent jurisdiction where there existed specific provisions of the law on the matter.

Lastly, counsel argued that the Public Procurement and Disposal Act 2005 did not apply to the contract herein.

This is an appeal from decisions of the magistrate's court firstly with regard to a preliminary objection, and secondly from an application for a temporary injunction.

The first issue I have to consider is whether this court can entertain this appeal. The respondent's advocate has argued that no valid appeal can lie to this court unless leave was sought. Indeed, there is no indication or suggestion that leave to appeal from the two rulings of the subordinate court was sought before filing this appeal.

Section 75 and 76 of the Civil Procedure Act (Cap. 21) provides as follows:-

75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted:-

- a. An order superseding an arbitration where the award has not been completed within the period allowed by the court.
- b. An order or an award stated in the form of a special case.
- c. An order modifying or correcting an award.
- d. An order staying or refusing to stay a suit where there is an agreement to refer to arbitration.
- e. An order filing or refusing to file an award in an arbitration without intervention of the court.
- f. An order under section 64,
- g. An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree,
- h. Any order made under rules from which an appeal is expressly allowed by rules,

(2) No appeal shall lie from any order passed in appeal under this section.

Section 76 provides as follows:-

76. (1) Save as otherwise expressly provided, no appeal shall lie from any order made by a court in the exercise of its original or appellate jurisdiction, but, where a decree is appealed from, any error, defect or irregularity in any order affecting the decision of the case may be set forth as a ground of objection in the memorandum of appeal.

(2) Notwithstanding anything contained in subsection (1), where any party aggrieved by an order of remand from which an appeal lies does not appeal therefrom, he shall thereafter be precluded from disputing its correctness.

In my view, from the above provisions of the law, it is clear that leave of the court should have been sought and obtained by the appellant before this appeal was filed. In my view, leave to appeal not having been sought and obtained, this appeal is incompetent, cannot stand, and is for dismissal.

In addition to the above, and assuming this appeal is properly before this court, in my view, the notice of preliminary objection of the appellant did not state what specific law the appellant wanted to rely upon in the objection. In addition, what was argued before the learned magistrate and also before this court by counsel is a mixture of law and facts which violates what was stated regarding a preliminary objection in the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors (1969)EA 696 and Niazons (k) Ltd –vs- China Road & Bridge Corporation Kenya 2001 KLR*, where in the court held that a proper preliminary objection arises from a pure point of law. The facts related to that point of law must have been admitted or agreed by the parties. An objection cannot qualify to be a preliminary objection where the facts or events have not been agreed.

Whether or not the tendering process herein had been completed is a question of fact. Whether or not the firm awarded the tender was a company, or a business name and its structure and ownership, are questions of fact. Whether a valid contract existed between the appellant and the respondent and the execution of the tender had been done, and who was entitled to payments, is also a question of fact. Whether duress was exerted on the appellant to sign a contract is a question of fact. All these issues were not agreed to or admitted by the parties.

In my view, the true factual position of all the above could only be established through evidence from witnesses. They could not thus be part of the preliminary objection, and cannot be upon on appeal from the preliminary objection raised in the subordinate court herein.

With regard to the interlocutory injunction granted by the trial court in my view the learned magistrate exercised the courts discretion properly. Such orders are not final. They are meant to protect the subject matter and preserve the existing status until a determination of the matter is made after hearing both sides substantively. With the arguments and facts placed before the learned magistrate, in my view the court was right in finding that the respondent had satisfied the requirement under the case of ***Giella –vs- Cassman Brown Ltd (1975) EA 358*** for the grant of an interlocutory injunction.

Lastly, with regard to pecuniary jurisdiction of the magistrate's court, that issue was not raised in that court. It cannot therefore be subject of an appeal from the decision of the magistrate's court as it was not an issue for determination therein. It is a point of law which can be raised in the trial court at any time and determined therein. Any party aggrieved by the decision of the trial court on the issue, may appeal, subject to compliance with the applicable laws.

I thus find that this appeal cannot succeed. Same is dismissed, with costs to the respondent. For clarity, I wish to state that the parties can progress the case in the magistrate's court, since it is still pending.

Dated and delivered at Garissa this 10th November 2015.

GEORGE DULU

JUDGE