



REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

MISC APP. NO. 5 OF 2011

IN THE MATTER OF: AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL FOR

JUDICIAL REVIEW ORDER OF CERTIORARI

AND

IN THE MATTER OF: THE LAW REFORM ACT

AND

IN THE MATTER OF: THE MAGISTRATES COURT ACT

BETWEEN

KNUT KILIFI BRANCHAPPLICANT

VERSUS

IN THE SENIOR RESIDENT MAGISTRATES COURT KILIFI.....DEFENDANT

AND

GUINNESSE CONSTRUCTION & HOUSING CO. LTD...INTERESTED PARTY

RULING

1. The Notice of Motion filed on 19.4.2011 seeks in prayer 1:

“An order of certiorari to remove to the High Court and quash the judgment of the Senior Resident Magistrate's Civil Case No. 10 of 2005 which judgment was delivered on 25th September , 2010”

2. The main ground is that the trial magistrate Gandani, Principal Magistrate (P.M) was at the time of judgment not seized of the necessary jurisdiction. The applicant contends that at the time of giving judgment the pecuniary jurisdiction of the said magistrate stood at Kshs. 800,000.00 .

3. It is further stated that the applicants were misled by their then advocate to file their suit in the

Senior Resident magistrate's Court which had no jurisdiction to entertain a dispute for the sum of Kshs. 928,000.00 the subject matter of the plaint and the amended defence and counterclaim, the latter which was filed in December, 2009.

4. The application is opposed by the Interested Party and Decree-holders in the lower court who assert that the trial court was clothed with the necessary pecuniary jurisdiction since 1st June, 2010, hence the judgment obtained was proper . The gazette notice is attached to the Replying affidavit as annexure JKK 2.
5. The Parties filed submissions which basically reiterated the positions taken in the respective affidavits . I have considered the rival affidavits and submissions made. In my considered view, only two questions call to be answered in this matter,as follows:

1. Did the learned trial magistrate have necessary jurisdiction to deliver the judgment of 24th September, 2010?

2. Was the suit cognizable in the Senior Resident Magistrate's Court prior to the year 2010?

6. On the first question , the increase of jurisdiction in respect of Gandani,P.M by the Chief Justice was made pursuant to the proviso to section 5(1) of the Magistrates Courts Act which states:

“Provided the Chief Justice may, by notice in the Gazetted, increase the limit of the jurisdiction of

- a. ...
- b. ...
- c. ...
- d. **a principal magistrate to a sum not exceeding one million shillings**
- e. ...
- f. ...”

7. According to the gazette notice No. 125999 the increase of jurisdiction in respect of Gandani,P.M was effective from 1st June, 2010 even though the notice was only gazetted on 22nd October, 2010. Under the above section it would seem that the gazette is a necessary component of the increase of jurisdiction but whether the gazette is what gives effect to increase is another matter.

8. The purpose of gazette in my considered view is notification to the public and the fact that the same was done several months after the decision cannot be read in a manner that defeats the intention of the notice. It would be against public policy to read section 5(1) of the Magistrates Courts Act in a manner that is not purposive. Many innocent third parties would be subjected to unwarranted hardship if their duly obtained judgments were to be upset on the basis of such a construction.

9. Of course, it is undeniable that it is desirable for the necessary gazette to be done very soon after a decision to increase jurisdiction. It is a fact however that the gazette process is controlled by the Government Printer, although in this case the delay is unusually long. It is not clear what led to such delay. In the circumstances of this case, I find that the Learned Principal Magistrate who presided over the subject matter and rendered a judgment had the necessary pecuniary jurisdiction, her jurisdiction having been enhanced with effect from 1st June, 2010.

10. This finding leads to the second question and in part also answers it. The Learned Principal Magistrate was stationed in the Senior Resident Magistrate's Court in Kilifi. To date, the Court in Kilifi is described as the Senior Resident Magistrate's Court (an anomaly requiring rectification)even though the Court is presided over by the Principal Magistrate. Technically speaking therefore, and from the undisputed facts of the case, the Senior Resident Magistrate's

Court in Kilifi was always potentially a Principal Magistrate's Court with adequate jurisdiction because of the amendment of the Magistrates Court Act in 2002. That is what is demonstrated by what happened in June, 2010: A Principal Magistrate attached to the Senior Resident Magistrate's Court was vested with increased pecuniary jurisdiction of Kshs. 1 Million.

11. My difficulty is with the period prior to the year 2010 . It has been claimed in the Applicant's submissions but not in their affidavit, that one C.O Obulutsa, a Senior Resident Magistrate, allowed amendment of the defence in 2008 to bring in the counterclaim for the sum of Kshs. 928,000.00 by the Interested Party. The relevant proceedings have not been availed to this court to confirm these statements. The burden lay with the Applicant to demonstrate , not merely the fact that its lawyers filed the suit in a Senior Resident Magistrate's court but also that specific magistrates who gave orders affecting the matter in different periods did not possess the requisite pecuniary jurisdiction. As regards Gandani, PM, that complaint has no merit.
12. There is no evidence before me that the order for amendment of the defence to introduce the counterclaim was made by a magistrate of the rank of Senior Resident Magistrate or even that prior to the year 2010 , there was no Principal Magistrate attached to the court as was the case in 2010. On the material presented , I am unable to make a determination favourable to the Applicant on the second question.
13. I also take note of the fact that the present Applicant was the party who commenced the proceedings in the court whose jurisdiction it is now seeking to impugn. It seems unfair that the applicant should now attempt to obtain an advantage out of their own admitted mistakes. The Interested Party stands to suffer prejudice if the present application is allowed.

For all the foregoing reasons the application before me must fail and is accordingly dismissed with costs.

Delivered and signed this 7th day of July, 2014

In the presence of Mr. Ole Kina h/b Ms Mwangi for the Interested Party.

C. W. Meoli

JUDGE