



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: P. KIHARA KARIUKI (PCA), MWILU & M'INOTI, JJ.A.

CIVIL APPEAL NO. 288 OF 2005

BETWEEN

GEORGE C. GICHURUAPPELLANT

AND

SENIOR PRIVATE KIOKO1ST RESPONDENT

THE ATTORNEY GENERAL2ND RESPONDENT

(Being an appeal from the Ruling and Decree of the High Court of Kenya at Nairobi delivered on the 17th day of July 2002 in Nairobi High Court Civil Case Number 708 of 2001 by Lady Justice M.A. Ang'awa)

in

H.C.C.C. No. 708 of 2002

JUDGMENT OF THE COURT

1. **GEORGE C. GICHURU** was on the 24th day of December, 1997 at about 12.30 a.m., driving his Nissan Sunny vehicle registration number KAB 831T along Karen road in the direction of Langata road while Senior Private Keith Kioko drove motor vehicle registration number 44KA 99, a Mercedes Benz Lorry, belonging to the department of Defence Langata Barracks. The two motor vehicles collided as a result of which the said George C. Gichuru sustained bodily injuries. He blamed senior Private Keith Kioko for the mishap and so he filed suit for damages against the said Kioko in the Principal Magistrate's Court at Milimani, Nairobi. He named Kioko and the Honourable the Attorney General as defendants.

2. It was agreed between Mr. Mwaniki advocate for the plaintiff and D.H. Njogu state counsel appearing for the defendants that liability be apportioned at the rate of 95% to 5% in favour of the plaintiff. That apportionment of liability was transformed into a consent judgment which was entered on the 29th day of November, 2000 by Mrs. Nzioka, Senior Resident Magistrate. The case was then marked as stood over generally to allow both counsel to try out of court negotiations on quantum of damages.

3. In the meanwhile and more specifically on the 23rd February 2001, George C. Gichuru the

plaintiff made an application for the transfer of his suit to the High Court for hearing and determination in the latter court on the grounds that the damages likely to be awarded would exceed the pecuniary jurisdiction of the Magistrate's court where the suit was initially instituted. That application was allowed by Mr. Kuloba J. (as he then was) on the 9th day of March, 2001 and an order transferring the suit to the High Court issued on the 18th April 2001. Thereafter the case was set down for the 8th July, 2002 to be heard for purposes of assessment of damages. It was placed before the learned lady Justice M.A. Ang'awa for the purpose.

4. When the learned judge took charge of the case and realized that the plaintiff was an army personnel, she referred the advocates to the provisions of **section 7(1)(a) & (b), (f) and (3) of the Government Proceedings Act Cap. 40 Laws of Kenya** as well as to some authorities and asked them to address the court as to the plaintiff's *locus standi* as such plaintiff. This was an issue that the learned judge considered as requiring determination in *limine*, as the same involved the issue whether or not the court had the requisite jurisdiction to hear and determine the case. At the end of the address by the advocates the court came to the conclusion that the plaintiff was non-suited as plaintiff and further that the transfer of the case from the Magistrate's Court to the High Court was wrongful. The learned judge consequently struck out the Plaint.

5. Dissatisfied the plaintiff in the suit preferred this appeal and raised the following grounds:-

1. ***The learned trial judge erred in law by striking out the suit on the basis of issues which were not on record.***
2. ***The learned trial judge erred in striking out the suit when no party had made such an application and on the basis of matters raised by herself.***
3. ***The learned trial judge erred by setting aside the order of transfer of the case to the High Court, which had been made by another judge of competent and equal jurisdiction with the consent of the parties.***
4. ***The learned trial judge failed to appreciate that consent judgment on liability in favour of the plaintiff was already on record investing in the plaintiff the right to be paid damages by the defendant.***
5. ***The learned trial judge failed to deal with and determine the issue before her, namely, the amount of damages to which the plaintiff was entitled.***
6. ***The learned trial judge erred in law by holding that the plaintiff had failed to comply with the requirements of the Government Proceedings Act.***
7. ***The learned trial judge erred in law by holding that she had no jurisdiction to hear the case.***
8. ***The decision of the trial judge has no basis in law.***

6. Arguing the appeal before us Mr. Mwaniki Gitau for the appellant submitted that the case was before the judge for the assessment of damages and she fell into error when, on her own motion, she raised issues of her own particularly when there was no application for the review of or an appeal against judge Kuloba's order transferring the case to the High Court. He added that the respondents having admitted liability and a consent judgment having been entered, they were estopped from denying liability or even raising the issue of jurisdiction. He placed reliance on authorities in an attempt to show that it is not open to a court to raise its own issues in a case and that judicial officers should not transform themselves into witnesses in proceedings before them.

7. Mr. Kaumba appearing for the respondents opposed the appeal on the grounds that once the court determined that it lacked jurisdiction, then it acted correctly in striking out the suit, strengthened further by its finding that the transfer of the case to the High Court was wrongful.

He distinguished the authorities relied on by the appellant stating that they dealt with situations where the courts decided on non-pleaded issues but that in the present case the issue raised was lack of jurisdiction and the High Court acted properly.

8. We propose to dispose of the issue of the transfer of the suit from the magistrate's court to the High Court first. Mr. Mwaniki admitted, and it appears clearly from his Notice of Motion dated 23rd February 2001, that the reason he applied for transfer of the suit was the lack of pecuniary jurisdiction of the court where the same was instituted. That is the purport of paragraph 6 of the affidavit sworn by Mr. Mwaniki in support of the Motion for transfer of the suit. And therein lay the issue raised by the judge of the court below and for which she is now faulted. So then what is the position in law as concerns transfer of suits in the circumstances of the case herein? **Section 18(1)(b) of the Civil Procedure Act cap 21 Laws of Kenya** provides for the general power of transfers when it states:-

“18(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or its own motion without such notice, the High Court may at any stage –

- a. -----
- b. ***Withdraw any suit or other proceeding in any court subordinate to it, and thereafter***
 - i. ***try or dispose of the same; or***
 - ii. -----
 - iii. -----”

9. Case law has defined the instances of such transfers, and suffice here to refer to but one of them, that of **KAGENYI V MUSIRAMO AND ANOTHER [1968] E.A. 43** wherein it was made abundantly clear that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it. This was the point that the High Court judge was confronted with and on which she made her determination. There was more. The learned judge referred herself and the parties to the provisions of section 7 of **The Government Proceedings Act Cap. 40** which clearly prohibits the kind of action that the plaintiff, an Armed Forces Personnel, (who would not, disclose in the plaint that fact of being an Army officer) did.

10. There is no dispute that the case was placed before the learned judge on the 8th July 2002. Before commencing the assessment of damages the judge sought to satisfy herself that she had the requisite jurisdiction and that was whence she raised the dual issues of the validity of the transfer of the suit to the High Court and the suitability of the plaintiff as plaintiff. With profound respect to Mr. Mwaniki, that is not akin to the judge raising her own issues for determination. She raised no issues of her own. She cannot be faulted. She did what an alert judge would do, to satisfy oneself that one is possessed of the requisite jurisdiction before hearing a case. That is why all the authorities relied on are found to be irrelevant, dealing as they do with totality different circumstances.

11. It is settled law that parties cannot, even by their consent on a matter, confer jurisdiction on a court where no such jurisdiction exists. And a court would act in vain, nay, perform a nullity, if it were to exercise a jurisdiction it does not have - **see Volume 3:1-N WORDS AND PHRASES LEGALLY DEFINED at pg 113.**

A question of jurisdiction may be raised by a party or *by the court suo moto* (emphasis provided) during the proceedings – **see section 18 Civil Procedure Act** - and once raised, that question must be determined without further ado. That is what the judge did. The reason is not difficult to find. And it is this, that:-

“Jurisdiction is everything. Without it, a court has no power to make one

more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law must down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

See OWNERS OF THE MOTOR VESSEL “LILLIAN’S” V CALTEX OIL KENYA [1989] KLR 1.

12. In the appellant’s own admission his suit was filed in a court without pecuniary jurisdiction. On the authority of **KAGENYI (supra)** Kuloba J committed a nullity when he purported to transfer the case to the High Court. And without jurisdiction Ang’awa J. had no power/authority to assess damages and we find that she did the only thing she had power to strike out the suit. She was right in the manner she proceeded. The upshot is this, that this appeal lacks an iota of merit and it is accordingly dismissed with costs.

Dated and Delivered at Nairobi this 19th day of July, 2013.

P. KIHARA KARIUKI

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PRESIDENT

COURT OF APPEAL

P. M. MWILU

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JUDGE OF APPEAL

K. M’INOTI

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JUDGE OF APPEAL

I certify that this is a
true copy of the original.

DEPUTY REGISTRAR