



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU
Civil Appeal 141 of 2008

TIMSALES KENYA LIMITEDAPPELLANT
VERSUS
RONALD NGALA OMOKARESPONDENT

**4(Appeal from a portion of ruling and order in Kisumu C.M.C.C 74 of
2006)**

J U D G E M
E N T

1. This is an appeal from the ruling and order of the learned Principal Magistrate Mrs. On'ginjo delivered on 27th of November, 2008 in C.M.C.C. No.474 of 2006. The appellant being dissatisfied with a portion of the ruling and orders given, appeals on the following grounds:-
 - (a) The learned trial magistrate erred in fact and in law in not appreciating that the appellant had raised matters of a fundamental nature to warrant the grant of all the orders sought in the application;
 - (b) The learned trial magistrate erred in fact and in law in failing to appreciate sufficiently or at all the principles applicable on determining the application that was before her;
 - (c) The learned trial magistrate erred in fact and in law in failing to appreciate that the orders sought in the application before her were for striking out of the suit as opposed to that of staying the suit;
 - (d) The learned trial magistrate erred infact and in making a ruling that was not tenable in law by staying the proceedings of the suit in its entirety on the one hand and awarding the defendants costs of the suit on the other hand.
2. The appellant urged the court to set aside the ruling and the order and for the court to strike out and dismiss the suit with costs. The appellant also seeks for costs of the appeal and application dated 9th January 2001.

3. It was submitted on behalf of the appellant that a court with no jurisdiction cannot transfer a suit to another court neither could the court order a stay of the same.
4. The respondent objected to the appeal on the grounds that the appellant had in the defence admitted jurisdiction of the court. That the court had jurisdiction to order for stay and the respondent has a right to institute a fresh suit.
5. Having considered the submissions by counsel for the parties, there are three issues for consideration by this court as follows:
 - (i) **Whether the Chief Magistrate's Court at Kisumu had territorial jurisdiction to hear the matter in the first place.**
 - (ii) **Whether the principal magistrate had powers to stay proceedings;**
 - (iii) **Whether this court ought to strike out the suit in its entirety.**

6. The respondent was described as a male adult residing in Luanda within the Republic of Kenya and, the defendant a Limited Liability Company of Post Office Box 692 **Narok**. The appellant having been employed by the plaintiff sustained injuries while in the cause of his work while at the plaintiff's factory in Elbergon. The question is where the plaintiff ought to have instituted the suit taking into consideration the place of resident of the respondent, registered office of the appellant and where the cause of action arose.

Section 11 of the Civil Procedure Act requires that a suit be instituted in the court of the lowest grade competent to try it. Section 14 of the Civil Procedure Act provides:

"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 the two courts."

The plaintiff in this case could only file his suit in Nakuru. He could not file his suit in Kisumu. It therefore, follows that the Chief Magistrate's court in Kisumu lacked territorial jurisdiction. Which indeed the Principal Magistrate acknowledges in the observation she made (page 2 of the ruling) See

page 3 of the Record of Appeal where she stated:

“I will therefore order for a stay of these proceedings pending filing in court within territorial jurisdiction in Nakuru.”

Having found that the lower court had no territorial jurisdiction, it means that the matter before court was incompetent and the learned Principal Magistrate ought not to have stayed and incompetent suit. Indeed in staying the proceedings the order does not assist the respondent as the suit is not capable of being transferred. In **ADEN AND ANOTHER VERSUS ULINZI SACCO SOCIETY LIMITED [2002] 1 KLR**. The court held inter alia:

“1.....

- 2. The jurisdiction either exists or does not abi nito and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.**
- 3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.**
- 4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.**
- 5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.**
- 6.**
- 7.”**

From the above authority it, therefore, follows that the respondent’s argument that the appellant had accepted jurisdiction in its defence, does not confer jurisdiction and the issue was thus properly raised.

For the reasons above mentioned this appeal succeededs, the plaint in **CMCC No.474 of 2006** is struck off with costs. The costs of this appeal is awarded to the appellant.

DATED AND DELIVERED THIS 30TH APRIL, 2010

ALI-ARONI
J U D G E

In the presence of:

.....Counsel for the Appellant

.....Counsel for the Respondent