REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NYERI

Civil Appeal 287 of 2002

FRANCIS NDICHU GATHOGO …….……..…… APPELLANT

AND

EVANS KITAZI ONDANSA ……..…….. 1ST RESPONDENT

COLLINDALE LTD. …….. 2ND RESPONDENT

***(Appeal from ruling and order of the High Court of Kenya At Meru (Kasanga, J) dated 1st August, 2002* In H. C. C. C. No. 87 of 2001)**

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JUDGMENT OF THE COURT

On some date which was never specified in the plaint, Francis Ndichu Gathogo's motor vehicle Reg. No. KAE 971 M was alleged to have been rammed from behind by motor vehicle Reg. No. KAC 486T which was said to be owned and driven by Evans Kitazi Ondansa and Collindale Ltd. and as a result of the accident Mr. Francis Ndichu Gathogo, the appellant herein, suffered a loss of Kshs.197,360/- in the form of repair charges and damages of Kshs.5000/- per day for 71 days. With the greatest respect to Mr. Charles Kariuki, learned counsel for the appellant, and whose firm drafted the pleadings, the plaint was so badly drafted that it is difficult to make sense of its contents. As an example, paragraph 4 of the plaint which contains the basis of the claim, is in these terms:-

"4. At all material times to the suit, the plaintiff is the registered owner of motor vehicle KAE 971 M along outering road, Nairobi when near Mutindwa bumps the defendant, his driver agent, servant and/or employee carelessly or negligently drove motor vehicle Reg. No. KAC 486 T directing the same to ram into or hit the plaintiff's motor vehicle from behind. "

The paragraph makes no sense at all and as we have said, not even the date of the alleged accident is stated. It is impossible to say who the owner of motor vehicle Reg. No. KAC 486T was and how that vehicle was connected to any of the two defendants who are now the respondents in this appeal. If that plaint had proceeded to trial in the form in which it is, we do not know what the trial judge would have said about the matter.

The plaint, however, did not proceed to trial. It was filed in the High Court in Meru High Court and on 18th May, 2001. M/s Kahari & Kiai Advocates of Nairobi filed a joint defence for the respondents and in the paragraphs relevant to the appeal before us , they pleaded as follows:-

"4. In the alternative and without prejudice to the foregoing, the Defendants aver that if the accident occurred along Outering Road Nairobi, the suit should have been filed in Nairobi where the Defendants resides (sic) and carries (sic) on business.

7. The Defendants deny the jurisdiction of this Honourable Court."

On 7th May, 2002, the parties appeared before Mulwa, J at Meru High Court and Mr. Kahari, learned counsel for the respondents, took a preliminary objection as to the jurisdiction of the Judge to hear the matter. The basis of the objection was that as the accident had occurred in Nairobi where the respondents were resident the suit ought to have been filed in Nairobi and not in Meru. By virtue of ***section 15*** of the Civil Procedure Act, the High Court Judge in Meru had no jurisdiction to hear the case, Mr. Kahari told Mr. Justice Mulwa.

Mr. Kariuki, in reply relied on ***section 60*** of the Constitution of Kenya which creates the High Court. That section provides:-

"60 (1). There shall be a High Court, which shall be a superior court of record, and which shall have unlimited original jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this Constitution or any other law."

Under that section the jurisdiction of the High Court is original and unlimited either by region, territory or the monetary value of the subject matter in dispute.

But we do not think it was necessary for Mr. Kariuki to call in aid the provisions of ***section 60(1)*** of the Constitution.

Section 15 of the Civil Procedure Act falls under the heading:-

"Place of Suing"

and is preceded by ***sections 11, 12***, ***13*** and ***14***. ***Section 11*** clearly deals with subordinate courts and the proviso ***(ii)*** to that section gives the High Court the power to direct the distribution of business where there is more than one subordinate court in the same district.

Section 12 also deals with subordinate courts whose pecuniary and other jurisdiction are limited; and so are ***sections 13*** and ***14***. All these sections have nothing to do with the jurisdiction of the High Court. Then ***section 15*** provides:-

"15. Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction –

(a) the defendant or each one of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business or personally works for gain; or

(b) any of the defendants (where there are more than one) at the time of the commencement

of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or

(c) the cause of action, wholly or in part, arises."

The provisions of ***section 15*** are subject to the provisions contained in ***sections 11, 12, 13, 14*** and ***15*** of the Act and all these sections clearly deal with matters in subordinate courts. ***Section 15*** itself can only deal with matters in the subordinate courts. That was the holding of the Court of Appeal for Eastern Africa way back in 1958 in the case of **RIDDLESBARGER AND ANOTHER VS. ROBSON AND OTHERS [1958] EA 375** where the second holding of the Court was that

"(ii) s. 15 of the Civil Procedure

Ordinance applies only to subordinate courts."

Mr. Kahari, though it was him who had urged Mulwa, J. to hold that the High Court in Meru had no jurisdiction to hear a matter arising in Nairobi, was unable to point out to us what change or changes had occurred since **RIDDLESBARGER'S** case to include the High Court as being covered in section 15 of the Civil Procedure Act. With the greatest respect to Mulwa, J., he was clearly in error in dismissing the plaint on the ground that he had no jurisdiction to hear the matter because the alleged accident had taken place in Nairobi while the suit was filed in the High Court at Meru. What the learned Judge should have done was to use the provisions of ***Order 46 Rule 5(2)*** of the Civil Procedure Rules which provides:-

"The Court may of its own motion or on the application of any party to a suit and for cause shown order that a case be tried in a particular place to be appointed by the court.

Provided always that in appointing such particular place for trial the court shall have regard to the convenience of the parties and their witnesses and to the date on which such trial is to take place and all other circumstances of the case."

Mr. Kariuki had specifically directed the attention of the learned Judge to this provision, but for some reason he chose to hold that he had no jurisdiction and instead dismissed the suit. We are in no doubt that he was in error. We accordingly allow the appeal and set aside all the orders made by the learned Judge and reinstate the plaint to be heard by the High Court Judge. We award the costs of this appeal to the appellant. We also award the costs of the preliminary objection to the appellant. These orders, however, do not deprive the respondents of their right under ***Order 46 Rule 5(2)*** of the Civil Procedure Rules to apply to the Judge in Meru to direct that there be a direction that the suit be heard in Nairobi. Nor do the orders prevent the High Court at Meru, on its own motion and after hearing what the parties might want to say, to make such directions. These shall be our orders on the appeal.

Dated and delivered at Nyeri this 17th day of May, 2007.

R.S.C. OMOLO

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR.