



**Juma v Mkopa Holdings Ltd t/a Mkopa Sola (K) Ltd & another
(Constitutional Petition E200 of 2021) [2023] KEHC 2001 (KLR)
(Constitutional and Human Rights) (17 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 2001 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E200 OF 2021**

**DKN MAGARE, J
FEBRUARY 17, 2023**

BETWEEN

STEPHEN JUMA PETITIONER

AND

MKOPA HOLDINGS LTD T/A MKOPA SOLA (K) LTD 1ST RESPONDENT

M-KOPA KENYA LIMITED 2ND RESPONDENT

JUDGMENT

1. This is a dispute emanating from an employment contract between the Petitioner and the Respondent(s). The Petitioner is claiming breach of his rights arising from the continued use of his photo between October 2016 and July 2020. He is alleged to have been terminated from the Respondent employment. Although there are three companies sued as 2 Respondents, it is not clear from the Petition, which of the Respondents, the Petitioner was working for.
2. The all Respondents are described as one company, a limited company registered in England and Wales owning 11 other named companies including the 2nd Respondent. This type of pleading is not helpful.
3. Issues for Determination;
 - a) Whether the Court has jurisdiction to hear and determine the petition.
 - b) Whether if (a) above is in the positive, whether there was breach of the Petitioner's Constitutional rights.
 - c) Whether remedies, including costs are available to the parties.



Pleadings

4. The Petitioner filed the Petition dated 2nd June, 2021. The Petition was accompanied by an affidavit of the Petitioner of even date and a certificate of Electronic Records drawn by Ian Makotsi. He has not described his qualification in terms of section 106 (B) of the *Evidence Act*. Nevertheless, nothing turns on the certificate.
5. A demand letter dated 29th July, 2020 laid a background a circumstances under which the Plaintiff herein taken in the courts of employment. This was done by the firm of representing the Respondents but the letter was annexed to the Petitioner's affidavit.
6. The petitioner sworn a lengthy 18 paragraph affidavit reiterating almost verbatim the content of the Petition save that the petition has a listing of several articles of the *Constitution* that were said to apply and or breached. On the other hand, the Respondent(s) also filed a 26 paragraph Replying Affidavit Sworn by Kageni Mbungu, on behalf of both Respondents. I have painstakingly read both.
7. I am satisfied that the parties are in agreement on pertinent facts. These are: -
 - a) There was an employment contracted between the parties herein which was terminated in 2016. The circumstances of termination are not really in dispute. Despite protestations regarding the contract of employment, there is ample evidence that existed employer employee relationship. There appears to be a parent company and subsidiary relationships between the Respondents inter se.
 - b) There is also agreement that the photos were taken during a photoshoot while the Petitioner was in the Respondent's employment.
 - c) The parties do not differentiate their relations and as such the defendants are related parties.
 - d) The photos were put in the website while the Petitioner was in the Respondent was in employment and removed when a demand letter was issued.

Jurisdiction

8. The Jurisdiction of this Court is subscribed in article 165 of the *Constitution*. The Court has unlimited original jurisdiction in Criminal and Civil Matters. The High Court, under article 165 3(b) has jurisdiction to determine whether a right of a fundamental freedom of a bill of Rights has been violated, infringed or threatened.
9. However, this court does not have jurisdiction, by dint of article 165 (5) to
 - a Matters reserved for the exclusive jurisdiction of the Supreme Court.
 - b. Falling within the jurisdiction of Courts contemplated in article 162(2) of the *Constitution*.
10. 162(2) provides that parliament shall establish Courts with status of the High Court to hear and determine disputes relating to;
 - a) Employment and labour relations and
 - b) The environment and the use and occupation of ad title land.
11. Article 162(2) (a) thus lay the constitutional basis for Parliament to establish courts with the status of the High Court to hear and determine disputes relating to the Employment and labour relations. This court is now established under section 4 of the *Employment and Labour Relations Court Act*.



12. Section 12 of the *Employment and Labour Relations Court Act*, the court, has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with article 162(2) of the *Constitution* and the provisions of that Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—
- (a) disputes relating to or arising out of employment between an employer and an employee;
 - (b) disputes between an employer and a trade union;
 - (c) disputes between an employers’ organization and a trade union’s organization;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;
 - (f) disputes between an employers’ organization and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer’s organization or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and (j) disputes relating to the registration and enforcement of collective agreement.
13. Hon Justice D S Majanja in *Kenya Red Cross Society v Kennedy Ajami Bende* [2023] eKLR had this to say regarding the jurisdiction of this court to handle matters that are essentially ELRC

“The exclusivity of the jurisdiction of the ELRC vis-à-vis the High Court in relation to disputes between employer and employee was underlined by the Supreme Court in *Republic v Karisa Chengo & Others*, SCK Petition No. 5 of 2015 [2017] eKLR where it held follows:

(52) From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of courts, with *sui generis* jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As article 165(5) precludes the High Court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court.

14. Jurisdiction is the authority to decide therefore, where the Court has jurisdiction it must take, jurisdiction while where it has no jurisdiction it must down its tools. On the other hand, also the Court cannot by sheer laziness or dislike for a file divest itself of jurisdiction that it has. In the case of the *Motor Vessel Lilian S.*, 1989 eKLR Justice Nyarangi JA laid the law in terms of exercise of jurisdiction by the High Court where he stated as follows:

“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 down(s) tools in respect of the matter before it in the moment it holds the opinion that it has no jurisdiction.”

15. In support of that contention, Justice Nyarangi quoted with approval words and phrases legally defined – Vol 3: I to N page 113.

“By Jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statute Charter or Commission under which the Court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to which jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction is an inferior Court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the Court or tribunal has been given the power to determine conclusively whether the facts exist. Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing jurisdiction must be acquired before judgment is given.”

16. The Supreme Court has had an opportunity in numerous occasions and it has never squandered such to clarify the extent of jurisdiction of this Court and Courts of equal status as aforesaid. For instance, In *S.K Macharia v KCB*, the Supreme Court, the Court was particular that there must be jurisdiction and the same cannot be conferred by consent by connivance or by craft. The Court was precise and held as doth: -

“As held in the matter of Advisory opinion of the Court under article 163 of the Constitutional Petition No. 2 of 2011 at para 30, the Court stated, “A Court may not arrogate itself jurisdiction through craft of interpretation or by way of endeavours to discern of interpret the intentions of Parliament where legislation is clear and there is no ambiguity.”

17. The Respondent’s submission on point is terse. It does not fully elucidate the pertinent issues raised. The Respondent raised the issue of jurisdiction in paragraph 22 of the Replying Affidavit. However, the Petitioner has not addressed the issue at all.

18. Nevertheless, before rendering judgment on merit the Court is duty bound to satisfy itself that it has both the subject matter jurisdiction and jurisdiction over the parties.

The issue of jurisdiction cannot be conferred by parties or imagined. The Court either has jurisdiction or it does not. Jurisdiction is dealt with in a manner of a Preliminary Objection.

19. In other words, it is taken as if the contents of the position are correct, without looking at any possible defect in the responses. In *Mukisa Biscuits Manufacturing* the Court of Appeal for East Africa had there to say.

“Whereas it was dealing with a Preliminary Objection, the same applies to jurisdiction. The facts relied upon, clearly show that the matter is an employment matter. In other words, in order to determine whether, the Respondent or any one of them was entitled to continue using the Petitioner’s image the Court must confirm the employment contract.”

20. Further to be able to know whether there was breach in failing to remove the photo the Court must of necessity analyze the disengagement contracts of between the parties. It is pleased and agreed that



the photo was taken in the course of employment. Whether the employer could still have former employees' images on their website depends entirely on construction of the employment contract. In the circumstances whether disguised as a commercial or constitutional dispute, the dispute herein is an employment dispute.

21. That Court can in within its exceptional competitive deal with breach of rights relating to the subject matter.
22. Under section 12(3) the *Employment and Labour Relations Court*, can issue any of the following orders —
 - (i) interim preservation orders including injunctions in cases of urgency;
 - (ii) a prohibitory order;
 - (iii) an order for specific performance;
 - (iv) a declaratory order;
 - (v) an award of compensation in any circumstances contemplated under this *Act* or any written law;
 - (vi) an award of damages in any circumstances contemplated under this *Act* or any written law;
 - (vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or
 - (viii) any other appropriate relief as the Court may deem fit to grant
23. All the orders sought in the petition, the petitioner can be dealt with in the Employment and Labour Relations Court.
24. The subject matter of tis case has not mutated and as such it remains matters employment.
25. I find that this Court has no jurisdiction to hear and determine this matter. Having determined that I have no jurisdiction to hear this matter, I will not deal with all the other issues.
26. The question then is what happened to this petition. I cannot transfer a petition to ELRC for hearing and determination since the petition is nullity. Lord Denning M.R in had this to say on issues of a nullity in *Macfoy v United Africa Co Ltd* [1961] All ER, 11:-

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...But if an act is only voidable, then it is not automatically void. It is only an irregularity which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside; and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it.”
27. Nothing can be built on a nullity. This means that if the court had no jurisdiction ab initio, then a nullity cannot be transferred. Transfer can only be done where the two Courts have concurrent



jurisdiction in some matters and this Court finds or the Courts of equal status find that the predominant question is in one Court and not the other.

28. However, in scenarios, like this matters, where all issues are related to or arise from employment, I am duly bound to down my tools. Nyarangi Judge in the *Owners of Motor Vehicle Vessel "Lilians v Caltex Oil (Kenya) Ltd* [1989] eKLR held as follows:

“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 a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds, the opinion that it is without jurisdiction.”

29. In the circumstances the issue of jurisdiction cannot be gain said. As earlier alluded I have perused the record and there is no issue of predominance. The issue of predominance was dealt with in *Mohammed Ali Baadi & Others v AG & 11 Others* [2018] eKLR where the Court relied at paragraph 88

“A Petition brought by residents of Lamu County. It cites violations of certain fundamental rights affecting the people of Lamu County. It is not, by any definition, a dispute between the two levels of government. Lamu County is only enjoined to the suit as an interested party. Lamu County did not bring the suit; and neither is it a principal party to the suit. It would be to over-stretch the meaning assigned to “dispute” under the Inter-Governmental Relations Act were we to require the suit to be submitted for resolution under Part IV of Inter-Governmental Relations Act.”

30. The best approach is to determine whether the predominant purpose falls within the High Court or Courts of equal status and from pleadings when a hybrid questions are raised they are then sent to a Court with the predominant question.
31. There being a purely employment dispute, this Petition is incapable of being salvaged.
32. I agree with Odunga J as then he was, when in *Wambua v Kamondia & 3 Others* [2022] IKEHC 10426 KLR) he noted that there are two types of jurisdictional questions. The first one is where a Court has no jurisdiction to embark on investigation into a matter. In such a case, there is nothing to be transferred. The second one where the Court has jurisdiction at the inception which is affected subsequently, the later can be transferred.
33. Having fallen within the former, the suit herein is struck out for lack of jurisdiction.

Costs

34. Ordinarily costs follow the event unless there are circumstances especially in Constitutional matters where the Court has the discretion not to award costs. The filing of a suit in a wrong Court brings in an urge to award costs as a deterrence. However, given existence of employer-employee relationship, though now terminated, the Court does not find it prudent to award the Respondents costs, though deserving.
35. In the circumstances, each party to bear their own costs.

Disposition

36. The petition is struck out for lack of jurisdiction with each party bearing its own costs

It is so ordered.



**DATED, ISSUED AND DELIVERED AT MOMBASA, VIRTUALLY 17TH DAY OF FEBRUARY
THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.**

HON. MR. JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

..... the Petitioner

..... for the Respondent

