



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

CIVIL APPEAL NO. 154 OF 2017

CHINA ROAD & BRIDGE CORPORATION.....APPELLANT

-VERSUS-

SAMUEL MWANGI NYAMU.....RESPONDENT

RULING

1. By a Notice of Motion dated 23rd October, 2020, the Appellant herein seeks that the orders issued on 6th October, 2020 dismissing this suit be set aside and the appeal be reinstated.
2. According to the deponent, who was the Appellant's advocate, after lodging this appeal on 23rd November, 2017, her firm applied for typed proceedings and judgement from the lower court and throughout 2018, their court clerk visited Mavoko Law Courts severally but each time the proceedings were not ready and on 16th January, 2019 they wrote to the Executive Officer a reminder for the same. On 16th January, 2019 they obtained the typed copy of the judgement and continued following up on the proceedings which they obtained in March, 2019 and immediately applied for the decree.
3. However, on 6th September, 2019 the Respondents applied to have the appeal dismissed for want of prosecution which application was scheduled for hearing on 31st October, 2019. To that application they filed a replying affidavit on 26th September, 2019 and served the same on 18th October, 2019. Come 31st October, 2019, the matter was listed before the Deputy Registrar who directed that the same be placed before the Judge and the same was rescheduled for mention on 6th May, 2020 when the Courts were not sitting due to COVID 19 and was further rescheduled to 6th October, 2020 for directions. On the said date the Respondents instead prosecuted the application which was allowed on the basis that the application was not opposed.
4. According to the Appellant, in dismissing the appeal, the court did not take into account the contents of the replying affidavit which though filed was not on record hence the Appellant was greatly prejudiced by the said orders.
5. In opposing the application, the Respondent deposed that he filed the suit seeking compensation in respect of injuries he sustained as a result of breach of contractual and statutory obligation by the Appellant and judgement was delivered on 31st October, 2017. According to the Respondent, the parties were, after a number of appearances, directed to attend court on 16th December, 2019 in order to take directions on the application, a date which was fixed by consent. On that date the Appellant failed to attend court and the application was allowed dismissing the appeal for want of prosecution.
6. Despite the foregoing, the applicant took more than nine months to follow up on the matter and no explanation has been offered for the delay. The court was therefore urged to disallow the application. However, in the event that the court was amenable to reinstating the appeal, the Respondent urged the Court to direct the Appellant to deposit half the decretal amount in a joint interest earning account.

Determination

7. I have considered the application herein, the affidavits in support thereof and the submissions filed.
8. The Court of Appeal in **Murtaza Hussein Bandali T/A Shimoni Enterprises vs. P. A. Wills [1991] KLR 469; [1988-92]** held that there is inherent power to restore a case for hearing after it has been dismissed.
9. However, the decision whether or not to reinstate a dismissed appeal is no doubt an exercise of discretion. This being an exercise of judicial discretion, like any other judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The Court's discretion being judicial must therefore be

exercised on the basis of evidence and sound legal principles, with the burden of disclosing the material falling squarely on the supplicant for such orders. See Gharib Mohamed Gharib vs. Zuleikha Mohamed Naaman Civil Application No. Nai. 4 of 1999.

10. In this case, the Appellant's case is that her appeal was dismissed on a date when the same was coming for directions without its replying affidavit which it had filed though not on the court filed being considered. That the matter was on that day coming up for directions and not hearing is admitted by the Respondent. It is also not disputed that the Respondent had in fact filed a replying affidavit whose contents were never considered. The general position was restated in *Halsbury's Laws of England Fourth Edition Vol. 1 page 90 para 74* as follows:

“The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...

11. This was the position in Onyango Oloo vs. Attorney General [1986-1989] EA 456 where the Court of Appeal expressed itself as follows:

“The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard... A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at ...Denial of the right to be heard renders any decision made null and void ab initio.” [Emphasis mine].

12. This was a restatement of Lord Wright's decision in General Medical Council vs. Spackman [1943] 2 All ER 337 cited with approval in R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007 that:

“If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision.”

13. In Ridge vs. Baldwin [1963] 2 All ER 66 at 81, Lord Reid expressed himself as follows:

“Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void.”

14. However, in Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998 the Court of Appeal held that:

“Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it.”

15. In this case, I don't agree that the Appellant was guilty of inordinate delay, the relevant period for the purposes of this application is the period between the date the appeal was dismissed and when this application was filed which was 20 days, a period which in my view is not inordinate in the circumstances.

16. In the premises, I find merit in the application, set aside the order dismissing the appeal and reinstate the same.

17. From the annexures to the application, it is clear that the cause of action arose from an alleged failure by the Appellant to provide the Respondent with a safe working environment.

18. In Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (Kenya) Limited [1989] KLR 1, Nyarangi, JA expressed himself as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance 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 the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of 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 power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

19. Similarly, the Supreme Court in Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR expressed itself as follows:

“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

20. Several decisions have been handed down by the courts regarding the issue of jurisdiction particularly what amounts to want of jurisdiction. As was held by Ochieng, J in Sammy Likuyi Adiema vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 Of 2003, a Tribunal may have jurisdiction to hear and determine issues, but it may give orders, which were in excess of its powers. In effect, if a tribunal made orders beyond its powers, that is not necessarily synonymous with the tribunal lacking jurisdiction to entertain the dispute in the first place. Jurisdiction may, in my view, therefore be conferred at two levels. It may be that the Court lacks jurisdiction to entertain the dispute *ab initio*, in which case it ought to down its tools before taking one more step as was held in Owners of the Motor Vessel “Lilian S” vs. Caltex Oil (K) Ltd [1989] KLR 1. It may also be that though the Court has jurisdiction to enter into the inquiry concerned it lacks the jurisdiction to grant the relief sought. It was therefore held by Sir Udo Udoma, CJ in Uganda General Trading Co. Ltd vs. N T Patel Kampala HCCC No. 351 of 1964 [1965] EA 149, expressed himself as follows:

“The objection to the jurisdiction may be due to the tendency to confuse the issue of jurisdiction with the issue of the form of action and procedure. It does not necessarily mean that because the action is not maintainable in law therefore the Court before which the case has been brought would have no jurisdiction to try it. On the other hand the court may have full jurisdiction over an action and it may yet be held that the action is not maintainable in law...The objection in the instant case is that the action is not maintainable in law because it has not been properly instituted, since the proper form and procedure which ought to originate the proceedings has not been followed. That surely cannot be an objection to the jurisdiction of the court but merely an objection to the form and procedure by which the proceedings have been originated. The mere omission to follow a prescribed procedure in instituting proceedings would not necessarily oust the jurisdiction of the court where there is one as in the instant case. It may be considered incompetent for a court with jurisdiction to exercise such jurisdiction because the matter over which jurisdiction is sought to be exercised has not been brought properly before it in accordance with a prescribed procedure and in a prescribed form. In such a case the jurisdiction of the court is not exercised because it would be incompetent to do so. Incompetency or incapability to exercise jurisdiction already possessed must therefore be distinguished from a complete want of jurisdiction, which may be regarded as a question of incapacity.”

21. Article 165(3) of the Constitution provides as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

.....

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

22. Article 165(5)(6) and (7) thereof on the other hand provides:

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

23. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to

employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article. Pursuant to that power Parliament enacted the **Employment & Labour Relations Court Act** No. 20 of 2011 which provides in section 12 (1) as follows:

(1) the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the constitution and the provisions of this 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 agreements.

24. Apart from that section 87 of the **Employment Act** No. 11 of 2007 provides as follows:-

(1) Subject to the provisions of this Act whenever –

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

25. Therefore, since the High Court's power and authority is derived from the Constitution, where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

26. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which ***fall within the jurisdiction of the courts contemplated in Article 162(2)*** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to “***determine the jurisdiction and functions of the courts contemplated in clause (2)***”. In my view the matters which fall within the ambit of Article 162(2) of the Constitution must be matters within the exclusive jurisdiction of the said specialised Courts.

27. In this case, the pleadings reveal that the substance of the dispute was that the Respondent got injured while in the employment of the Appellant.

28. In **Juma Nyamawi Ndungo & 5 Others vs. Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR** the Court clarified that disputes relating to or arising from the employment relationship between an employee and an employer are to be heard by the Employment and Labour Relations Court (ELRC). In the case of **Saidi Mohammed vs. Diamond Industries Ltd (2018) eKLR** the court observed that the Employment and Labour Relations Court has appellate jurisdiction in disputes relating to work injury. In **Elizabeth Njeri Nderi & Another vs. Highway Carriers Limited [2019] eKLR** the Court of Appeal while allowing an appeal arising from the provisions of the ***Work Injury Benefits Act*** held that now that the appellate court is the Employment and Labour Relations Court, the case should be remitted to that court.

29. The consequence thereof is that appeals in relation to work injuries are handled by the Employment and Labour Relations Court.

30. In my view this matter substantially falls within the jurisdiction of the ELRC. I agree with the position adopted by **Majanja, J** in **United States International University (USIU) vs. Attorney General Nairobi Petition 170 of 2012 [2012] eKLR**, in which he expressed himself *inter alia* as follows:

“[41] Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law. Such a situation would lead precisely to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current court

[43] The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibit the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters of their competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court. Ordinarily where the High Court exercises jurisdiction to interpret the Constitution or enforce fundamental rights, its decisions even where declaratory in nature will require the court to follow or observe the direction. This would mean that the High Court would be supervising the Industrial Court which is prohibited by Article 165(6).

[44] The Industrial Court is a specialist court to deal with employment and labour relations matters. By virtue of Article 162(3), section 12 of the Industrial Court Act, 2011 has set out matters within the exclusive domain of that court. Since the court is of the status of the High Court, it must have the jurisdiction to enforce labour rights in Article 41 and the jurisdiction to interpret the constitution and fundamental rights and freedoms is incidental to the exercise of jurisdiction over matters within its exclusive domain. In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.”

31. In this case, I am satisfied that this dispute can be properly dealt with by the ELRC. This Court ought not to readily clothe itself with jurisdiction when other Constitutional organs have been bestowed with the jurisdiction to entertain the same. This was the position adopted in **Peter Oduor Ngogo vs. Hon. Francis Ole Kaparo, SC Petition 2 of 2012**, [para. 29-30] where it was held:

“The Supreme Court, as the ultimate judicial agency, ought in our opinion, to exercise its powers strictly within the jurisdictional limits prescribed; and it ought to safeguard the autonomous exercise of the respective jurisdictions of the other Courts and tribunals...In the interpretation of any law touching on the Supreme Court’s appellate jurisdiction, the guiding principle is to be that the chain of Courts in the constitutional set-up, running up to the Court of Appeal, have the professional competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or of jurisprudential moment, will deserve the further input of the Supreme Court...Consequently, this Court recognises that all courts have the constitutional competence to hear and determine matters that fall within their jurisdictions and the Supreme Court not being vested with ‘general’ original jurisdiction but only exclusive original jurisdiction in presidential petitions, will only hear those matters once they reach it through the laid down hierarchical framework.”

32. Similar sentiments were expressed in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

“We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

33. The demarcation of the jurisdiction between the High Court and Courts of equal status was the subject of Supreme Court’s decision in **Petition No. 5 of 2015- Republic vs. Karisa Chengo & 2 Others** where the Court expressed itself *inter alia* as hereunder:

“it is obvious to us that *status* and *jurisdiction* are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation...Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis 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 ELC or ELRC 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 ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

34. Having considered the issues raised herein I associate myself with the sentiments of the Court in **East African Railway Corp vs. Anthony Sefu [1973] EA 237**, where it was held that:

“It is, a well established principle that no statute shall be so construed as to oust or restrict the jurisdiction of the Superior Courts, in the absence of clear and unambiguous language to that effect.”

35. It is my view that in the circumstances of this case, it would not advance the course of justice to terminate these proceedings.

36. In this case, since I am satisfied that the dispute can be properly dealt with by the ELRC, the order which commends itself to me and which I hereby make is that further proceedings in this appeal will be undertaken by the ELRC since the said Court is a Court of equal status as the High Court and is empowered to grant the reliefs sought herein.

37. The costs will be in the cause.

38. Orders Accordingly.

Ruling read, signed and delivered in open Court at Machakos this 26th day of January, 2021.

G. V. ODUNGA

JUDGE

In the absence of the parties.

CA Geoffrey