



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NUMBER 455 OF 2019

DAVID R ADANJE.....EXPARTE/APPLICANT

VERSUS

NAKURU WATER AND SANITATION SERVICES LIMITED....RESPONDENT

RULING

1. The Applicant vide an application dated 19th August 2019 brought under **Section 3 and 3A of the Civil Procedure Act Cap 21, order 51 rule 1 of the Civil Procedure rules, 2010** and all other enabling provisions of the law sought for the following orders;

1) *Spent*

2) *THAT leave be granted to the Applicant DAVID R. ADAJE to file his suit afresh arising from the unlawful seizure of his house hold goods detained by the respondent and unlawful levying and deduction of rent from his salary even after eviction from the respondent's premises whilst he was an employee of theirs.*

3) *THAT the costs of this Application do abide the outcome of the intended suit.*

2. The grounds on the face of the Application and which are reiterated in the annexed Affidavit were that the applicant was employed by the respondent as a casual worker in 1989. He was later promoted to the position of water technician. Upon this promotion he was issued with a company house at Mereroni treatment works staff quarters at Milimani within Nakuru town. He occupied the house until the year 2007 when he was issued with a three-month notice dated 9th October to vacate the house. The Notice is annexed as DMA1

3. He deponed that upon receipt of the letter he approached his superiors for an explanation and the managing director agreed to reconsider the said notice. He has however not annexed any evidence to that effect.

4. He deponed that despite the said agreement by a letter dated 6th February 2008 he was reminded that the previous notice was still in effect and was given 7 days within which to vacate the house. He deponed that he was subsequently forcefully and unceremoniously evicted by the respondent. During the eviction his household goods worth Kshs. 500,000/= were either destroyed or confiscated.

5. The Applicant filed the suit CMCC 359 of 2012 seeking *inter alia* Kshs. 500,000/= being the value of goods damaged by the respondent. On 18th January 2017, in his absence, a judgement was delivered in favour of the respondent by the Hon. B. Mararo Principal Magistrate. That for several months afterwards the file was missing from the court's registry and by the time it was located time had lapsed for him to give instructions for filing of an appeal. His application seeking to file the appeal out of time was dismissed.

6. The respondent filed grounds of opposition dated 14th July 2020 and a Replying affidavit sworn on 13th October 2020 by J.N Gachathi the managing director at Nakuru Water & Sanitation Services Limited. It is the respondent's position that the application is utterly defective and an abuse of court process as the same is not soundly grounded on any relevant or known provisions of law; that the issues raised herein have already been decided in NAKURU CMCC NO.359 OF 2012, **DAVID R. ANDAJE VS NAKURU WATER & SANITATION SERVICES LTD** and the suit dismissed on 18th January 2017 and the fresh suit sought is likely to be *res judicata* running afoul of **section 7 of the Civil Procedure Act**. The respondents seeks the dismissal of the application.

7. On 30th July 2020 parties took directions to canvass this Application by way of written submissions.

8. It was submitted for the applicant that the court in dismissing his suit in Nakuru **CMCC 359 of 2012** the trial court found that he filed his claim four years after the cause of action. That however the court's judgment did not indicate what should happen to the property that was

confiscated by the respondent. In addition, that the trial court did not address the issue of the illegal deduction of the house rent from his salary.

9. It was further submitted for the applicant that he was invoking the inherent jurisdiction of this court as provided for in **section 3 and 3A of the Civil Procedure Act**. To put emphasis on this he cited an extract from **Halbury's Laws of England .4th edition. Vol. 37 paragraph 14** which stated as follows;

“The jurisdiction of the court which is comprised within the term “inherent” is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone ,whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process...In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers ,a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

10. It was also submitted for the applicant that he had suffered and continues to suffer injustice occasioned by the respondent for years which injustice can only be corrected by this court. That he had tried to access the property that was confiscated by the respondent in vain. To add insult to injury, the respondent had never stopped deducting house rent even though he was no longer in occupation of the house.

11. For the Respondent it was submitted that the application is *res judicata* as the issues raised have already been determined by a court of competent jurisdiction.

12. I have carefully considered the application before me the affidavits and annexures and submissions by each party.

13. Without delving into the merits of the case it is glaringly evident that this court may lack jurisdiction because the cause of action arose out of the employment of the applicant by the respondent. The applicant's complaint is that by virtue of his employment by the respondent herein he was assigned a privilege, a house. That when the relationship between him and his employer became sour, as according to DMA1, where the employer states: *“this is to bring to your attention that following your behaviour recently you are given three months' notice to rent a house and vacate Water Works. The notice takes effect from the date of this letter”* he was forcefully evicted from that house. In the process he suffered loss and damage. He sued and lost in the magistrate's court. An application to file an appeal out of time was also dismissed. In addition, despite the eviction his employer continued to deduct house rent from his salary for the said house. He comes before this court seeking leave to file a fresh suit.

14. In **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR**, the court citing from *Words and Phrases Legally defined – Volume 3: I – N Page 113* defined the term jurisdiction to mean;

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to 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 the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.”

15. The applicant seeks that this court exercises its inherent jurisdiction to do justice to his case. However, it is my view that that inherent jurisdiction would be exercisable if the court already had the jurisdiction to deal with the matter, assigned as herein above stated. As a court I cannot assign myself jurisdiction over a matter then proceed to exercise inherent jurisdiction in the matter.

16. When it comes to matters employment the **Constitution of Kenya 2010 states at Article 162(2)** that;

Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations;

Then at **Article 165(5)** goes on to curtail the Jurisdiction of this court in the following terms;

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

(a) ...; or

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

Parliament went ahead and enacted the **Employment and Labour Relations Court Act no 20 Of 2011**. The jurisdiction of the court is set out at **Section 12** which provides *inter alia*

Jurisdiction of the Court

(1) *The Court shall have 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 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;***

(3) *In exercise of its jurisdiction under this Act, the Court shall have power to make 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.*

17. It is clear from these legal provisions that jurisdiction over the applicant's issues lies with the Employment and Labour Relations Court, which court is the one empowered to exercise its inherent jurisdiction over the said matter.

18. In the circumstances I am bound by the fiat issued by the court in **Owners of the Motor Vessel "Lillian S"** (above)

"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."

19. I must down my tools. I must not take any further step.

20. Nevertheless. It is only in the interests of justice that I will not strike out the application. I direct that the matter be transferred to the Employment and Labour Relations Court.

21. The matter be mentioned before the Deputy Registrar Employment and Labour Relations Court on the 14th May 2021 to confirm the transfer.

22. Costs in the cause.

Dated and delivered via ZOOM this 27th April 2021

Mumbua T Matheka J

CA: Edna

N/A by counsel though notified. Ruling be sent via email to

S.C Tarus Advocates for Applicant

E.M Juma & Ombui Advocates for the Respondent

Mumbua T Matheka

Judge

27.4.2021