REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL APPEAL NO. 56 OF 2018

WEST KENYA SUGAR CO. LIMITED.....APPELLANT

VERSUS

MATAYO INGOSHE.....RESPONDENT

AND

CIVIL APPEAL NO. 60 OF 2018

WEST KENYA SUGAR CO. LIMITED.....APPELLANT

VERSUS

JASON WAFULA KALIBO.....RESPONDENT

AND

CIVIL APPEAL NO. 122 OF 2018

WEST KENYA SUGAR CO. LIMITED.....APPELLANT

VERSUS

SOSTINE SALAMBA MILIMO.....RESPONDENT

AND

CIVIL APPEAL NO. 136 OF 2018

GODFREY SILIBWA.....1ST APPELLANT

WEST KENYA SUGAR CO. LIMITED.....2ND APPELLANT

VERSUS

TIMOTHY AGENO KIYESI.....RESPONDENT

AND

CIVIL APPEAL NO. 166 OF 2018

WEST KENYA SUGAR CO. LIMITED.....APPELLANT

VERSUS

JACOB WANJA WERUNGA.....RESPONDENT

AND

CIVIL APPEAL NO. 1 OF 2019

WEST KENYA SUGAR CO. LIMITED.....APPELLANT

VERSUS

ALEX KADENGE MALUNGO.....RESPONDENT

AND

CIVIL APPEAL NO. 26 OF 2019

WEST KENYA SUGAR CO. LIMITED.....APPELLANT

VERSUS

MOSES MUSEE INJENDI.....RESPONDENT

AND

CIVIL APPEAL NO. 29 OF 2019

WEST KENYA SUGAR CO. LIMITED .....APPELLANT

VERSUS

TITUS CHIVUYI MULEKA.....RESPONDENT

JUDGMENT

1. The appeals herein have not been consolidated. They are only being handled simultaneously with respect to interlocutory applications filed in all of them turning on the same point, transfer of the appeals from the High Court to the Employment and Labour Relations Court for disposal. The applications are common and they raise the same point of law. I shall, therefore, determine all of them simultaneously.

2. I shall use the proceedings in Kakamega HCCA No. 56 of 2018 as the frame for the purpose of this ruling. The respondent filed a Motion, dated 19th October 2020, seeking striking out of the appeal, on grounds that it had been filed in the wrong court, contrary to the mandatory provisions of the Constitution of Kenya. The groundS on the face of the application are that in the plaint filed at the trial court, the parties were in an employee-employer relationship; and the appeal from a decision in the trial court suit ought to have been filed at the Employment and Labour Relations Court, and not the High Court. The affidavit sworn in support of the application is along similar lines, except that the deponent makes reference to a decision I made in *West Kenya Sugar Co. Ltd vs. Enos Ambani Tangle* [2020] eKLR (Musyoka J), where I held that the High Court had no jurisdiction to handle such appeals, and the same were incompetent and could not be transferred, and I proceeded to strike them out.

3. The appellant then filed a response to that application, where it is conceded that the appeal was filed at the wrong forum, prior to the ruling in *West Kenya Sugar Co. Ltd vs. Enos Ambani Tangle* [2020] eKLR (Musyoka J). The appellant argues that an error on the part of their advocate ought not be visited on them. It is also argued that prior to the ruling the court had been transferring such matters administratively to the Employment and Labour Relations Court, on its own instance. It is further averred that there would be double standards to now begin to strike out appeals filed at the wrong forum instead of transferring them administratively as was the case previously. It is further argued that striking out is a drastic action. It is further argued that there is no law barring the court from transferring cases before it where it has no jurisdiction.

4. Thereafter, the appellant mounted his own application, dated 1st December 2020, praying for transfer of the matter administratively or otherwise to the Employment and Labour Relations Court, at Kisumu, for admission, hearing and determination. The grounds on the face of it are: that the appeal arose from a cause seeking compensation of an injured employee in the purview of work injury benefits and employment relations; that the High Court has no jurisdiction to entertain work injury related causes as affirmed in *West Kenya Sugar Co. Ltd vs. Enos Ambani Tangle* [2020] eKLR (Musyoka J), and that the filing of the instant appeal at the High Court was a remediable error; that hitherto the decision, in *West Kenya Sugar Co. Ltd vs. Enos Ambani Tangle* [2020] eKLR (Musyoka J), the court administratively transferred similar matters to the Employment and Labour Relations Court; that it would be application of double standards by the court if other matters were transferred while other were struck out; among others. The grounds on the face of the application are regurgitated in the affidavit sworn in support of the application.

5. Directions were given for the applications be canvassed by way of written submissions. Both sides have complied and filed their respective written submissions.

6. The appellant submits o. two grounds: on whether the appeal ought to be struck out for want of jurisdiction, and whether it could be transferred to the court with jurisdiction. Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya is cited, to make the point that the court has inherent power to make orders necessary to meet the ends of justice and to prevent abuse of the process of court. The appellant concedes to filing the matter at the wrong court, but argues that it would be draconian to strike it out, and cites such decisions as *John Nahashon Mwangi vs. Kenya Finance Bank Limited (in liquidation)* [2015] eKLR, *Belinda Murai & 6 others vs. Amos Wainaina* [1978] KLR, *Philip Chemwolo & another vs. Augustine Kubede* [1982-88] KLR 103, among others. Section 1A, B of the Civil Procedure Act, on the overriding objective, and Article 159 (2)(d) of the Constitution, are cited for the argument that the effect of section 18 of the Civil Procedure Act, that an order of transfer of a suit from one court to another cannot be made unless the suit is filed in the court with jurisdiction, has been whittled down, by those provisions, and jurisprudence emerging from such decisions as *Wycliffe Mwangaza Kihugwa vs. Grainbulk Handlers Limited* [2014] eKLR (Kasango J), and *Esther Mugure Karegi vs. Penta Tancom Limited* [2016] eKLR (J. Ngugi J). On transfer of the appeal to the Employment and Labour Relations Court, it is argued that there has been a shift in jurisprudence from formalism to a more functional approach to questions of jurisdiction. The decisions, in *Esther Mugure Karegi vs. Penta Tancom Limited* [2016] eKLR (J. Ngugi J), *Pamoja Women Development Programme & 3 others vs. Jackson Kihumbu Wang'ombe & another* [2016] eKLR, *Prof. Daniel N. Mugendi vs. Kenyatta University, Benson I. Wairegi, Eliud Mathu & Prof. Olive M. Mugendi* Civil Appeal No. 6 of 2012 and the *Kenya Medical Research Institute vs. Davy Kiprotich Koech* [2018] eKLR (Waki, Warsame & Murgor JJA), are cited to make that point. It is submitted that it would be against jurisprudential development in Kenya set by both the High Court and the Court of Appeal on the issue of transfer of cases similar to the instant one, if this court strikes out or dismisses the instant appeal, instead of transferring it. It is also argued that it would be contrary to the rule on judicial precedence for this court to find contrary to the Court of Appeal on the same issue. It is also mentioned that the court had been transferring the matters administratively, prior to its decision in *West Kenya Sugar Co. Ltd vs. Enos Ambani Tangle* [2020] eKLR (Musyoka J).

7. In his written submissions, the respondent argues two grounds: whether the High Court has jurisdiction to hear and determine work injury claims; and whether this court can order transfer of the instant appeal to the Employment and Labour Relations Court. On the first ground, it is argued that by dint of Articles 162(2) and 165(5) of the Constitution, and section 12 of the Employment and Labour Relations Court, the High Court lacks jurisdiction over work injury related claims, and that that jurisdiction properly lies with the Employment and Labour Relations Court. On jurisdiction, he cites the decisions in *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Limited* [1989, to argue that jurisdiction is primordial, and that without it the court cannot render itself one way or the other in any matter. *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (**Karanja, Gatembu & Sichale JJA**) and *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (**Makhandia, Ouko & M'Inoti JJA**)**,** are cited to make the point that a suit filed before a court without jurisdiction is incompetent and is not available for transfer to the court with jurisdiction.

8. Let me start by first setting out the background. It is common ground that the High Court has no jurisdiction over work injury related claims by dint of Articles 162(2) and 165(5) of the Constitution of Kenya, 2010. The Constitution of Kenya, establishes, at Article 162(2), a special court to handle disputes that revolve around the employment and labour relations. Article 165(5) of the same Constitution strips the High Court of jurisdiction over such matters. Articles 162(2) and 165(5) state as follows: –

> "*162(1) …*
>
> *(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*
>
> *(a) employment and labour relations; and*
>
> *(b) ...*
>
> *(3) …*
>
> *(4) …*
>
> *163 …*
>
> *164….*
>
> *165(1) …*
>
> *(2) …*
>
> *(3) …*
>
> *(4) …*
>
> *(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) …*

(7) …"

9. It was against the background of Article 162(2) of the Constitution, that Parliament established the Employment and Labour Relations Court, whose jurisdiction is set out in section 12 of the Employment and Labour Relations Court Act. The said 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, relating to employment and labour relations. Section 12, relevant to the dispute at hand, read as follows:

> *"(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;*
>
> *(b) …*
>
> *(c) …*
>
> *(d) …*
>
> *(e) …*
>
> *(f) …*
>
> *(g) …*
>
> *(h) …*
>
> *(i) …*
>
> *(j) ...*
>
> *(2) An application, claim or complaint may be lodged with the Court by or against an employee, an employer …*
>
> *(3) In exercise of its jurisdiction under this Act, the Court shall have power" to make any of the following orders –*
>
> *(i) …*
>
> *(ii) …*
>
> *(iii) …*
>
> *(iv) …*
>
> *(v) …*
>
> *(vi) An award of damages in any circumstances contemplated under this Act or any written law;*
>
> *(vii) …*
>
> *(viii) …"*

10. It is also common ground that the disputes in all the claims the subject of the appeals herein, turned on work injury related questions. That would, therefore, mean that the court with appellate jurisdiction from a decision of the trial court, by dint of Articles 162(2) and 165(5) of the Cognition and section 12 of the Employment and Labour Relations Court Act, was the Employment and the Labour Relations Court, and not the High Court. The appellant concedes that the appeals were filed before the wrong court.

11. The principal bone of contention lies with what the High Court ought to do with suits that are filed before it in circumstances where it is bereft of jurisdiction to entertain such suits. Would there be jurisdiction to transfer the suits from the High Court to the court that would otherwise have jurisdiction? The appellant argues that the appeals were filed before the wrong forum by mistake of its advocate, and that they ought not be penalised for no wrongdoing on their part. They aver that that mistake can be remedied on the basis of the inherent powers of the court, the oxygen rule and the constitutional injunction against overreliance on technicalities of procedure. The respondent, on his part, argues that a suit filed before the wrong forum, which lacks jurisdiction, would be incompetent, and there is no legal basis for transferring an incompetent suit. Both sides have cited case law to support their respective positions. The decisions cited by both sides are fairly recent decisions.

12. From the decisions in *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR (**Karanja,**

Gatembu & Sichale JJA) and *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR (**Makhandia, Ouko & M'Inoti JJA),** the Court of Appeal appears to take the position that the mere filing of a suit before a court without jurisdiction makes the suit itself incompetent, for want of jurisdiction of the tribunal before whom it is filed. Being incompetent renders the suit useless or dead, for the court cannot possibly proceed to dispose of it. Since it would be a dead suit, there would be no legal foundation for its transfer to another court, where it would then acquire a life. The approach would be to ask the parties to withdraw the incompetent suit filed before the court without jurisdiction, so that the parties can consider filing a competent suit before the court with jurisdiction. The alternative is the dismissal or striking out of the incompetent suit. There are two arguments inherent in this approach, that the suit is incompetent, what purpose would it serve to transfer an incompetent suit. Secondly, the court lacks jurisdiction over the dispute, so where does it get the jurisdiction to order transfer of the suit in respect of which it has no jurisdiction to another court.

13. Transfer of suits under section 18 of the Civil Procedure Act is not an administrative function, but a judicial one, once a suit before the wrong court is placed before the Judge for a determination on whether to transfer it or not, the court would then be exercising a judicial discretion. The Judge, in that case, would not be acting administratively. The court would act administratively in a case where it originally had jurisdiction over the matters in dispute, then the law changes, taking away the jurisdiction, and conferring it on another court. In such a case, the suit would not be incompetent, for when it was filed, there was jurisdiction, and, therefore, competence. Jurisdiction and competence would then be lost because of changes in the law, and upon such changes, the court can then administratively order that the matter be transferred to the court competent to handle the matter. However, suits that are filed after the law has changed, in the wrong court, would not be treated in the same way. They would be incompetent *ab initio*, for having been filed at the wrong forum.

14. Both sides have cited decisions of the Court of Appeal on transfer of suits that are otherwise incompetent for having been filed before courts without jurisdiction. The appellant argues that the cases he has cited represent the current trend in jurisprudence. I beg to differ, with respect. The decision in *Kenya Medical Research Institute vs. Davy Kiprotich Koech* [2018] eKLR (Waki, Warsame and Murgor JJA) was made in 2018, while that in *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (**Karanja, Gatembu & Sichale JJA**) came thereafter, in 2019. It cannot, therefore, be said that the cases that the appellant has cited reflect the current jurisprudence on the subject, while the cases relied on by the respondent represent the old approach. I have not seen any shift in jurisprudence, or any jurisprudential development. What emerges is that the Court of Appeal is divided on the subject, and, therefore, the High Court finds itself having to choose between the different approaches adopted by the Court of Appeal. It cannot be asserted, one way or the other, that this or that is the correct position in law, in view of the conflicting positions taken by the Court of Appeal. The appellant accuses this court of acting contrary to judicial precedent, ostensibly by not following *Kenya Medical Research Institute vs. Davy Kiprotich Koech* [2018] eKLR (Waki, Warsame & Murgor JJA), yet, in *West Kenya Sugar Co. Ltd vs. Enos Ambani Tangle* [2020] eKLR (Musyoka J), I was guided by *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (**Karanja, Gatembu & Sichale JJA**) and *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR (**Makhandia, Ouko & M'Inoti JJA),** both of which are Court of Appeal decisions, where *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (**Karanja, Gatembu & Sichale JJA**) is more recent than *Kenya Medical Research Institute vs. Davy Kiprotich Koech* [2018] eKLR (Waki, Warsame and Murgor JJA).

15. I am not of the persuasion that the positon that I adopted in *West Kenya Sugar Co. Ltd vs. Enos Ambani Tangle* [2020] eKLR (Musyoka J) was wrong, and did not reflect the current law on the subject. The Court of Appeal, in the two decisions cited above, very authoritatively pronounced that a suit filed at the wrong court is incompetent, and a nullity, and the High Court should not, in exercise of a jurisdiction it does not have, purport to transfer such a suit to another court. That is the position that commends itself to me, I am not persuaded to adopt the approach represented in the decision in *Kenya Medical Research Institute vs. Davy Kiprotich Koech* [2018] eKLR (Waki, Warsame & Murgor JJA).

16. There was the argument that I had previously, before my decision in *West Kenya Sugar Co. Ltd vs. Enos Ambani Tangle* [2020] eKLR (Musyoka J), ordered, or, even administratively, transferred similar appeals to the Environment and Labour Relations Court. As a collorary, it is submitted that I am practicing double standards. The practice that I had adopted prior to *West Kenya Sugar Co. Ltd vs. Enos Ambani Tangle* [2020] eKLR (Musyoka J) changed after my attention was drawn to *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* [2019] eKLR (**Karanja, Gatembu & Sichale JJA**), which is the most recent decision of the Court of Appeal, that I am aware of, on the subject. I was bound by it. My subsequent decisions were informed by it. It changed my approach to the matters. There are, consequently, no double standards.

17. In the end, and in view of what I have stated above, it is my conclusion that the appeals herein, filed at the High Court, instead of the Employment and Labour Relations Court, are incompetent. They cannot be transferred, and, as a consequence, I hereby strike them out. Any party aggrieved by the orders that I have made here above, has 28 days to move the Court of Appeal appropriately.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 6TH DAY OF AUGUST, 2021

W. MUSYOKA

JUDGE