



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. CIVIL APPLICATION NO. E059 OF 2021

CHANDARIA INDUSTRIES LIMITED.....APPLICANT

-VERSUS-

JOHN KIMAGUTI MASISA.....RESPONDENT

RULING

1. At the onset, the respondent herein filed a suit against the applicant before the subordinate court by way of the plaint dated 23rd March, 2016 and sought for various reliefs including general and special damages for injuries sustained while in the course of his employment with the applicant. The record shows that the suit was defended.

2. It is also apparent from the record that upon hearing the parties, the trial court in the judgment delivered on 4th December, 2020 in favour of the respondent and against the applicant.

3. Subsequently, the applicant moved this court by way of the notice of motion dated 12th February, 2021 and sought for leave to file an appeal against the aforesaid judgment out of time and for a stay of execution of the judgment pending the hearing and determination of the intended appeal.

4. Before the notice of motion could be heard, the respondent brought the notice of preliminary objection dated 27th July, 2021 to challenge the intended appeal as well as the notice of motion dated 12th February, 2021, premised on the following grounds:

a. THAT the High Court lacks the requisite jurisdiction to hear and determine an appeal or an application for leave to file an appeal relating to employment and labour relations.

b. THAT Section 12(1) of the Employment and Labour Relations Act No. 20 of 2011 grants the Employment and Labour Relations Court exclusive and appellate jurisdiction to hear and determine all disputes relating to it in accordance with Article 162(2) of the Constitution and the provisions of the Employment Act No. 20 of 2011 or any other written law which extends jurisdiction to the Court relating to employment and labour relations including inter alia, disputes relating to or arising out of employment between an employer and an employee.

c. THAT the notice of motion dated 12th February, 2021 is a nullity ab initio and an abuse of due process of the law and of this Honourable Court.

5. The parties dispensed with the preliminary objection through filing and exchanging written submissions. In his submissions dated 1st September, 2021 the respondent contends that the High Court has no jurisdiction to entertain the notice of motion dated 12th February, 2021 and the intended appeal by dint of **Section 12** of the **Employment and Labour Relations Act (“the Act”)** which stipulates that:

“(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) disputes between an employer and a trade union;

- (c) disputes between an employers' organisation and a trade unions organisation;
- (d) disputes between trade unions;
- (e) disputes between employer organizations;
- (f) disputes between an employers' organisation and a trade union;
- (g) disputes between a trade union and a member thereof;
- (h) disputes between an employer's organisation 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.”

6. The applicant on its part urges this court to be guided by the provisions of **Article 159 (2) (d) of the Constitution of Kenya, 2010** which prescribe for the administration of justice without undue regard to procedural technicalities.

7. The applicant further submits that should this court find that it lacks jurisdiction to entertain the intended appeal and the aforesaid notice of motion, then it would be proper to have the file transferred to the court with competent jurisdiction rather than to dismiss/strike out the notice of motion. This submission is backed *inter alia*, by the case of **Magot Freight Services Limited & another v Samson Mwakenda Mangale [2021] eKLR** where the file which was originally placed before the High Court was eventually transferred to the Employment and Labour Relations Court for want of jurisdiction.

8. I have considered the grounds laid out in the notice of preliminary objection; and the rival submissions and authorities cited in that respect.

9. It is clear that the preliminary objection is fundamentally challenging the jurisdiction of this court to entertain the notice of motion dated 12th February, 2021 and consequently, the intended appeal.

10. Reference is made to the notorious case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** and reaffirmed in the case of **Performance Products Ltd & another v Hassan Wario Arero & 7 others [2018] eKLR** where the respective courts elaborated on the definition and purpose behind preliminary objections in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

11. The argument by the respondent is essentially that since the claim in question is in the nature of a work injury, the court competent to handle the notice of motion dated 12th February, 2021 and the intended appeal is the Employment and Labour Relations Court (“the Court”) and not the High Court.

12. I have already cited hereinabove the provisions of **Section 12 of the Employment and Labour Relations Court Act** which set out the jurisdiction of the Court.

13. I now turn to **Article 165(3)(a) of the Constitution, 2010** which provides thus:

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

a. unlimited original jurisdiction in criminal and civil matters”

Clause (5) above stipulates that:

“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).”

14. **Article 162 (2)** (supra) further provides that:

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

a. employment and labour relations

...”

15. The perusal of the material placed before the trial court, show that the respondent and the applicant enjoyed an employer-employee relationship at all material times. It is also apparent that the case relates to a work injury claim.

16. By virtue of the above-cited provisions, it is clear that the High Court does not have jurisdiction over work injury and related claims and hence the court with the requisite jurisdiction to entertain such claims or appeals against claims of such nature is the Employment and Labour Relations Court.

17. In the case of **West Kenya Sugar Co. Limited v Matayo Ingoshe & others [2021] eKLR** the court arrived at a similar rendition when faced with the question as to whether the High Court has jurisdiction to handle work injury related claims.

18. Similarly, in the case of **Perfect Scan Limited v Harrison Kahindi Said [2021] eKLR** formerly known as **High Court Civil Appeal No.160 of 2016 at Mombasa**, the High Court stated that work injury claims fall within the purview of the Employment and Labour Relations Court, and consequently declined to hear the appeal.

19. Having arrived at the above determination on the issue of jurisdiction, I am now called upon to determine whether in the circumstances, it would be proper for me to make an order for transfer of the file to the proper court.

20. On this subject, I note that the Court of Appeal has taken two (2) conflicting positions. On the one hand, in the case of **Phoenix of EA Assurance Company Limited v SM Thiga t/a Newspaper Service [2019] eKLR** and the case of **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel [2016] eKLR** the Court of Appeal held that a court lacking jurisdiction has no powers to transfer a file to another court. On the other hand, the Court of Appeal in the case of **Kenya Medical Research Institute v Davy Kiprotich Koech [2018] eKLR** determined that the High Court can transfer a matter to the Employment and Labour Relations Court for hearing and determination.

21. Drawing from the above decisions, the High Court has equally taken varying approaches to the subject. In the case of **West Kenya Sugar Co. Limited v Matayo Ingoshe & others** (supra) the High Court took the position that it cannot transfer a matter for lack of jurisdiction, whereas in the case of **Perfect Scan Limited v Harrison Kahindi Said** (supra) the court exercised its discretion by transferring the matter to the Employment and Labour Relations Court.

22. I am more persuaded by the legal position that lack of jurisdiction does not interfere with the judicial discretion of a court to transfer a matter to the competent court, by dint of the **Article 159(2)(d)** (supra) that justice should be served substantively and without undue regard to procedural technicalities. To order the transfer of the file to the competent court will aid in facilitating the expedient disposal of the matter, as opposed to striking it out for want of jurisdiction. Furthermore, there is nothing to indicate that any of the parties will be prejudiced in the process.

23. In the case of **Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) [2020] eKLR** the court ordered for the transfer of the file to the Employment and Labour Relations Court in the interest of substantive justice.

24. Consequently, the respondent’s notice of preliminary objection dated 27th July, 2021 succeeds in terms of prayers (a) and (b). Consequently, I hereby make the following orders:

- a. This court lacks jurisdiction to hear and determine the notice of motion dated 12th February, 2021 and the intended appeal.**
- b. The file is hereby withdrawn from the High Court and transferred to the Employment and Labour Relations Court for disposal of the matter.**
- c. Each party to bear their own costs.**

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 22ND DAY OF OCTOBER, 2021

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

..... for the Respondent