



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

Coram: D. K. Kemei – J

CIVIL APPEAL CASE NO. 77 OF 2017

BAMBURI CEMENT LIMITED.....APPELLANT

VERSUS

MUNYAO KIKUNGU.....1ST RESPONDENT

NAIROBI KEEN KLEENERS LTD.....2ND RESPONDENT

(Being an appeal from the judgement of Honourable (Ms) Kisiangani (Resident Magistrate) delivered on 10th May, 2017 in the Chief Magistrate's Court at Machakos in CMCC No.1138 of 2011) Munyao Kikungu –Vs- Nairobi keen Kleeners Limited & Anor)

RULING ON DIRECTIONS

1. The appeal herein arises from the judgement of Hon. Kisiangani – Resident Magistrate in **Machakos CMCC No. 1138 of 2011** delivered on the 10/05/2017 wherein general damages of Kshs. 100,000/= plus special damages of Kshs. 20,000/= were awarded to the 1st Respondent with liability being shared between the Appellant and 2nd Respondent at 50% to 50%.

2. The Appellant was aggrieved by the said judgment and it filed a Memorandum of Appeal dated 30/05/2017 where it raised six grounds of Appeal in which it raised the following grounds of appeal namely:

(a) That the learned Magistrate erred in law and fact by finding that the Appellant is liable and apportioned liability at 50-50 between the appellant and 2nd respondent when this finding was not supported by the weight of the evidence before the court.

(b) That the learned magistrate erred in law and fact in finding the appellant vicariously liable to the respondent notwithstanding that the claim would be time barred by virtue of Section 4 subsection 2 of the Limitation Act, in a claim for breach of contract of employment.

(c) That the learned magistrate erred in law and fact in finding that the respondent was an employee of the appellant.

(d) That the learned trial magistrate erred in law and in fact in apportioning the liability between the appellant and 2nd respondent despite the clear terms of the contract between the appellant and 2nd respondent which stated that the 2nd respondent would fully indemnify the appellant.

(e) That the learned trial magistrate award of Kshs. 100,000/= to the 1st respondent by way of general damages is excessive, harsh and unjustified given the nature of the injury suffered by the 1st Respondent.

(f) That the learned magistrate erred in law and fact by failing to consider adequately or at all the issues raised in the 2nd appellant's submissions dated 11th April, 2017.

3. A perusal of the pleadings in the trial court reveals that the dispute relates to a work injury claim under the Work Injury Benefits Act 2007. The issue for determination therefore is whether this court has jurisdiction to handle the matter.

4. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine it, then the suit would be deemed a nullity as per the decision of Nyarangi J A in the case of **Owners of Motor Vessel 'Lilian 's' –vs- Caltex Oil (K) limited [1989] eKLR** as follows:

“Jurisdiction is everything without which a court of law has no power to make one more step. Where a court of law 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 the moment it holds the opinion it is without jurisdiction.”

5. In selecting a court with power to handle the type of litigation regard must be made to the enabling law which empowers such court to hear such a case. This matter relates to a work injury where the Respondent sustained injuries while in the course of employment with the Appellant. Hence the dispute is basically an employment and labour relations one which should be handled by the Employment and Labour Relations Court. Parliament enacted the Employment and Labour Relations Act No. 20 of 2011. Section 12(1) thereof provides for the jurisdiction of the court as follows:

12. Jurisdiction of the court:

(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 the Employment and Labour Relations including:-

(a) disputes relating to or arising out of employment between an employer and employee;

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

(c) disputes between an employer’s organization and a trade union’s organization;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employer’s 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 objection of trade union officials;

(j) disputes relating to the registration and enforcement of collective agreement.

6. The Employment Act No. 11 of 2007 vide Section 87 thereof had provided that disputes between employer and employee were to be determined by the Industrial Court which is the precursor to the present Employment and Labour Relations Court. As the relationship between the Appellant and Respondent is one of employer and employee and owing to the coming into operation of the Work Injury Benefits Act 2007 as well as the establishment of the Employment and Labour Relations Court, it follows that the disputes herein ought to be tried before the said court. Even though the suit might have been pending before the Magistrates court or that it had been finalized there the next forum to determine the appeal should be the Employment and Labour Relations Court. Hence the appeal ought not to have been lodged here in the first place since this court lacks jurisdiction.

7. Having established that this court lacks jurisdiction, the next issue for determination is whether the appeal should be struck out or dismissed for lack of jurisdiction by this court. Striking out or dismissing the appeal obviously is a drastic measure as it has the effect of disorienting the parties herein. I find the best option is to have the matter transferred to the Employment and Labour Relations Court for determination. There will be no prejudice suffered by the parties if such direction is made as both have legitimate expectations to have their dispute determined on merit.

8. In the result, I order that this matter be and is hereby transferred to the Employment and Labour Relations Court (ELRC) for determination.

It is so ordered.

Dated and delivered at Machakos this 28th day of July, 2020.

D. K. Kemei

Judge