



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 96 OF 2017

MINI BAKERIES (NRB) LIMITEDAPPELLANT

VERSUS

LEVI KARIZ ORIEDORESPONDENT

JUDGMENT

1. The Constitution of Kenya, promulgated in 2010, 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.

2. For avoidance of doubt, Article 162(2) states as follows: –

‘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. On the other hand, Article 165(5) of the Constitution states as follows: -

‘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).’

4. In obedience to Article 162(2) of the Constitution, Parliament did, through the Employment and Labour Relations Court Act, No. 20 of 2011, establish such a court, known as the Employment and Labour Relations Court. The jurisdiction of the Employment and Labour Relations 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.

5. For avoidance of doubt the provisions of 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) ...”

6. In the plaint filed at the trial court, in Kakamega CMCCC No. 479 of 2015, it is averred that the parties herein were in an employee-employer relationship, and the cause of action accrued within the context of the said relationship, that is to say, in the course of the said employment. It was further alleged that the incident or accident, the subject of the dispute, was occasioned by the employer the applicant, assigning the employee, the respondent duties without due care and attention, failing to take any precautions for the safety of the respondent while he was engaged on the said work, failing to provide a safe place of work, failing to provide necessary tools, among others. On 21st April 2017, the parties entered into a consent on liability at 80:20, whose effect was that the appellant herein conceded that the respondent was its employee. The appeal before me does not challenge the fact of the employment relationship, but turns on assessment of damages.

7. The dispute herein is squarely located within employment and labour relations. The High Court no longer has jurisdiction over matters revolving around employment and labour relations.

8. What should I do with this appeal, now that I have no jurisdiction to determine it? As the appeal was filed 2017, long after the High Court had lost jurisdiction over such matters, seeing that the new Constitution became effective in 2010 and the Employment and Labour Relations Court Act came into force in 2011, it follows that I do not have the jurisdiction to hear it or to order its transfer to the court with jurisdiction. A suit or appeal filed before a court which has no jurisdiction is incompetent, and is not available for transfer to the court with jurisdiction. The fate that such suit or appeal should suffer is that of being struck out.

9. I am fortified, in stating the above, by several decisions of the Court of Appeal on the subject. The Court of Appeal, in *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR, held that jurisdiction is at the heart of any proceeding and a court should be sensitive to that before disposing of it, for without jurisdiction, nothing moves. The exact words of the court were:

“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.”

10. In a more recent decision, *Phoenix of EA Assurance Company Limited vs. SM Thiga t/a Newspaper Service* (2019) eKLR, the Court of Appeal said:

“... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first placed. If the suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. without jurisdiction, the Court cannot confer jurisdiction upon itself ...”

11. With regard to exercise of power to transfer suits or appeals, filed before a court without jurisdiction, the Court of Appeal stated, in *Equity Bank Limited vs. Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, as follows:

“In numerous decided cases, courts, including this Court, have held that it would be illegal for the High Court in exercise of its

powers under S. 18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court having jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign. It is settled law that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same.”

12. In view of what I have stated above, at paragraph 8, and the decisions that I have cited above, there can be no doubt that the appeal herein, filed at the High Court, instead of the Employment and Labour Relations Court, is incompetent. Since it is incompetent, it cannot be transferred, and, as a consequence, I hereby struck it out. The respondent shall have the costs of the appeal.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18th DAY OF December 2020

W. MUSYOKA

JUDGE