



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL APPEAL NO. 82 OF 2016

ATHI RIVER STEEL PLANT CO LTD.....APPELLANT/RESPONDENT

VERSUS

KELVIN KATA KITUNG.....RESPONDENT APPLICANT

RULING

1. The Applicant herein filed the Application by way of Notice of Motion dated 3rd April 2017 and filed in court on 5th April 2017. The application is made under **Orders 2 Rule 15, 51 Rule 1 and 42 Rule 35** of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act, Laws of Kenya. The Application seeks the following Orders:

- a. *That the memorandum of appeal dated 12th August, 2016 be struck out and the appeal be dismissed for want of prosecution*
- b. *That the honorable court review the orders of the lower court dated 16th November, 2016 granting stay to the appellant/Respondent.*

2. The Application is based on the following grounds:-

- (a) *That the appellant has never set down the appeal for hearing since filing the memorandum of appeal*
- (b) *The appellant has failed to take any steps towards the prosecution of the appeal for over 8 months.*
- (c) *The entire appeal is incurably defective, incompetent and an abuse of the court process.*

3. The application is supported by an affidavit deposed by the applicant.

4. The Appellant/Respondent opposed the application vide grounds of opposition wherein the learned counsel found the application to be misconceived because the appeal has not yet been admitted or listed down for directions and no record of proceedings has ever been supplied to the appellant and hence the application is premature and should be rejected with costs.

5. The Application was canvassed by way of written submissions.

6. In submissions filed on behalf of the Respondent/Applicant Messrs. R. O. A Otieno and Company Advocates, it is submitted that it is the duty of the appellant to fix the appeal for directions. Reliance was placed on the case of **Bruce Mutie Mutuku T/a Diani Tours & Travel Centre v Equity Bank Limited (2014) eKLR**.

7. In submissions filed on behalf of the Appellant/Respondent by Messrs Manthi Masika & Company Advocates, it is submitted that before the appeal is dismissed, directions ought to have been issued under Order 42 Rule 13 of the Civil Procedure Rules and that 3 months ought to have lapsed since the issuance of directions. Reliance was placed on Section 79B of the Civil Procedure Act as well as the case of **Kirinyaga General Machinery v Hezekiel Mureithi Ileri HCCC 98/08**.

8. It is not in dispute that the appeal herein was filed on 12th August, 2016 and there is no record of appeal. Order 42 Rule 35 (2) of the Civil Procedure Rules, 2010 provides that

“..If within one year after the service of the memorandum of appeal, the Appeal shall not have been set down for hearing, the Registrar shall on notice on the parties list the Appeal before a Judge in chambers for dismissal.”

9. There is no other action taken by the appellant and the response does not give any explanation for the failure to do so. A person interested in his/her case cannot go to slumber for more than two years without making an inquiry about the position of the file. This case has been in court for more than 12 years, the plaint having been filed in 2006. The appeal has also been pending in court for more than 2 years having been filed in 2016. There is no indication that the appellant has any interest in the appeal as it is counsel and not the appellant, who replied to the application. In **Elem Investment Limited v John Mokora Otuoma (2015) eKLR** the court declined to grant an order for dismissal because the respondent satisfactorily explained to the court the reasons for the delay in prosecuting the appeal and in the instant case there is no such application. The Appellant's counsel has merely submitted that proceedings have not been supplied by the lower court to enable the filing of the record of appeal. This is only through grounds of opposition. There is no evidence that proceedings were applied for and that there was delay in availing them by the court. It is clear that the appellant has never bothered to pursue the appeal.

10. I find no reason why the appeal should continue to lie in the shelves of the court any longer. However a perusal of the lower court record reveals that the matter relates to a work injury claim. There have been considerable developments with regard to the law that governs such disputes. This then calls for this court to side step the Respondent/Applicant's application dated 3rd April 2017 and proceed to the heart of the matter namely whether this court has jurisdiction to entertain the appeal in the first place.

11. The guiding principles to all courts is that where a suit is filed in a court that lacks jurisdiction to hear and determine the suit, then the suit would be deemed a nullity as per the decision of Nyarangi JA in the case of **Owners of Motor vessel "Lillian S" V Caltex Oil (K) Ltd (1989) Klr 1** that:

"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 that it is without jurisdiction."

12. In the case of **Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR**, the operation of Section 16 of the Work Injury Benefits Act that barred actions for recovery of damages for occupational accident was stayed. The court ordered and or issued *inter alia* a declaration that Sections 10, 16, 23, 26 and 53 (2) (d) and 2 (e) and the entire part IV and V are ultra vires the Constitution of Kenya 2010 and are null and void to the extent that they place judicial authority in an entity that is not part of the judiciary as well as a declaration that the provisions of the Employment and Labour Relations Act No. 20 of 2011 Section 12(a), 22, 29 and 35 and the Magistrate's Court Act Section 9(b) by dint of Article 261 (1) of the Constitution of Kenya 2010 and Section 7 of Schedule 6 of the Constitution of Kenya, override all provisions in the Work Injury Benefits Act No. 13 of 2007 that are in conflict with them..

13. The Employment & Labour Relations Court Act No. 20 of 2011 provides as here below under Section 12 (1):

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 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' organization and a trade union's organization;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' 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 election of trade union officials; and

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

14. The Employment Act No. 11 of 2007 at Section 87 provides as follows: -

87. Complaint and jurisdiction in cases of dispute between employers and employees

(1) Subject to the provisions of this Act whenever –

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill-treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

(2) No court other than the Industrial court shall determine any complaint or suit referred to in subsection (1).

(3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.

15. In effect the **Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR** case issued declarations that clarified conflicting positions because Section 16 was declared unconstitutional and on the other hand disputes relating to or arising from the employment relationship between an employee and an employer are to be heard by the ELRC. In the case of **Saidi Mohammed v Diamond Industries Ltd (2018) eKLR** the court observed that the Employment and Labour Relations Court has appellate jurisdiction in disputes relating to work injury. The consequence thereof is that appeals in relation to work injuries are handled by the Employment and Labour Relations Court and it is patently clear from the interpretations of this case that I find that this court had no jurisdiction to entertain the appeal in the first place.

16. With regard to the legal effect of the finding in the case of **Saidi Mohammed v Diamond Industries Ltd (2018) eKLR** and **Juma Nyamawi Ndungo & 5 others v Attorney General; Mombasa Law Society (Interested Party) [2019] eKLR** I am guided by the case of **A v. The Governor of Arbour Hill Prison [2006] IESC 45, [2006] 4 IR 88**, (at paragraph 36) where Murray CJ, stated as follows:

“Judicial decisions which set a precedent in law do have retrospective effect. First of all the case which decides the point applies it retrospectively in the case being decided because obviously the wrong being remedied occurred before the case was brought. A decision in principle applies retrospectively to all persons who, prior to the decision, suffered the same or similar wrong, whether as a result of the application of an invalid statute or otherwise, provided of course they are entitled to bring proceedings seeking the remedy in accordance with the ordinary rules of law such as a statute of limitations. It will also apply to cases pending before the courts. That is to say that a judicial decision may be relied upon in matters or cases not yet finally determined. But the retrospective effect of a judicial decision is excluded from cases already finally determined. This is the common law position”.

17. Similarly in In the South African case of **Sias Moise v. Transitional Local Council of Greater Germiston, Case CCT 54/00, Justice Krieger (for the majority) held:**

“If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution.”

“Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date.”

18. Further, In India, Mahajan J, in **Keshavan Madhava Menon v. The State of Bombay [1951] INSC** held that:

“If a statute is void from its very birth then anything done under it, whether closed, completed, or inchoate, will be wholly illegal and relief in one shape or another has to be given to the person affected by such an unconstitutional law.”

19. In light of the foregoing authorities, I safely conclude and hereby find that it is not the function of this court to entertain any appeal in disputes relating to work injury. The employment and labour relations court does have appellate jurisdiction.

20. In the result the appeal herein is dismissed for lack of jurisdiction.

It is so ordered.

Dated and delivered at Machakos this 21st day of November, 2019.

D. K. Kemei

Judge