



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISCELLANEOUS CIVIL APPLICATION 278 of 2017**

**MASS INVESTMENTS LIMITED.....APPLICANT**

**-VERSUS-**

**STEPHEN MASILA KYALO.....RESPONDENT**

**RULING**

1. The Application by way of Notice of Motion dated 2<sup>nd</sup> November, 2017 and brought under Certificate of Urgency is founded in Sections 1A, 3, 3A and 79G of the Civil Procedure Act (Cap21) and Order 43 rule 6 of the Civil Procedure Rules it asks the Court for:

**a. Spent**

**b. Spent**

**c. an order of stay of execution of the judgment of the court delivered on 12<sup>th</sup> July 2017 in Mombasa Chief Magistrate's Civil Suit 2300 of 2014 STEPHEN MASILA KYALO –VERSUS- MASS INVESTMENT LIMITED together with all the consequential orders pending the hearing and determination of this Application.**

**d. Costs.**

2. The application is premised on the grounds that are premised on the face of it and the supporting affidavit of GODFREY MUTUBIA and FAHAD HAJI MANSUR both sworn on 2<sup>nd</sup> November 2017 as follows:

**a. that the primary suit was heard and judgment entered against the applicant for the sum of Kshs561,400.00 on 12<sup>th</sup> July, 2017.**

**b. that the judgment was collected but never brought to his attention until 23<sup>rd</sup> October, 2017 while carrying out a routine review of files and the applicant learn that the judgment had been delivered against the applicant.**

**c. counsel promptly informed the applicant who then informed him to file an appeal against the decision.**

**d. that unfortunately by then, the time for filing the intended appeal had lapsed.**

**e. that the delay was not deliberate but an oversight on the part of the Respondent and no prejudice will be occasioned to the respondent.**

**f. that the applicant is willing to abide by any condition that may attach to the grant of leave to file the intended appeal out of time.**

3. In response, the Respondent filed a statement of grounds of opposition dated 13<sup>th</sup> November, 2017 opposing the application in its entirety together with a list of authorities. According to the Respondent, the application ought not to be allowed on the grounds that;

**a. the Honourable Court lacked jurisdiction to entertain the current application.**

**b. the application is bad in law, incompetent and fatally defective.**

**c. there has been inordinate delay in filing the application by the applicant.**

Parties agreed to dispose of the application by way of written submissions on 16<sup>th</sup> November, 2017 and their filing was confirmed on 16<sup>th</sup> October, 2018.

**ANALYSIS AND DETERMINATION**

4. Taking into consideration the pleadings and rival submissions filed by the respective parties, I find that of all the issues raised for determination, the main one is whether this Honourable Court has jurisdiction to entertain this instant application.

5. The Respondent, in his statement of grounds of opposition and written submissions raised the issue of jurisdiction, which I believe the court should endeavour and establish whether it has jurisdiction to delve into the merits of the dispute as between the parties before anything else. This is because jurisdiction is everything and without it, the court must down its tools, so that if it finds it lacks jurisdiction in this case, then it will not analyze the other issues other than jurisdiction flowing from the submissions of both parties.

6. The Supreme Court in **SAMUEL KAMAU MACHARIA V. KCB AND OTHERS [2012] eKLR** stated:

*“A Court’s jurisdiction flows from either the Constitution or Legislation or both. Thus a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...the Court must operate within the constitutional limits. It cannot expand jurisdiction through judicial craft or innovation.”*

In the case of **OWNERS OF THE MOTOR VESSEL LILLIAN “S” V CALTEX OIL (KENYA) LTD 1989 KLR 1 at page 14**, the court of Appeal stated thus:

*“Without jurisdiction 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.”*

7. The Applicant submitted that this court has original and unlimited jurisdiction to hear civil matters and argued that in the trial court they relied on common law and as a result this instant appeal falls squarely under the High Court’s Jurisdiction. He also submitted that in the event this court finds it lacks Jurisdiction to entertain the instant Application, then in the interest of justice, it should exercise its discretion by transferring the same to the Employment and Labour Relations Court for hearing and determination.

8. The Respondent on the other hand submitted that **MOMBASA SRMCC NO. 2300 OF 2014**, the subject matter of this application and the intended appeal, is based on work place injuries arising from a contract of employment. He goes on to state that the Constitution of Kenya establishes the Employment and Labour Relations Court and clothed it with jurisdiction. He also submitted that an employment dispute may be defined as a controversy between an employer and employee relating to each other’s rights and obligation arising out of contract of employment between them which includes the condition of employment between them which includes the conditions at the work place. Citing Honourable Justice Mabeya’s conclusion, the Respondent submitted that the proper forum to deal with matters where negligence is pleaded in the lower court as arising out of an employer-employee relationship in the Employment and Labour Relations Court. This then becomes the pertinent issue for determination and to do this, it is important to restate the laws on this.

9. Article 165 (2) of the constitution provides that;

*“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to employment and labour relations.”*

Article 165(5) then states;

*“The High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).”*

Pursuant to Article 165(2), the Employment and Labour Relations Court Act was enacted;

*“to establish the Industrial Court as a superior court of record; to confer jurisdiction on the Court with respect to employment and Labour Relations and for connected purposes.”(See the provisions of Section 4 of the said Act.)*

Section 12 of the Employment and Labour Relations Court Act defines the jurisdiction of the court. The 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, and the provisions of this Act, or any other written law which extends jurisdiction to the Court relating to Employment and Labour Relations.”*

10. The intention of the Employment Act with regard to Labour disputes is better understood by a reading through Section 87(1) of the same:-

1. "subject to the provisions of the 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."

And for avoidance of doubt, Section 87(2) categorically states:

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

11. Having set done the law on the issue of the court's jurisdiction with regard to matters Employment and Labour disputes, I have read through the judgement of the lower court annexed to the application by the Applicant, and from the facts set out herein, it is not a dispute that the Respondent filed a suit against the Applicant claiming general and special damages for injuries he sustained in the course of his employment with the Applicant. It was established that there existed an employer-employee relationship between the Applicant and Respondent. This relationship was proved by a commendation letter dated 29<sup>th</sup> August, 2014 from the Applicant to the Respondent. The Applicant did not tender evidence to rebut this inference. At the conclusion of the trial, the learned magistrate awarded the Respondent general damages in the sum of Kshs800,000/= and special damages of Kshs2,000/=.

12. From the foregoing, it is crystal clear that the court with the jurisdiction to entertain a work injury related claim or appeal, is none other than the Employment and Labour Relations Court, Article 165(5) of the Constitution having ousted the High Court's Jurisdiction over the same.

13. The applicant submitted that in the event this Honourable Court finds that indeed it lacks Jurisdiction to entertain the current application and so, in the interest of justice and the overriding objectives, the application should be transferred to the Employment and Labour Relations Court for hearing and determination. In the case of **DANIEL MUGENDI –VERSUS- KENYATTA UNIVERSITY**, it was held that;

*" And in order to do justice in the event where the High Court, the industrial court or the Environment and Land court come across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts, with equal/similar status should in the spirit of harmonization, effect the necessary transfers among themselves."*

**Justice P.J. Otieno** in **ABDULMAJID MOHAMED ADAM V NIMISH SHAH T/A FLORA PRINTERS [2017] eKLR** while transferring a suit to the proper forum stated

*"...However, what does the expression "down tools" mean "To me the learned Judge, R.O. Kwach, to be precise, meant and can only be taken to have meant that once jurisdiction is established to be lacking, the court cannot purport to deal with the matter further. It cannot not be taken to mean that I just down my tools, the pen, and fold the file ad infinitum. That could result in a large numbers of files that are just folded, never to be touched because the court has downed its tools... Being bound and guided by those very wise and well-founded words of the court of Appeal, I chose prudence over imprudence and order that, the appeal be and is hereby transferred to the Environment and Land court, Mombasa for hearing and determination."*

And Judge Ngugi in **DEVKI STEEL MILLS LIMITED V JOHN MBUVI MACKENZIE [2016] eKLR NGUGI J** held that:

*"Since I have concluded that this is not the proper forum, I need not go into analysis of the other questions raised by the Application dated 27/06/2016. I will, instead, simply strike out the whole application with costs. The Applicant may, of course, seek redress in the appropriate forum."*

Being guided and persuaded by the findings of the above cited cases, and more specifically the finding of **DANIEL MUGENDI -VS KENYATTA UNIVERSITY(supra)**, the Notice of Motion application dated 2<sup>nd</sup> November, 2017 is hereby transferred to the Employment and Labour Relations Court for hearing and determination.

Costs shall be in the cause.

**DATED, and DELIVERED at Mombasa this 30<sup>th</sup> day of November, 2018.**

**D. CHEPKWONY**

**JUDGE.**