



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 545 OF 2012**

**MAGNATE VENTURES LIMITED ..... APPELLANT**

**VERSUS**

**JOHN KIOKO KYUMBISYO ..... RESPONDENT**

**RULING**

While this appeal was pending determination the respondent herein filed a Notice of Preliminary objection to the effect that the appeal is incompetent as the High Court lacks jurisdiction over the subject matter on the basis of Article 165 (5) of the Constitution of Kenya.

This was after both counsel had filed submissions to address the appeal pending. As the issue of jurisdiction goes to the very substratum of any proceedings, the court decided to address that issue before any step is taken. Both learned counsel have filed submissions to address the issue of jurisdiction. The basis of the objection by the respondent is that Article 165 (5) of the Constitution expressly denies the High Court jurisdiction in respect of any matters reserved for the court established under Article 162 (2) (a) of the Constitution which deals with Employment and Labour Relations. It is submitted on behalf of the respondent that this is a dispute relating to Employment and Labour and the Act of Parliament establishing that court specifically provides for the dispute to be handled thereby under Section 12 (1) (a) and therefore this court has no jurisdiction.

The preliminary objection is opposed by the appellant on whose behalf it has been submitted that this court has jurisdiction to handle any tortious cause brought before it. Both learned counsel have filed submissions and cited some authorities which I have noted.

In the case of Owners of the **Motor Vessel “Lillian S” Versus Caltex Oil (Kenya) Limited (1989)** **KLR** 1 Nyarangi JA had this to say,

**“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.”**

The plaint herein was filed on 28<sup>th</sup> July, 2010. The respondent was said to have been injured in the cause of his employment with the defendant while working on a bill board when he fell from a height and sustained some injuries. This is set out in the plaint and in the end claimed damages for pain, suffering and loss of amenities, special damages and costs.

The defence of the Appellant was filed on 19<sup>th</sup> April, 2011. In that defence the jurisdiction of this court was denied. However, when the trial commenced at the Milimani Commercial court before the Chief Magistrate, the respondent submitted himself to the Jurisdiction of the court by giving evidence which led to the judgment in this appeal.

For purposes of record the plaint was filed before 27<sup>th</sup> August, 2010 when the Constitution was promulgated. The defence was filed after the promulgation of the Constitution. That notwithstanding, the employment and labour court was established by The Industrial Court Act, 2011 which was assented to on 27<sup>th</sup> August, 2011 and commenced on 30<sup>th</sup> October, 2011. The plaint and defence therefore were

both filed before the operation of the Employment and Labour Court which is now said to have jurisdiction over these proceedings.

Be that as it may, I have looked at Section 12 of the said Act which appears at part III thereof. Jurisdiction is limited to disputes between the employer and the employee. Nowhere in that section is the jurisdiction to hear any tortious cause is expressly excluded. Regrettably the word “dispute” is not defined but we shall be stretching the English language too far to include an action in tort as falling within that word.

There is sufficient authority pointing to the fact that where jurisdiction is an issue, this should be raised at the earliest opportunity so as to avoid waste of valuable judicial time – see **Republic Vs Chief Registrar of the Judiciary and 2 others Ex parte Relay Services Limited (2015) eKLR.** Further, under Order 42 Rule 13 (2) of the Civil Procedure Rules it is provided,

**“Any objection to the Jurisdiction of the appellate court shall be raised before the Judge before he gives directions under this rule.”**

The memorandum of appeal dated 19<sup>th</sup> October, 2012 does not raise the issue of jurisdiction. Directions herein were given on 19<sup>th</sup> June, 2015. Prior to that date the issue of Jurisdiction was not raised. The respondent’s submissions filed on 24<sup>th</sup> August, 2015 do not raise the issue of jurisdiction.

It is clear at this stage that this court has jurisdiction to hear and determine this appeal. The Preliminary objection is therefore dismissed. The costs shall be in the appeal.

***Dated, signed and delivered at Nairobi this 30<sup>th</sup> day of March, 2016.***

**A. MBOGHOLI MSAGHA**

**JUDGE**