



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NUMBER 541 OF 2009**

**DAVID NZIOKA NTHENGE. .... PLAINTIFF/RESPONDENT**

**VERSUS**

**DE LA RUE CURRENCY AND SECURITY PRINT LIMITED. . DEFENDANT/APPLICANT**

**RULING**

The court has been called up to rule on a Preliminary Objection dated 7<sup>th</sup> day of December, 2015. The objection has been raised by the Defendant though from the record it appears to have been drawn and filed by the Advocate for the Plaintiff which I presume must have been an error on the part of the advocate of the Defendant. The same is on a point of law as hereunder: -

1. That this Honourable court lacks jurisdiction to entertain this instant suit pursuant to inter alia Article 162 of the Constitution and Section 12 of the Industrial Court Act.

The Respondent in reply to the Preliminary Objection filed grounds of opposition on the 29<sup>th</sup> day of January, 2016 and has relied on the following grounds: -

1. That the Workmen Compensation Act (Repealed) provided that an employee had an option to institute proceedings in a Civil Court independently of the Act where the injury was caused by the negligence of the employer.
2. That the Employment and Labour Relations Court, created under Article 162 of the Constitution and Section 12 of the Act, only came into operation on 19<sup>th</sup> July, 2012 when the court was gazetted vide Gazette Notice No. 9797.
3. That the Employment and Labour Relations Court was not in existence at the time the cause of action arose and as such the Employment and Labour Relations act does not have any retrospective effect.
4. That the drafting, tenor and substance of the Complaint does not seek orders of reinstatement, damages or wrongful termination of employment or any matter concerning terms of employment that would necessitate the suit falling under the ambit of an employment matter or dispute.
5. That neither the Constitution nor the Employment and Labour Relations Court Act limit the High Court's jurisdiction in respect of work injury claims based on the torts of negligence and breach of duty of care.
6. That the Preliminary Objection does not intend to achieve justice for either the Defendant or the Plaintiff and seeks to only delay compensation to the Plaintiff, which has been pending for the last six years.
7. That the issues canvassed in the Complaint dated 12<sup>th</sup> October, 2009 are weighty and demonstrate that there is a justifiable dispute.
8. That the Preliminary Objection is an abuse of Court process and granting it would prejudice and

defeat the Plaintiff's legitimate interests and rights.

9. That the Preliminary Objection dated 7<sup>th</sup> December, 2015 is devoid of any merit and should be dismissed with costs.

Before I can consider the submissions by the respective parties it is necessary for this court to set out the brief facts of the matter.

The Plaintiff herein was filed on the 12<sup>th</sup> day of October, 2009 by the Plaintiff who pleads that, he was at all material times to the suit, an employee of the Defendant working as a general cleaner at the Defendants printing plant.

It is further pleaded that on the 12<sup>th</sup> October, 2009, while in the course of his duty, he was instructed by the Defendant Servants and/or agents to court papers on the Vaccumatic Counting Machine in the vault, when he injured his lower back while putting a lower ream onto a pallet for which injuries he was treated. As a result of the injuries, the Plaintiff requires continued care, pain management, physical therapy and hydrotherapy among other future medical care. He has blamed the defendant for negligence and breach of duty of care that it owed to him.

The Defendant filed its statement of defence which essentially denies the allegations levelled against it, in the plaint.

The application was canvassed by way of written submissions which the respective parties duly filed. In his submissions, the Applicant submitted that the court lacks jurisdiction to entertain this suit since the subject matter arises out of an employment relationship. It argued that the Respondent instituted this suit against the Applicant for injuries sustained while in employment of the Applicant and the Employment and Labour Relations Court has exclusive mandate under Article 162 of the Constitution to determine the questions arising out of employment and Article 165 (b) of the Constitution which provides that the High Court has no jurisdiction to entertain matters of Employment and Labour Relations Court.

The Applicant further avers that this position is also emphasized under Section 12 of the Employment and Labour Relations Court Act under Section 12 of the Employment and Labour Relations Court Act and Section 87 of the Employment Act. It asserted that the suit was filed in the year 2009 at which time High Court had the jurisdiction to hear and determine the matter. However, after the promulgation of the New Constitution the Employment and Labour Relations Court attained the same status as High Court and this should be guided by Section 22 of the 6<sup>th</sup> Schedule of the Constitution which provides for judicial proceedings before any court shall continue to be heard and determined by the same court or corresponding court. It argued that corresponding court here means the Employment and Labour Relations Court and since the hearing of this matter has not commenced then, the proper forum to determine this case is the Employment and Labour Relations Court.

On his part, the Respondent has relied on the provisions of Section 12(2) of the Employment and Labour Relations Act which provides: -

- a. 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 disputes relating to or arising out of employment between an employer and an employee.

He referred to Article 162 of the Constitution and the Workmen's Compensation Act which the Respondent relied on when he filed the suit. He averred that the Employment and Labour Relation's Court came into operation on the 19<sup>th</sup> July, 2012 when the court was gazette vide gazette Notice Number 9797 of 19<sup>th</sup> July, 2012.

The Respondent further averred that Section 22 of the 6<sup>th</sup> Schedule provides that all judicial proceedings

pending before a court shall continue to be heard by the same court or a corresponding court established under the Constitution. He added that Employment and Labour Relations Court has jurisdiction over matters arising out of employment between an employer and an employee but this matter is not centered on employment matters at all.

He stated that Section 2 of the Labour Relations Act (2007) defines employment matter as a matter concerning any terms or conditions of or affecting employment. He cited Article 165 (3) (a) of the Constitution of Kenya that gives the High Court unlimited jurisdiction in Civil matters. He concluded by submitting that the matter was filed six years ago when the Employment and Labour Relations Act was not in existence and the same does not have retrospective effect.

I have perused the court record and it reveals that the plaint in this matter was filed by the Respondent on the 12<sup>th</sup> October, 2009 wherein he has claimed damages for injuries suffered at the work place when he was instructed by the applicant to count papers on the Vaccumatic Counting Machine in the vault. It was while carrying out the said instructions that he is alleged to have injured his lower back while putting a lower ream into a pallet. The parties filed the necessary pleadings in the matter with the Applicant filing the last pleading being reply to defence on the 17<sup>th</sup> December, 2009. The matter is yet to be heard.

The Applicant is convinced that this court lacks jurisdiction to hear the matter while the Respondent feels that the Court has jurisdiction and that the matter should proceed before this court.

The Defendant has raised the Preliminary Objection herein. The essence of a Preliminary Objection was given by Law JA Old Sir Charles Newbold P, in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors (1969) E.A. 696 at page 700** where JA stated that: -

***“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a Preliminary Point may dispose off the suit. Examples are objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

Sir Charles Newsbold P added as follows page 701: -

***“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any facts are to be ascertained or if what is sought is the exercise of judicial discretion.”***

I have carefully considered the Preliminary Objection together with the submissions by the learned counsels. The jurisdiction of this court to hear the matter has been questioned and I am required to address it at the first instance before proceeding with the case any further. The Court of Appeal in the case of **Abok James Odera T/a A J Odera & Associates vs John Patrick Machira T/a Machira & Co. Advocates (2013) eKLR** while addressing the issue of jurisdiction referred to various cases and stated thus: -

***“... The case of Kimani Wanyoike Vs Electoral Commission Civil Appeal No. 213 of 1995 (UR) where the Court of Appeal ruled that: -***

***“Where there is a law prescribed or governing a procedure for the redress of any particular grievance, that procedure should be strictly followed”***

Similarly in the celebrated case of **Motor Vehicle M.V. “Lillian S” Vs Caltex Oil (Kenya) Limited (1989) KLR 1 at page 14 line 29-43** Nyarangi J.A. (as he then was) had this to say: -

***“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of***

***this authority are imposed by statute, charter or commission under which the court is constituted and may be extended or restricted by the like mean. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the action and matters of which the particular court has cognizance of or as to the areas over which the jurisdiction shall extend; or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal including an arbitrator depends on the existence of a particular set of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given power to determine conclusively whether the fact exists. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision a merit to nothing. Jurisdiction must be acquired before judgment. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Facts constitute the evidence before the court... the moment a court determines that it has no jurisdiction it has to down its tools and proceed no further.”***

Coming from the background of the above quoted cases, I now proceed to consider if this court has jurisdiction to hear the matter herein. The High Court is a creature of the Constitution under Article 165(1) and its jurisdiction is limited by Article 165(5) (b). Under this article, the jurisdiction of the High Court does not extend to matters falling within the jurisdiction of the Employment and Labour Relations Court. On the other hand, Article 162 of the Constitution provides for other courts that have the status of the High Court which includes the Employment and Labour Relations Court. The same Article continues to emphasize that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the Employment and Labour Relations Court.

An Act of Parliament governing the Employment and Labour Relations Court was enacted and commenced on the 30<sup>th</sup> August 2011 (The Employment and Labour Relations Act). Section 12(1) of the said Act highlights the jurisdiction of the Employment and Labour Relations Court which includes disputes relating to or arising out of employment between an employer and an employee. The Act under Section 12(3) proceeds to list the orders that a court can issue which in (vi) includes an award of Compensation in any circumstances contemplated under the Act. It is, therefore, evident that the Employment and Labour Relations Court has jurisdiction to hear matters arising from dispute between an employer and an employee that concerns employment. Therefore, where an employee is injured in the course of employment a dispute is bound to arise between them with the employee seeking damages arising from the injuries suffered as a result of negligence by his employer.

Subsequently, the argument by the Respondent that the Employment and Labour Relations Court, only has jurisdiction to deal with matters concerning terms and conditions affecting employment is misconceived and misleading. The prayers sought in the plaint can, therefore, be attained in the Employment and Labour Relations Court but in a case where a litigant files a matter in the “**wrong**” court, the Court of Appeal in the case of **Daniel N Mugendi Vs Kenyatta University & 3 others (2013) eKLR** had this to say: -

***“And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes 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 similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice.”***

However, given that this matter was filed on 12<sup>th</sup> October 2009 before the promulgation of the new Constitution and enactment of the Employment and Labour Relations Court, then it is imperative and in the interest of justice to consider transitional provisions of the Acts governing employment matters. The Constitution of Kenya under Section 22 of the 6<sup>th</sup> Schedule provides: -

***“All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this constitution or as directed by the Chief Justice or the Registrar of the High Court.”***

The above provision is couched in mandatory terms. It categorically provide for proceedings before a court to continue in the same court that they were instituted or alternatively in a corresponding court. I have perused the plaint herein and the cause of action is based mainly on the tort of negligence and it has nothing to do with the terms and conditions of employment between the Plaintiff and the defendant. This is a matter that can effectively be handled by the Civil Division of the High Court.

In the premises, no useful purpose will be served by transferring the matter to the Employment and Labour Relations Court. I find that the Preliminary Objection lacks merits and the same is hereby dismissed with no orders as to costs.

**Dated, signed and delivered at Nairobi this 9<sup>th</sup> day of June, 2016.**

.....

**L NJUGUNA**

**JUDGE**

**In the presence**

..... *for the Plaintiff*

..... *For the Defendant*