



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KIAMBU
CIVIL APPEAL NO. 8 of 2016

DEVKI STEEL MILLS LIMITED.....APPELLANT/APPLICANT

VERSUS

JOHN MBUVI MACKENZIE.....RESPONDENT

RULING

1. The Appellants herein came before this court with a Notice of Motion dated 27th June, 2016 (“Application”) filed under certificate of urgency asking the court for two primary reliefs: First, to stay execution of the judgment and decree entered in **Thika CMCC No. 856 of 2013** until the hearing and determination of the appeal intended to be filed against both. Second, the Application seeks an extension of time to enable the Intended Appellant to lodge the appeal outside the statutorily allowed time.
2. In this ruling, despite much confusion wrought by wrong titling by the Applicant which the Respondent argues is an independent ground for dismissing the Application, I have styled Devki Steel Mills Limited (which was the original Defendant in **Thika CMCC No. 856 of 2013**) as the Applicant (since it filed the Application). I have also styled John Mbuvi Mackenzie (who was the original Plaintiff in **Thika CMCC No. 856 of 2013**) as the Respondent.
3. The Application seeking stay of execution and enlargement of time to file the appeal challenging the award of damages is based on the following grounds:
 - a. That the Applicant was only able to obtain the proceedings and judgment in Thika CMCC No. 856 of 2013 on 17/06/2016 and that this delay led to the delay in lodging of the appeal;
 - b. That the judgment was delivered *ex parte* and hence the Applicant was unaware of the decree against them until execution proceedings began;
 - c. That the Applicant has furnished security into court by depositing the entire decretal sum into court;
 - d. That the appeal will be rendered nugatory if the stay is not granted;
 - e. That the Appellant/Applicant has now obtained certified copies of the proceedings and judgment;
 - f. That if this Application is not allowed, the Appellant/Applicant stands to suffer irreparable loss and grave prejudice while no prejudice or such loss stands to be suffered by the Respondents if the same is allowed; and

g. That the Appellant/Applicant has a merited appeal with a high probability of success.

4. The Application is further supported by an Affidavit sworn by Thomas Maosa, the advocate for the Applicant.

5. The Respondent has opposed the Application. Through his advocates, the Respondent filed a Notice of Preliminary Objection, a Replying Affidavit sworn by Nelson Harun Muturi, his advocate both dated 04/07/2016.

6. By consent, the parties agreed to canvass the Application by written submissions. Although the Applicant was to file its written submissions by 14/07/2016 and the Respondent to file and serve theirs within 14 days of being served, the Applicant did not comply. Consequently, the Respondent filed their written submissions on 28/07/2016. The Applicant filed theirs on 29/07/2016. I have considered the Application and the respective affidavits, as well as the submissions and authorities filed.

7. There are four issues for determination:

a. First, whether the High Court is the appropriate forum for the intended appeal.

b. Second, assuming the High Court has jurisdiction, is the Applicant disentitled from approaching the Court by virtue of the fact that it has preferred similar applications in the lower court;

c. Third, is the Application fatally defective anyway?

d. Fourth, if the Application survives the three jurisdictional hurdles above, should it be granted on its merits? This issue has two prongs: whether, in the circumstances an extension of time is merited and whether a stay of execution pending the hearing and determination of the appeal should be granted on the facts.

8. The first issue is potentially dispositive so it behooves me to begin with it. As Justice Nyarangi famously stated “Jurisdiction is everything...[and] a Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.” (*Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1*).

9. The Respondent has submitted that this Court does not have jurisdiction to entertain the intended appeal. This is because, the Respondent argues, the intended appeal is from a matter arising out of an employer-employee relationship and thus falling within the jurisdiction of the Employment and Labour Relations Court as the Court with the constitutional and statutory jurisdiction to entertain appeals from magistrates’ courts on employer-employee matters.

10. The Respondent argues that the plain reading of the Constitution at Article 165(2) and section 12(2) and (3) of the Employment and Labour Relations Court Act warrants the conclusion that the Employment and Labour Relations Court (ELRC) has the exclusive appellate jurisdiction over the matter contemplated in the intended appeal since the cause of action arose out of workplace injury. The Respondent relied on the ruling by Mabeya J. in *Francis Mutunga Musau v Devki Steel Mills Limited 2015 eKLR (Nairobi Misc. No. 91 of 2015)*.

11. The Applicant’s response on this issue of jurisdiction is simply that the High Court has “unfettered jurisdiction” to hear an application for stay of execution pending the final determination of an appeal. Further, the Applicant argues that the appeal does not in any way relate to a matter of employment.

12. I was not sure what to make of the Applicant’s assertion that the appeal does not in any way relate to a matter of employment. It is common between the parties that the Respondent is an employee of the Applicant and that he suffered a workplace injury in the course of accomplishing tasks assigned by the Applicant. In other words, the Respondent (John Mbuvi Makenzie) suffered an injury in the course of his employment with the Applicant (Devki Steel Mills Limited) and while carrying out duties duly assigned

by the Applicant.

13. The question, then, is whether an appeal from an award of damages for such an injury is an “employment and labour relations” matter that belongs to the ELRC. The Applicant thinks not. Mr. Maosa is not entirely clear why he does not believe this is a matter for ELRC except that he suggests that the only issue for determination is whether the compensation awarded was excessive for the injuries suffered – which is not, per se, an employment issue. Mr. Maosa insists that the issue for determination in the appeal is whether the award of damages is excessive.

14. We need to begin with first principles. A Court only exercises jurisdiction which has been given to it by law. A Court must have jurisdiction to enter a valid, enforceable judgment on a claim. Differently put, a Court can only assume power over a claim that the laws authorize it to hear. The Supreme Court has recently restated this first principle in **Supreme Court of Kenya Application No. 2 of 2011 involving Samuel Kamau Macharia v. KCB and Others [2012] Eklr** thus:

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.

15. The Constitution of Kenya establishes the ELRC and clothes it with jurisdiction in Articles 162(2) and 165(5). The former reads:

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

16. Article 165(5), on the other hand, provides that the High Court shall not have jurisdiction in respect of matters in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2).

17. The Employment and Industrial Relations Court Act was enacted pursuant to Article 162 [2] of the Constitution. It is 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.*”

18. Section 4 of the ELRC Act states, “*In pursuant to Article 162[2] of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes, and the furtherance, securing and maintenance of good employment and labour relations in Kenya.*”

19. Section 12 of the ELRC Act defines the jurisdiction of the ELRC. 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.*”

20. In order to better understand what is intended by labour disputes, the Employment Act is helpful. It provides as follows in section 87(1):

Subject to the provisions of this Act, whenever – [a] an employer or employee neglects 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 on 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.

21. And, for avoidance of doubt, Section 87 [2] states categorically: “*No other Court other than the Industrial Court shall determine any complaint or suit referred to in subsection [1].*”

22. In the **Francis Mutunga Musau case** cited above, after analyzing these provisions of the law, Justice Mabeya concluded as follows:

An employment dispute in my view may be defined as a controversy between an employer and employee relating to each other's rights and obligations arising out of the contract of employment between them which includes the conditions of employment

23. Justice Mabeya then went on to conclude that the ELRC is the proper forum to deal with matters where negligence is pleaded in the lower court as arising out of employer-employee relationship since the cause of action is pegged on and is dependent primarily upon the relationship of employment.

24. I agree wholly with the reasoning of Justice Mabeya. A workplace injury claim is predicated firstly on the employment relationship between the parties. Section 87 of the Employment Act expressly envisaged that such matters will fall under the jurisdiction of the ELRC. Both for reasons of comity, the need for consistency and predictability in legal decisions as well as independent reasoning, I am persuaded to follow the reasoning by Justice Mabeya in the *Francis Mutunga Case*. I therefore hold that this Court does not have jurisdiction to entertain this matter.

25. For clarity, I should point out that parsing the case to be one of an appeal against amount of damages only does not provide a jurisdictional hook as Mr. Maosa obliquely suggested. The question is one of subject matter jurisdiction – and the subject matter here is workplace injury arising out of employment relationship. The amount of compensation awardable is not the subject matter and therefore cannot be the basis for determining the jurisdiction of the Court.

26. 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.

Dated and delivered at Kiambu this 30th day of August, 2016.

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JOEL NGUGI

JUDGE