



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL SUIT NO. 235 OF 2010

ELIJAH MOGIKA OBWORO.....PLAINTIFF

VERSUS

KISII BOTTLERS LIMITED.....DEFENDANT

RULING

Introduction

1. On the 25th August 2010, the plaintiff herein Elijah Mogika Obworo filed a suit against the defendant in which he claimed that he had been wrongfully dismissed from his employment and he therefore prayed for damages as follows :-

- (a) An order that summary dismissal letter dated 28th June 2010 is unjustified and unlawful.**
- (b) Damages for wrongful dismissal calculated at the rate of kshs. 85,359 per month commencing 1st July 2010 for the remaining period of employment up to retirement.**
- (c) General and exemplary damages for defamation.**
- (d) Costs of this suit.**
- (e) Any other relief that this honourable court may deem fit and just to grant.**

2. The defendant filed a memorandum of appearance on the 6th of September 2010 and defence on the 20th September, 2010 in which it denied liability. Thereafter the pleadings closed and the matter was subsequently set down for hearing.

3. From the record of proceedings, this matter proceeded to formal proof before Wakiaga J. On conclusion of oral evidence parties were directed to file written submissions.

4. When the above matter came before me on 6th June 2016, this court noted that the case fell within the jurisdiction of the Employment and Labour Relations Court and hence the need to have it referred to the right court.

5. Mr. Mose for the plaintiff submitted that this case was filed prior to the establishment of the Employment and Labour Relations Court under the 2010 Constitution and that Sitati J. had earlier made a determination/ruling on the matter to the effect that this court had jurisdiction to hear the matter. He further submitted that in fact the defendant had filed an application dated 29/11/2010 and in the said

application the defendant raised the issue of jurisdiction as one of the orders sought on 8/7/2011. The court then as per Sitati J. dismissed the said application with costs to the plaintiff and held that it had jurisdiction to handle the matter. He thus submitted that the issue of jurisdiction is settled and the only issue of determination is whether or not this case should be transferred to the Employment and Labour Relations Court.

6. Mr. Thuo for the defendants opposed the transfer of the suit to the Employment and Labour Relations Court for the fact that there are 2 causes of action i.e one for defamation and another for unfair termination of employment. Hence, he submitted that there should be two cases hence they had admitted partially that this case touches on Employment and Labour Relations. Thus he opined that this case should not be transferred at this late stage.

7. Mr. Mose in reply to the above submission submitted that they already abandoned their prayer in defamation as they did not call any evidence on defamation and hence he urged the court to move the case to the Employment and Labour Relations Court.

8. Having looked at the plaintiff's application, the prayers he sought, the oral evidence adduced in court and the oral submissions by the advocates representing the parties in this matter the issues that present themselves for determination in this matter are:-

1) What is the jurisdiction of the Employment and Labour Relations Court?

2) Does this court have jurisdiction to transfer this case to the Employment and Labour Relations Court?

9. With regard to the first issue jurisdiction is a fundamental matter in the dispensation of justice. The Supreme Court in the decision of **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (unreported) at para 29 and 30** discussed the issue of jurisdiction in the following terms: "Assumption of jurisdiction by court in Kenya is a subject regulated by the constitution, by statute law and by principles laid out in judicial precedent. In **Owners of Motor Vessel 'Lillian S' -vs- Caltex Oil Kenya) Limited [1989] KLR 1**, Nyarangi J. A at p. 14) held; **"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matters then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step."**

10. The consequence of a court proceeding without jurisdiction is stated in unambiguous terms in **Words and Phrases Legally Defined, Vol. 3. I-N (at p. 113).**

"Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing."

11. Article 162 (2) of the Constitution establishes courts with the status of the High Court to hear and determine disputes relating to (a) employment and labour relations and (b) the environment and the use and occupation of the title to land. Under Article 162 (3) Parliament is empowered to determine the jurisdiction of the court of the status of the High Court. Section 12 of the Industrial Court Act, 2011 sets out the jurisdiction of the court as follows:-

12(1) 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:-

(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) Dispute between an employer's organization and a trade union organizations.

(d) Disputes between trade unions.

(e)

12. Thus the Employment and Labour Relations court is the court bestowed with the status as constituted under the Industrial Court Act, 2011 as a court with the status of the High Court and is competent to interpret matters arising from disputes falling within the provisions of section 12 of the Industrial Court Act. In the instant case, the plaintiff's cause of action is primarily rooted on his terms of employment with his employer (defendant) hence, the Employment and Labour Relations Court is the most suitable court under Section 12 (1) (a) to address the plaintiff's prayers.

13. I now turn to the next issue of whether the Industrial Court's jurisdiction is limited to hearing cases filed after the establishment of the Industrial Court.

14. The answer to this can be found at Article 165 (6) (b) which categorically states that this court (High Court) is not to exercise jurisdiction of the courts established in Article 162 (2). Establishment of the Industrial Court is complete once judges to that court are appointed. (See **Brookside Dairy Limited –vs- Attorney General and the Industrial Court [2012] eKLR** and **James Kuria Ndirangu –vs- Dr. Willy Mutunga and Others Nairobi Petition No. 50 of 2012 (unreported)**).

15. In **United States International University (USIU) –vs- Attorney General [2012] eKLR** Majanja J. observed:-

“...This would only leave the Industrial Court as the only other forum for the exercise of the jurisdiction over cases dealing with matters described in Section 12 of the Industrial Court Act, 2011. My reasoning is further fortified by the provision of Section 22 of the Sixth Schedule to the Constitution which provides that “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.” [Emphasis mine]

In view of the fact that a corresponding court to the High Court, that is the Industrial Court has now been established to deal with employment and labour matters. It follows then that all employment and labour relations matters pending in the High Court shall now be heard by the Industrial Court which is now a court of the status of the High Court. The High Court therefore lacks jurisdiction to deal with all matters of employment and labour matters whether filed in the High Court before or after the establishment of the Industrial Court.”

16. In the instant case, this matter was filed in this court before the establishment of the industrial court and at the time, this court was vested with the requisite jurisdiction to hear and determine the case. The subsequent establishment of the Employment and Labour Relations Court did not therefore connote that all pre-existing labour relations cases would be struck out for want of jurisdiction as in such a case, the proper cause of action would be to transfer the cases to the right court. I believe that this is what informed Sitati J, when faced with an application seeking the dismissal of this suit for lack of jurisdiction, to hold and correctly so, that this court had jurisdiction to hear the case. At the moment, there is a properly constituted Employment and Labour Relations Court which has equal status as the High court and hence it is the proper forum for dealing with this matter as it primarily arises from an employer-employee relationship.

17. It is therefore the finding of this court that the subject of whether there can be inter transfer of cases

between the High Court and courts of equal status of the High Court, has been discussed in many authorities. In the case of **Prof. Daniel N. Mugendi vs Kenyatta University, Benson I. Wairegi, Eliud Mathiu and Prof. Olive Mugenda CA. No. 6 of 2012, at page 11**, the Court of Appeal held as follows:

“Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertains to Industrial and Labour Relations matters. It is only just and proper that the Industrial Court do exclusively entertain those matters in the context and with regard to Article 165 (5) (b). And in order to do justice, in the event where the High Court or the Environment and 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 necessary transfers among themselves until such time as the citizenry is well acquainted with the appropriate form 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.”

18. In the circumstances I direct this file be transferred to the Industrial Court at Kisumu for hearing and determination. Mention in Kisumu on 10th October 2016.

Dated, signed and delivered at Kisii this 17th day of August, 2016

HON. W. A. OKWANY

JUDGE

In the presence of:

- Mose for the Plaintiff
- Ochoki for Simba for the Defendant
- Omwoyo: court clerk