



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Case 18 of 2012

NAIVASHA SELF SERVICE STORES LIMITED:.....PLAINTIFF

VERSUS

HENRY LANGAT CHERUIYOT:.....1ST DEFENDANT

DANIEL MUKUHA NJAU:.....2ND DEFENDANT

PAUL THUKU GACHORA:.....3RD DEFENDANT

MAURICE SIMULE:.....4TH DEFENDANT

RULING

The plaintiff instituted these proceedings by way of a plaint which was filed on 5th February, 2012. In the prayers, only one substantive relief is sought namely, an order that motor vehicle registration number KBD 066P, KBD 967J, tractors registration numbers KYN 270 and KBF 365 plus other properties obtained from proceeds of theft be repossessed. In the body of the plaint the plaintiff avers that its claim against the defendants jointly and severally is for the reinstatement and or furnishing security for due performance of the stole good and/or repossession of the aforesaid vehicles and any other moveable properties belonging to the defendants and more particularly the 1st defendant.

The basis of the plaintiff's claim is pleaded in paragraphs 6, 7, 8 and 9. In brief, it is that the defendants jointly stole various assorted items/goods from the plaintiff's Naivas Sokoni Branch - Eldoret valued at Kshs. 36,645,161/- which items/goods came into their possession by virtue of their employment with the plaintiff.

Simultaneously with the plaint, the plaintiff lodged a chamber summons in which it, *inter alia*, sought orders for repossession of the said vehicles and alternatively an order for security of the stolen goods.

The application was certified urgent by **Mshila J**, who, on 6th February, 2012, granted an order placing the above vehicles under the custody of the D.C.I.O. Eldoret Police Station pending interpartes hearing.

On 19th April, 2012, counsel for the 1st and 2nd defendants filed a notice of a preliminary objection. The objection was heard before me on 9th May, 2012. The objection is based on the grounds that:-

1) The jurisdiction to determine the dispute between the parties is vested in the Industrial Court of Kenya by virtue of Section 12 of the Industrial Court Act, No. 20 of 2011.

2) The High Court lacks jurisdiction to entertain the suit and application under Article 162(2) of the Constitution of Kenya.

During the oral canvassing of the preliminary objection, counsel for the 1st and 2nd defendants argued that the plaint as drawn indicates that the plaintiff's cause of action arises from the employment relationship it has with the defendants and its suit should therefore have been filed in the Industrial Court which has exclusive jurisdiction.

Responding to the preliminary objection, counsel for the plaintiff argued that the defendants in their filed pleadings admit the jurisdiction of the court and even have sought orders of the court in their favour. In counsel's view, the Industrial court has no jurisdiction to determine the dispute between the plaintiff and the defendants.

Article 162(2) of the Constitution is in the following terms:-

“(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to

(a) employment and labour relations.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

Pursuant to the above provisions, the Industrial Court Act 2011 was enacted. Section 12 of that Act circumscribes the jurisdiction of the Industrial Court. Subsection (1) of that section reads 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;”

So, the Industrial Court has exclusive jurisdiction to hear and determine all disputes relating to employment and labour relations including disputes arising out of employment between an employer and an employee. In the plaint filed herein, the defendants are described as employees of the plaintiff: the 1st defendant is its Branch Manager at Naivas Sokoni Branch-Eldoret; the 2nd defendant is its Assistant Manager of the same branch; the 3rd defendant is its Receiving/Dispatching clerk while the 4th defendant its a store keeper at the same branch.

It is pleaded in paragraphs 6, 7 and 8 as follows:-

“6. On diverse dates between 1st August, 2011 and 21st January, 2012, the defendants jointly stole various items/goods from the plaintiff's Naivas Sokoni Branch at Eldoret all valued at Kshs. 36,645,161/-.

7.The foresaid theft was discovered and/or unearthed after an internal audit and/or stock-taking was carriedout on the 21st January, 2012, at Naivas Sokoni Branch by the loss control Manager and Internal Auditors.....

8.The policy of the plaintiff's company is that the Branch Manager of any given Branch, the

Assistant Branch Manager store keeper and the Receiving/Dispatch clerk are responsible for the inventory and hence liable for the loss aforesaid.”

From the above averments, it is plain that the plaintiff’s cause of action has its roots in the relationship the defendants have with it as its employees. Indeed the defendants are said to be liable to the plaintiff by virtue of the **“policy of the plaintiff.”** In my judgment, the dispute between the plaintiff and the defendants arises from their relationship as employer and employee. The dispute therefore falls squarely under the purview of section 12(1) (a) of the Industrial Court Act, 2011. That being my view of the matter, it follows that this court has no jurisdiction to determine the dispute between the plaintiff and the defendants since exclusive jurisdiction is vested in the Industrial Court by virtue of section 12(1) of the Industrial Court Act 2011.

As correctly held by **Ringera J**, as he then was, in **Adero & Another -Vs- Ulinzi Sacco Society Ltd (2002) I KLR 577**, jurisdiction cannot be conferred even by consent of the parties nor can it be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction. So, it is immaterial that the defendants have not challenged the jurisdiction of the court in their defences or have sought orders in their favour in these proceedings.

In the premises, the preliminary objection is upheld. This court lacks jurisdiction to entertain the plaintiff’s suit and application and both are struck out. Each party shall bear its own costs of the suit and application.

It is so ordered.

DATED AND DELIVERED AT ELDORET

THIS 13TH DAY OF JUNE, 2012

F. AZANGALALA
JUDGE

Read in the presence of:-

Mr. Kitur for 1st and 2nd Defendant and H/B for Salim for the 3rd Defendant.

Mr. Marube H/B for Omboto for the Plaintiff and

Ms. Ayuma for the Objector.

F. AZANGALALA
JUDGE

13TH JUNE, 2012