



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

HIGH COURT CIVIL CASE NO. 467 OF 2008

JOHN KABUGI MACHARIA. PLAINTIFF/RESPONDENT

VERSUS

KENYA TEA DEVELOPMENT

AGENCY LTD..... DEFENDANT/APPLICANT

R U L I N G

By a Chamber Summons dated 30th July 2009 filed under Order 6 Rule 13(1) (a) and (d) of the Civil Procedure Rules, the defendant **KENYA TEA DEVELOPMENT AGENCY LTD** have sought the following orders: -

- 1. The plaint herein be struck out.***
- 2. The suit against the defendant be dismissed.***
- 3. The costs of the application and of the suit be borne by the plaintiff.***

The application has grounds on the face of the Chamber Summons. The grounds are as follows: -

- a) The Honourable court has no jurisdiction to entertain this suit in view of the express and mandatory provisions of section 87(2) as read with section 45(5) and 50 of the Employment Act 2007.***
- b)The Employment Act No. 11 of 2007 came into operation on 20th December, 2007 before the commencement of this suit.***
- c) Section 12 of the Labour Institutions Act, No. 12. Of 2007 rests exclusive jurisdiction for disputes arising out of the employer and employee relationship in the Industrial Court.***
- d)Plaint accordingly discloses no reasonable cause of action against the defendant or is otherwise an abuse of the process of court.***

The applicant through their counsel Ochieng, Onyango, Kibet & Ohaga advocates filed written submissions on 2nd November, 2009. It was contended in the said submissions, that the cause of action arose from an alleged breach of terms of a contract of employment between the plaintiff and the defendant. Therefore in view of the provisions of the Employment Act No. 11 of 2007 and the Labour

Institutions Act No. 12 of 2007, this court does not have jurisdiction to adjudicate over the matter, such jurisdiction having been exclusively conferred on the Industrial Court. Reliance was placed on the case of **OWNERS OF MOTOR VESSEL “LILIANS” VS CALTEX OIL (K) LTD (1989) KLR 1(CAK)**, wherein at page 14 Nyarangi JA. stated: -

“Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

It was contended, that following the repeal of the Employment Act (Cap 266) through the introduction of new legislation, the jurisdiction of the High Court in employment matters was removed from the High Court. It was contended that section 45(5) of the Employment Act No. 11 of 2007 (***the present law***) depones what constitutes unfair termination of employment and sets in motion a mechanism for resolving such an issue in the following terms: -

“In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial court shall consider.....”

It was the contention that the mechanism above envisages only the Labour Officer and the Industrial Court, not other courts.

Counsel emphasized that section 47 of the Act sets out the procedure to be used by an employee in lodging a complaint relating to unfair termination of service or summary dismissal. In particular, section 47(3) provides-

“47(3) The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Industrial Court on the same issue and to the right to complain of any other infringement of his statutory rights.”

It was further argued that section 87 of the Act, which deals with disputes relating to employment, provides for exclusive jurisdiction of the Industrial Court under subsection (2) as follows: -

“87(2) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1)”

Counsel therefore contended that the jurisdiction of the High court was ousted, and that only the Industrial Court has jurisdiction to entertain employment related disputes.

In addition, counsel argued that the Labour Relations Act No. 12 of 2007, under section 12, made it abundantly and unequivocally clear that only the Industrial Court has jurisdiction to adjudicate on grievances arising from the relationship of an employer and employee. Counsel highlighted section 12(1) of the Act, which provides: -

“12(1). The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint of infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between an employee or employees’ organization and a trade union or between a trade union, an employer’s organization, a federation and a member thereof”.

Counsel contended that the provisions of section 60 of the Constitution did not give unlimited jurisdiction to the High Court as such, as the said section provides that the jurisdiction of the High Court in civil and criminal proceedings, is subject to any other jurisdiction conferred by the Constitution and any other law. Counsel contended that, in terms of section 60 of the Constitution, other laws could limit the jurisdiction of the High Court, or could confer that jurisdiction on other institutions. Reliance was placed

on the case of **NAROK COUNTY COUNCIL VS TRANSMARA COUNTY COUNCIL** [2001] IEA 157, wherein Kwach JA stated: -

“Section 60 of the Constitution does give the High Court unlimited jurisdiction but I do not understand it to mean that it can be used to cloth the High Court with jurisdiction to deal with matters which a statute has directed should be done by a minister as part of his statutory duty. Clearly if section 270(b) of the Act had simply provided that the two local authorities should agree on the apportionment without indicating what is supposed to be done in the event of disagreement, then in the case I would agree with the learned Judge that even without an express provision that the dispute should be taken to court, the High Court would have jurisdiction under section 60 of the Constitution of Kenya to deal with the matter and make a determination. But in the present case, the law expressly states that in default of agreement between the two councils, the apportionment of assets and liabilities would be undertaken as directed by the minister.”

Reliance was also placed on the case of **WAMUTU VS KIARIE** [1982] KLR 480, wherein the Court of Appeal had no hesitation in striking out a suit on the basis that the High Court had no jurisdiction to entertain the cause of action in view of section 21(4) of the Registered Land Act (Cap 300), which deprived the court of jurisdiction in respect of boundary disputes, unless the boundaries had first been determined by the Land Registrar.

In a supplementary list of authorities, the applicant’s counsel sought to rely on the case of **JANE WANJIKU & OTHERS Vs KENYA TEA DEVELOPMENT AGENCY LTD** – Nbi HCCC 121 of 2009, wherein Waweru J stated, inter alia, that

“I therefore have no hesitation in holding that the plaintiffs must first exhaust the elaborate machinery set out in the Employment Act, 2007 for resolution of the disputes with their former employers regarding their retirement or termination of their contracts of service. This court has no original jurisdiction to determine those disputes as such jurisdiction has been specially vested in the Industrial Court by the said Act.”

The application is opposed. The plaintiff/respondent through his counsel **J. M. MUGO & COMPANY Advocates** filed grounds of opposition. The said grounds are as follows: -

- 1. THAT the application is misconceived and lacks any merits or substance.***
- 2. THAT the Honourable court has unlimited original jurisdiction to deal with civil and criminal matters under section 60 of the Constitution of Kenya and hence has jurisdiction to hear and determine the suit herein.***
- 3. THAT the provisions of section 87(2) and 45(5) of the Employment Act No. 11 of 2007 and section 12 of the Labour Institutions Acts, No. 12 of 2007 cannot override the provisions of section 60 of the Constitution of Kenya which confers the High Court with unlimited original jurisdiction in civil and criminal matters.***
- 4. THAT the High Court is vested with powers to transfer the suit herein for trial or disposal to any court sub-ordinate to it including the Industrial Court, if (it) deems fit and just and therefore the application by the defendant to strike out is actuated by malice and intended to defeat the course of justice.***

The plaintiff/respondent, also through their counsel filed written submissions on 19th January, 2010. It was contended that the Constitution confers on the High Court unlimited original jurisdiction in civil and criminal matters. Counsel emphasized the provisions of section 60(1) of the Constitution, which provides:

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“60(1) There shall be a High Court, which shall have unlimited original jurisdiction in civil and

criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law.”

It was the contention that the sections of the Employment Act, and Labour Relations Act, relied upon by the applicant, were inconsistent with the express provisions of the Constitution. Therefore, the same were null and void to the extent of that inconsistency. Counsel relied on section 3 of the Constitution, which provides: -

“3. This Constitution is the Constitution of the Republic of Kenya and shall have the force of law through out Kenya and, subject to section 47, if any other law is inconsistent with this Constitution, this Constitution shall prevail and the other law shall, to the extent of the inconsistency, be void.”

Counsel also relied on the case of **NGUI Vs REPUBLIC [1985] KLR 268** where a three judge bench of the High Court, including the Chief Justice Simpson, held that section 123(3) of the Criminal Procedure Code (Cap 75) was inconsistent with section S. 72(5) and 60(1) of the Constitution, and therefore void to that extent.

Counsel argued that the case of **WAMUTU VS KIARIE (1982) KLR 480**, and the case of **OWNERS OF MOTOR VESSEL “LILLIANS” VS CALTEX OIL [1989] KLR1**, as well as the case of **NAROK COUNTY COUNCIL VS TRANS MARA COUNTY COUNCIL [2000] IEA 161** relied upon by the applicant, were distinguishable and not applicable in our present case.

On the hearing date, Mr. Khasiani for the applicant, and Mr. Gicheru for the respondents relied on the written submissions.

I have considered the application, documents filed and submissions on behalf of the parties.

There is no dispute that this is a matter relating to termination of employment. There is no doubt that this case was filed in 2008, after the coming into effect of the Employment Act No. 11 of 2007 and Labour Institutions Act No. 12 of 2007 both of which came into effect on 2007. There is no doubt that this suit was filed on 23rd October 2008. The Employment Act No. 11 of 2007 came into effect on 2nd June 2008 vide LN. 61 of 2008. It is the applicant’s contention that by virtue of the provisions of the Employment Act No. 11 of 2007 and the Labour Institutions Act No. 12 of 2007, the High Court has no jurisdiction to entertain this case, as it was filed after the coming into effect of the two Acts of Parliament. The respondent contends that by virtue of the provisions of section 60 of the Constitution, which confers unlimited original jurisdiction to the High Court in civil and criminal proceedings, this court has jurisdiction to adjudicate over this matter, which essentially is a civil matter, irrespective of the coming into effect of the new legislation.

In my view, the provisions of section 60 of the Constitution do not give the High Court limitless original jurisdiction. The jurisdiction of the High Court may be limited by statutes, provided that the said limitation is not inconsistent with any provisions of the Constitution. In this regard, I am in full agreement with what was stated by Waweru J in the case of **JANE WANJIKU MAINA & OTHERS Vs KENYA TEA DEVELOPMENT AGENCY LTD –NBI HCCC No. 121 of 2009**, wherein the learned Judge stated:-

“It is quite clear that the jurisdiction of the ordinary courts, including the High Court has been ousted and the same vested in the Industrial Court. Notwithstanding section 60 of the Constitution, the original unlimited jurisdiction of the High Court is not limitless. The Court of Appeal has held that where a statute confers jurisdiction upon an inferior court or tribunal or upon some other person or authority, the original jurisdiction of the High Court in such matter is ousted, and the parties to the dispute must first exhaust the jurisdiction conferred upon that inferior court or tribunal or other person or authority. See for instance the case of NAROK COUNTY COUNCIL VS TRANSMARA COUNTY COUNCIL [2000] IEA 161. See also the case of WAMUTU VS KIARIE (1992) KLR 480.

I therefore have no hesitation in holding that the Plaintiffs must first exhaust the elaborate machinery set out in the Employment Act, 2007 for resolution of the disputes with their former employer regarding their retirement or termination of their contracts of service. This court has no original jurisdiction to determine those disputes as such jurisdiction has been specially vested in the Industrial Court by the said Act.”

The above case is a case similar to the present case. The issues are similar. The laws in issue are the same. I find and hold that the High Court has no original jurisdiction to entertain the present case. That jurisdiction has been conferred by statute on the Industrial Court.

The respondent’s counsel has, in the Grounds of Opposition, suggested that this court do transfer the case to the Industrial Court. In submissions, however, he seems to have abandoned that argument. In my view, this case cannot be transferred to the Industrial Court. It was filed under the Civil Procedure Act (Cap 21) and Rules, and not under the relevant applicable law that is the Employment Act of 2007 and the Labour Institutions Act of 2007. The proceedings to be filed in the Industrial Court have to comply with the provisions of those Acts. Secondly, this suit having been filed in the wrong forum is no suit at all. Therefore there is nothing to transfer. A suit can only be transferred if in the first place it is a valid suit. An invalid suit cannot be transferred. In my view, this is what is meant by the reasoning of the Court of Appeal that once a court finds that it has no jurisdiction it downs tools, as was clearly stated in **OWNERS OF MOTHER VESSEL “LILIANS” –VS- CALTEX OIL (K) LTD 1989 KLR 1 (CAK)**, wherein Nyarangi JA stated: -

“Jurisdiction is everything. Without it, a court has no power to take one more step. A court of law downs tools in respect of a matter before it the moment it holds the opinion that it is without jurisdiction”

I have already held that this court has no jurisdiction to entertain this case. I cannot take one more step. This court cannot transfer a case in which it has no jurisdiction. The case having been filed in the wrong forum is no suit at all. I decline to transfer the case to the Industrial Court.

For the above reasons, the application is allowed the plaintiff’s suit is struck out. The defendant shall have the costs of the application and the suit. It is so ordered.

Dated and delivered at Nairobi this 15th day of February, 2011.

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GEORGE DULU
JUDGE