



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Mattan Construction Ltd (Civil Appeal 10 of 2017)
[2024] KEHC 5964 (KLR) (23 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 5964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
CIVIL APPEAL 10 OF 2017**

JN NJAGI, J

MAY 23, 2024

BETWEEN

DICKSON WARUHIU MWANGI APPELLANT

AND

MATTAN CONSTRUCTION LTD RESPONDENT

(Being an appeal from judgment and decree of Hon. L. Mutai, Chief Magistrate, in Nanyuki CM Civil Case No. 94 of 2016 delivered 12/10/2017)

JUDGMENT

(Being an appeal from judgment and decree of Hon. L. Mutai, Chief Magistrate, in Nanyuki CM Civil Case No. 94 of 2016 delivered 12/10/2017)

1. By a plaint dated August 10, 2016, the Appellant herein sued the Respondent seeking general damages and special damages following injuries he sustained due to an alleged accident that occurred on September 13, 2013 while the appellant was working in employment of the Respondent. The Appellant averred that he was employed by the Respondent as a casual labourer and it was the duty of the Respondent to take precaution for his safety in the course of his duties.
2. He further stated that he was on the material day lawfully working in the course of his employment at the Respondent's construction site when the Respondent, its agent and or servant provided him with unsafe system of work and as a result, he was hit by a road paver whereof he sustained injuries.
3. The Appellant blamed the Respondent for the occurrence of the accident by attributing negligence on its part, breach of statutory duties and breach of terms of his employment contract and gave particulars of the negligence and breach of the terms of the employment contract.



4. The Respondent denied the claim vide a statement of defence dated September 28, 2016. It vehemently denied that the Appellant was its employee. It denied to have carried out construction work in Nanyuki, hence it was not privy to the occurrence of the said accident.
5. After hearing the parties, the trial magistrate dismissed the Appellant's claim on account that the Appellant failed to prove on a balance of probability that he was an employee of the Respondent. More so that the Appellant had failed to disclose the details of the paver that hit him as well as the ownership of the alleged paver.
6. Being aggrieved by the trial court's judgement, the Appellant appealed to this court vide a memorandum of appeal dated October 31, 2017 raising 10 grounds of appeal challenging the trial magistrate's findings.
7. I have perused the pleadings filed with the lower court. The substance of the dispute before the court was that the Appellant got injured while in the employment of the Respondent. The dispute was therefore a work injury claim. The question that comes to my mind is whether this court has jurisdiction to entertain the appeal.
8. The parties did not raise the issue with this court. I have agonised on whether I am at liberty to raise the issue on my own motion. In my view, jurisdiction is such an important issue in a case that it can be raised by the court even on its own motion. In *Bona Vacantia Properties (K) Limited v Mwanzia* (Environment & Land Case 11 of 2021) [2023] KEELC 17964 (KLR) (30 May 2023) (Ruling), it was held as follows:

Jurisdiction is fundamental; indeed central in any matter before a court of law. It does not have to be raised by any party. The court may as well pick it out on its own motion.

In *Anaclet Kalia Musau v Attorney General & 2 others* [2020] eKLR, Civil Appeal 111 of 2017, the Court of Appeal in determining a jurisdictional issue which was never raised by the parties to the suit stated as follows:

".....A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel "Joey" v Owners and Masters of The Motor Tugs "Barbara" and "Steve B"* [2008] 1 EA 367 stated thus:

"What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded..."

9. In *Hafswa Omar Abdalla Taib & 2 others v Swaleh Abdalla Taib* [2015] eKLR the Court of Appeal held that the court has authority to act on its own motion on such a crucial question such as the jurisdiction of the court even where it has not been raised by the parties. Said the Court:

"...the determination of the appealturns on the issue of jurisdiction.; that is, whether this court has jurisdiction to entertain this appeal in the first place. We appreciate that it was an issue that was not raised by any of the parties. However, it is an issue of law that has long been settled and the parties and indeed their legal teams are deemed to know. Accordingly, this court can suo moto raise and determine the same."



10. The same Court in *Sinopec International Petroleum Service Corporation v Public Procurement Administrative Review Board & 3 others* (Civil Appeal E012 of 2024) [2024] KECA 184 (KLR) (23 February 2024) (Judgment), had the following to say on the issue:

The question whether an appellate Court can suo moto raise and address a point of law that was not addressed in the lower courts has been addressed by this Court in several decisions. In *Harun Meitamei Lempaka v Lemanken Aramat & 2 others* [2014] eKLR the Supreme Court cited with approval decided cases affirming that it is firmly settled law that issues of jurisdiction or competence of a court to entertain or deal with a matter before it is very fundamental. It is a point of law and therefore, a rule of court cannot dictate when, and how, such point of law can be raised. Being fundamental and threshold issue of jurisdiction, it can be raised at any stage of the proceedings in any court including this Court. The apex court proceeded to state as follows:

(176) Consequently,a court of law can rightly raise a legal question of jurisdiction even where no party raises such a question.”

11. Being guided by the above authorities, I am find that this court can suo moto raise the issue of jurisdiction and proceed to determine it.
12. It is trite law that jurisdiction is everything and without it, a court has no power to make one more step – see The *Owners of the Motor Vessel “Lillian S” v Caltex (K) Ltd* (1989) eKLR.
13. It is also trite law that a court’s jurisdiction flows from either the *Constitution* or legislation or both. In *Samuel Kamau Macharia v Kenya Commercial Bank & 2 others* (2012) eKLR the Supreme Court held as follows:

“A court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law 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. It cannot expand its jurisdiction through judicial craft or innovation nor can parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

14. In the case of *Benson Ambuti Adega & 2 others v Kibos Distillers Ltd & 5 others* (2020) eKLR, the same while citing its earlier decision in *R v Karisa Chengo* (2017) eKLR emphasized that:

“By ‘jurisdiction’ is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. 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 actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics..... Where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

15. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law.



16. Jurisdiction of this court is derived from article 165 of the Constitution. Article 165(3) of the Constitution provides as follows:

- 3) Subject to clause (5), the High Court shall have-
 - (a) unlimited original jurisdiction in criminal and civil matters;
.....
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.

17. Article 165(5), (6) and (7) thereof on the other hand provides:

- (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

18. The Courts contemplated in article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same article. Pursuant to that power Parliament enacted the Employment & Labour Relations Court Act No. 20 of 2011 which provides in section 12 (1) as follows:

- (1) the court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to 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;
.....

19. Section 87 of the Employment Act No. 11 of 2007 provides as follows:

- (1) Subject to the provisions of this Act whenever –



- (a) an employer or employee neglects or refuses 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 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.
- (2) No court other than the Industrial court shall determine any complaint or suit referred to in subsection (1).
- (3) This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.
20. Under article 165(5)(b) of the *Constitution*, section 12(1) of *Employment and Labour Relation Court Act* and section 87 of the *Employment Act*, it is clear that this Court has no power to determine issues which fall within the jurisdiction of the courts contemplated in article 162(2) aforesaid and matters which relates to employment including work injury related claims.
21. The consequence thereof is that appeals in relation to work injuries are handled by the Employment and Labour Relations Court.
22. That being my position on the matter, the question that arises is whether I should strike out the appeal for want of jurisdiction or transfer the suit to the appropriate court. As to whether this court has power to order for transfer of the suit to the Employment and Labour Relations Court, the Court of Appeal in *Kenya Medical Research Institute v Davy Kiprotich Koeh* [2018] eKLR stated that;

“But in view of the overriding objectives of the courts as read together with article 159 (2) of the *Constitution* which entreat them to perform their duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities, recent cases have adopted a different approach to dealing with cases concerning the courts of equal status, that is the High Court, the ELRC and the Environment and Land Court. In the case of *Prof Daniel N. Mugendi v Kenyatta University, Benson I. Wairegi, Eliud Mathiu & Prof Oliver M. Mugenda* Civil Appeal No. 6 of 2012 this Court rendered itself thus;

“Believing as we do that the approach taken by Majanja J. is the correct one, and in endeavoring 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 pertain to Industrial and Labour Relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matter in that context and with regard to article 165(5) (b). An in order to do justice, in the event where the High Court, the Industrial 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 the 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”.

As such, in the interest of justice, we would accept that this would be the correct approach to adopt in this case, and we would order that the suit be transferred to the Employment and Labour Relations Court for hearing and determination. In that event, we do not see that any prejudice would be visited on the appellant.”

- 23. The Court of Appeal in that case ordered the High Court to transfer the suit to the Employment and Labour Relations Court.
- 24. Accordingly, it is my considered view that this court has no jurisdiction to hear this appeal and I do hereby order that the same be transferred to the Employment and Labour Relations Court for
- 25. hearing and determination. Costs to abide by the outcome of the appeal at the said court.

WRITTEN AND SIGNED BY:

J. N. NJAGI

.....

JUDGE

DELIVERED, DATED AND SIGNED AT NANYUKI THIS 23RD DAY OF MAY 2024

By:

A K NDUNGU

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

.....for Applicant

.....for Respondent

Court Assistant -

