



**Kenya National Union of Teachers v Nzili (Civil Appeal
E041 of 2023) [2024] KEHC 8835 (KLR) (8 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8835 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL APPEAL E041 OF 2023
SM GITHINJI, J
JULY 8, 2024**

BETWEEN

KENYA NATIONAL UNION OF TEACHERS APPELLANT

AND

MUDZO KUHENDERWA NZILI RESPONDENT

*(An Appeal the Ruling of Hon. J.Ongondo – SPM at Malindi
delivered on 7th March, 2023 in Cmcc No.238 of 2022)*

JUDGMENT

Representation:

Oraro & Co. Advocate for the Appellant

Oraro & Co. Advocate for the Appellant

1. Before this court is an interlocutory appeal against a ruling of the subordinate court dated 7/3/2023 wherein the appellant's preliminary objection challenging the jurisdiction of the subordinate court, in CMCC No. 238 of 2022, was dismissed.
2. The facts which gave rise to the objection in question are that on 12/9/2022, the Respondent instituted a suit against the Appellant seeking payment of outstanding salary arrears amounting to Kshs. 11,157, 541/-. The Respondent alleged that he is a former chairman of the Appellant and that on 14/12/2020, he was appointed to the position of liaisons and labour advisor to the secretary general of the Appellant. The Respondent claimed that he worked for the Appellant from 1/12/2020 to June 2022 and that the Appellant was to adopt the salary scale of his last pay grade at the Appellant, which he pleaded was Kshs. 887, 239/-. He alleged that for the entire period, the Appellant paid him a monthly salary of Kshs. 300,000, contrary to the agreed sum.



3. In response, the Appellant filed a notice of preliminary objection dated 4/10/2022 on the ground that the subordinate court was not equipped with the requisite jurisdiction to determine the Respondent's claim by virtue of gazette notice no. 6024 contained in the Kenya Gazette Vol. CXX-No. 74 dated 22/6/2018, which grants the subordinate court jurisdiction to determine employment disputes arising from contracts of employment where the gross monthly pay does not exceed Kshs. 80,000/=.
4. In the impugned ruling, the learned magistrate observed that the Appellant's objection was misconceived since the Respondent had invoked the civil jurisdiction of the court on breach of contract and not employment and labour relations laws. He dismissed the preliminary objection on that ground.
5. Aggrieved by the ruling, the Appellant, in the present memorandum of appeal dated 27/3/2023, raised the following grounds: -
 - a. The learned magistrate erred in law and fact by dismissing the notice of preliminary objection dated 4/10/2022 which challenged its jurisdiction to hear and determine employment disputes where the employees' gross monthly pay exceeded Kshs. 80,000.00/=.
 - b. The learned magistrate misapprehended the law by finding that the suit was within the jurisdiction conferred to the magistrates' court in view of the respondent's styling and entitling the case as a civil matter.
 - c. The learned magistrate misapprehended the law by finding that it had pecuniary jurisdiction by virtue of section 7 of the Magistrate Court Act, 2015 to determine a case for breach of contract despite the said contract being one arising from an employee-employer relationship where the employee's gross monthly pay exceeded Kshs. 80,000/=.
 - d. The learned magistrate erred in law, by failing to consider the gazette notice no. 6024 contained in Kenya Gazette Vol. CXX No. 74 dated 22/6/2018 limiting its jurisdiction to determine employment disputes where employee's gross monthly pay exceeds Kshs. 80,000/=.
 - e. The learned magistrate misapprehended the law by abrogating the respondent the latitude to determine the jurisdiction of the court through the framing of the suit as a civil case for breach of contract.
6. The Appellant proposed that the ruling and order of the subordinate court dated 10/3/2023 be set aside and substituted with an order allowing the preliminary objection; and that the cost of this appeal be awarded to the Appellant.
7. The appeal was canvassed by way of written submissions-; the Appellant's dated 6/12/2023 and the Respondent's dated 14/2/2023 filed in the subordinate court.

The Appellant's Submissions

8. Counsel for the Appellant framed two issues for determination. Firstly, whether the trial court has jurisdiction to entertain the suit filed by the respondent. Secondly, whether the notice of preliminary objection was merited and ought to have been upheld.
9. Regarding the first issue, counsel submitted that a court's jurisdiction stems from *the Constitution* or statute and a court can only exercise jurisdiction conferred to it by law. To support this claim, counsel referred the court to the case of Samuel Kamau Macharia & another versus Kenya Commercial Bank Limited & 2 others [2012] eKLR.



10. Counsel argued that the learned magistrate misapprehended himself in relying on the provisions of section 7 of the Magistrates Court Act, 2015, and that the issues raised in the plaint are purely issues arising out of employer-employee relationship/contract. Counsel stated that the pecuniary jurisdiction for magistrates in such matters as was gazette in the aforementioned gazette notice, was Kshs. 80,000. To counsel therefore, the proper forum as stipulated under Article 162 (2) (a) of *the Constitution* and section 12 of the *Employment and Labour Relations Court Act*, would be exclusively the employment and labour relations court. To support this argument and the importance and place of specialized courts, counsel relied on the case of USIU versus Attorney General [2012] eKLR and Karisa Chengo & 2 others versus Republic [2015] eKLR.
11. In relation to the second issue, counsel submitted that the threshold to be met was set out in the case of Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd [1969] EA 696. According to counsel the notice of preliminary objection as filed met the threshold stated therein as it was undisputed and pleaded that the Respondent's monthly income was way beyond Kshs. 80,000/= . Counsel relied on the case of *Jiffy Pictured Limited versus Ofula (Civil Appeal E140 of 2021)* [2022] KEELRC 4022 (KLR) and IEBC versus Jane Cheprenger & 2 others [2015] eKLR.

Respondent's Submissions

12. Addressing the issue whether the trial court has jurisdiction, counsel argued that the manner of initiating a suit cannot be termed as a mere technicality as is the basis of section 5 and 19 of the *Civil Procedure Act*. He argued that the Respondent invoked the court's civil jurisdiction by filing a plaint as an ordinary civil suit and not as an employment and labour relations claim. Counsel continued that in filing the suit as he did, the Respondent rightly invoked the trial court's jurisdiction provided under section 7 (1) (b) of the Magistrates' Court Act.
13. On whether the preliminary objection is merited, counsel submitted that the nature of a preliminary objection was restated in the case of *Barrawah versus Mnyazi & another; IEBC (interested party) (miscellaneous Constitutional Petition E003 of 2022)* [2022] KEHC 12751 (KLR). That it raises a pure point of law which is argued on the assumption that all facts pleaded are true. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. Counsel narrated that there are several disputed facts in the statement of defence, therefore the objection must fail.
14. I have considered the record, submissions by counsel as well as the law. The jurisdiction of this court as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion (See *OI Pejeta Ranching Limited versus David Wanjau Muhoro* [2017] eKLR).
15. The sole issue that arises for determination is whether the subordinate court has jurisdiction to hear and determine the suit.

Analysis and Determination

16. It is trite that jurisdiction is central in any litigation and a court of law cannot validly take any step without it. The Supreme Court stated in the Matter of Interim Independent Electoral Commission [2011] eKLR as follows: -
 - [29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard



is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“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 matter is 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.”

- [30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient - Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”
17. It was not disputed that the jurisdiction of the Magistrate’s Court to handle employment and labour relations disputes arises from the power donated to the Chief Justice under section 29 of the *Employment and Labour Relations Court Act* to gazette magistrates to handle such matters. Pursuant to this power, the Chief Justice issued Gazette Notice No. 6024 of 2018 mandating magistrates of the rank of Senior Resident Magistrate and above to hear, with some exceptions, disputes arising from employment contracts where the employee’s gross monthly salary does not exceed Kshs. 80,000/-.
18. The disputed issue is whether the claim before the subordinate court amounts to an employment matter. According to the Appellant, the plaint as pleaded raises issues concerning an employment contract hence the appropriate forum to hear and determine the suit should be the ELRC bearing in mind the pecuniary limit imposed on the magistrate’s court. The Respondent’s view, and the subordinate court’s view is that the suit as filed did not invoke the jurisdiction of the employment court or laws but a normal civil suit. To settle this, it is pertinent we look at what the law provides in terms of jurisdiction of the employment and labour relations court, at the substance of the pleadings filed before the subordinate court.
19. The jurisdiction of the Employment and Labour Relations Court is found in Section 12 (i) of the *Employment and Labour Relations Court Act*. This provision states as follows: -
- (i) 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 provision 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 and arising out of employment between employee and employer.”
20. A cursory perusal of the Plaint dated 7/9/2022 reveals that the substance of the Respondent’s claim or cause of action is clearly an alleged employment contract between himself and the Appellant. The claim in the present suit rests squarely within the jurisdiction of ELRC, contrary to the opinion of the Respondent’s counsel; the claim being in the nature of a dispute relating to and arising out of employment between the parties herein, the Appellant being the employer and the Respondent, an employee.
21. Having said that and bearing in mind the pecuniary limitation placed on the magistrate’s courts by the said gazette notice, it is evident that the subordinate court is not equipped with the requisite jurisdiction to hear and determine the dispute. For this reason, I find that the appeal is merited. It is hereby allowed as prayed.



22. Given the foregoing, it follows that suit Cmcc No.238 of 2022 before the lower Court stands dismissed for want of jurisdiction with costs to the defendant, and for this appeal to the Appellant.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF JULY, 2024.

S.M. GITHINJI

JUDGE

In the Presence of; -

Mr Ombogo holding brief for Mr Mbaluto for the Appellant

Mr Binyenya is for the Respondent – (absent)

