



Muiruri v Grand Forest Japan Hospital Limited & another (Civil Suit 6 of 2023) [2024] KEHC 12776 (KLR) (Civ) (24 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 6 OF 2023**

**CW MEOLI, J
OCTOBER 24, 2024**

BETWEEN

LUCY WAIRIMU MUIRURI PLAINTIFF

AND

GRAND FOREST JAPAN HOSPITAL LIMITED 1ST DEFENDANT

**KENYA MEDICAL LABORATORY TECHNICIANS & TECHNOLOGY
BOARD 2ND DEFENDANT**

RULING

1. By way of a plaint dated 11.09.2023 Lucy Wairimu Muiruri (hereafter the Plaintiff) sued Grand Forest Japan Hospital Ltd and Kenya Medical Laboratory Technicians & Technology Board (hereafter the 1st & 2nd Defendant) seeking general damages; a declaration that the registration of Forest Japan Diagnostic Centre Medical Laboratory operation license issued on 04.05.2022 was unlawful, irregular and unconstitutional; cancellation of the registration of Forest Japan Diagnostic Centre Laboratory license issued on 04.05.2022; and costs of the suit.
2. The Plaintiff averred that she is a medical laboratory technician and technologist and was employed by the 1st Defendant as a laboratory technologist on a yearly contract renewable on annual basis and effective April 2016. That on or about February 2022 the Plaintiff learnt that the 1st Defendant had used her personal professional license to register its laboratory Forest Japan Diagnostic Center without her express consent, knowledge and or approval. She further averred that the 2nd Defendant illegally colluded with the directors of the 1st Defendant to issue a license to Forest Japan Diagnostic Center without a contractual agreement between the directors of the 1st Defendant and the Plaintiff for the use of her license in the registration of the laboratory. Hence the license was being illegally used by her



- employer, Grand Forest Japan Hospital Limited with the connivance of the 2nd Respondent, in the provision of laboratory services
3. Asserting that the contract between the 1st Defendant and Plaintiff was one involving employer-employee relationship as stipulated in the employment contract, the Plaintiff accused the 1st Defendant of going beyond the terms of the agreement to use the Plaintiff's academic credentials to registrar and procure a license for its laboratory without her knowledge or consent. Thereby unfairly and wrongfully earning income and profits from the license. She averred that the 2nd Defendant failed to observe its regulatory and supervisory obligations when it registered the 1st Defendant's laboratory despite it being apparent from the documents and records before it that the Plaintiff was not a director of the said Defendant, and in the absence of a contract or approval by the Plaintiff. That as a result of the Defendants actions or omission, the Plaintiff has suffered extensive loss and damage for which she claimed compensation.
 4. The 1st Defendant filed a statement of defence dated 12.01.2024 denying the key averments in the plaint and challenged the jurisdiction of this Court to entertain the suit, as filed. However, admitting to employing the Plaintiff pursuant to a contract that terminated on or about 31.03.2023 and was subsequently not renewed and or extended. Alongside the statement of defence, the 1st Defendant filed a Preliminary Objection (PO) of even date, premised on grounds that: - this Court lacks jurisdiction to hear and determine the suit pursuant to Article 165(5)(b) as read together with Article 162(2)(a) of *the Constitution* of Kenya; the plaint is frivolous, vexatious and amounts to an abuse of the Court process; and that the plaint is thus liable for dismissal with costs to the 1st Defendant.
 5. Despite service, the 2nd Defendant failed to enter appearance and or file a defence in the matter. That said, in response to the PO, the Plaintiff filed a replying affidavit dated 13.05.2024, the propriety of which the Court will address later its ruling. Thereafter, directions were taken on disposal of PO through written submissions. Both parties duly complied.
 6. On the part of the 1st Defendant, counsel began by echoing the dicta in the celebrated case of *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 and citing the definition of "jurisdiction" as defined in *Halsbury's Law of England, 4th Ed. Vol. 10* Para. 314. To assert that from the Plaintiff's pleadings, the dispute herein stems from an employer-employee relationship between the Plaintiff and 1st Defendant, and therefore the matter falls within the jurisdiction of the Employment and Labour Relations Court.
 7. Further calling to aid the provisions of Article 162(2) of *the Constitution*, Section 12 of the Employment & *Labour Relations Act*, the decisions in *Local Authorities Provident Fund Board (Lapfund) v Kisii County Government* [2018] eKLR, *Maendeleo ya Wanawake Organization v Hellen Makone & Another* [2014] eKLR, Republic v Karisa Chengo & 2 Others [2017] eKLR, *Runka Services Co-operative Sacco Limited v Mbaya* [2022] KEHC 123 and *Sadia & Another v Rarieda Sub-County Fisheries Officer & 3 Others* [2023] KEHC 4105 counsel posited that in the absence of an employer-employee relationship between the Plaintiff and 1st Defendant, the instant dispute would not exist. Counsel therefore argued that it would not be proper for this Court, bereft of the requisite jurisdiction, to entertain the suit which ought to be struck out.
 8. In response, the Plaintiff's counsel anchored his submissions on the celebrated decision in *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors* (1969) EA 696, the provisions of Article 165(3), 165(5) (6) & (7) of *the Constitution* and Section 12(1) of the Employment & Labour Relations Court Act. In support of the submission that the jurisdiction of this court flows from *the Constitution* and statute and the Court cannot arrogate itself powers not donated by law. Counsel argued that notwithstanding the employer-employee relationship between the Plaintiff



and 1st Defendant, the latter acted beyond the terms of the agreement and fraudulently used the Plaintiff's academic credentials to register and procure a license for its laboratory without the Plaintiff's knowledge nor consent. Which actions went beyond the scope of an employer-employee relationship, hence this Court had jurisdiction to entertain the suit as filed.

9. It was further submitted that the suit as presented is against the Plaintiff's former employer and also the 2nd Defendant sued jointly for collusion and breach of their statutory duty. Consequently, there existed no employer-employee relationship as between the Plaintiff and the latter Defendant to warrant proceedings before the Employment and Labour Court. Counsel urged the Court to dismiss the PO for being incompetent or in the alternative to transfer the suit to the Employment and Labour Relations Court.
10. The Court has considered the rival submissions by the parties and the record herein. The 1st Defendant's PO is premised on Article 165(5)(b) as read together with Article 162(2)(a) of the Constitution of Kenya. The latter provision states that; -

- “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- (2) Parliament shall establish 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, and title to, land.”

11. Article 165(5)(b) of the Constitution on the other hand provides that;-

- (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).

12. As to the nature of a preliminary objection, the law is settled. In *Mukisa Biscuits Manufacturing Company Ltd* (supra), it was stated:”

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....

A preliminary objection is in the nature of what used to be a demurrer: It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”



13. In the case of *Oraro v Mbaja* [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that:

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.

Where a Court needs to investigate facts; a matter cannot be raised as a preliminary point... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”

See also *Kigwor Company Limited v Samedy Trading Company Limited* [2021] eKLR.

14. In *Mulemi v Angwenye & Another (Civil Appeal 170 of 2016)* [2021] KECA 214 the same Court further distilled the definition of a preliminary objection as elucidated in *Mukisa Biscuits* (supra) by stating as follows:-

- “i) It must be a pure point of law;
- ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;
- iii) If argued as a pure point of law, it may dispose of the suit;
- iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court’s discretion”.

15. As earlier noted, the Plaintiff in response to the PO opted to file a replying affidavit dated 13.05.2024. It goes without saying that in respect of the PO, this Court is not expected to interrogate factual issues but rather to consider points of law, based on uncontested facts in the respective pleadings. The Plaintiff’s affidavit is clearly an invitation to interrogate disputed factual matters which the court declines.

16. The key objection raised by the 1st Defendant is to the jurisdiction of this Court to entertain the suit. The locus classicus on the question of jurisdiction is the case of *Owners of the Motor Vessel “Lillian S”* (supra) where Nyarangi. JA (as he then was) famously stated: -

“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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other 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.”

17. As held in *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR and rightly submitted by the Plaintiff, 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.

18. The High Court draws its original jurisdiction to entertain disputes from Article 165 (3) of *the Constitution* and relevant statute. That said, the pertinent uncontested facts include the existence of an employer-employee relationship between the Plaintiff and 1st Defendant. The suit herein is founded on fraud and misrepresentation with regard to the 1st Defendants alleged unauthorized use of the Plaintiff's licence, being acts going beyond that relationship. The 2nd Defendant is sued for collusion and breach of their statutory duty in facilitating the acts complained of. (See Para. 3 of the plaint)
19. The court having reviewed the parties' respective material canvassed in respect of the PO notes that the basis of the 1st Defendant's PO is Article 162(2)(a) of *the Constitution* and by extension Section 12(1) of the Employment & *Labour Relations Act*, the latter which provides that: -

- “(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) disputes between an employers' organisation and a trade unions organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organizations;
 - (f) disputes between an employers' organisation and a trade union;
 - (g) disputes between a trade union and a member thereof;
 - (h) disputes between an employer's organisation or a federation and a member thereof;
 - (i) disputes concerning the registration and election of trade union officials; and
 - (j) disputes relating to the registration and enforcement of collective agreements.”

20. Reviewing the Plaintiff's pleadings, it is apparent that at the heart of the dispute before this Court is an employment contract, the Plaintiff asserting at paragraph 11 of the plaint that “.....although the contract between the 1st Defendant and the Plaintiff was that of employer/employee relationship as stipulated in the employment contract, the 1st Defendant went beyond the terms of the agreement and used the Plaintiff's academic details to register and procure a license for its laboratory without neither her knowledge nor consent”. The said employment contract was admitted by the 1st Defendants in their defense statement. Inevitably, it is the said contract of employment that spells out the rights and obligations of the respective parties and will aid the court in determining whether indeed the 1st defendant had acted outside the terms of the said contract. As alleged by the Plaintiff in her plaint.



Thus, at the heart of the dispute herein though fundamentally premised on contract and or the 2nd Defendant's alleged breach of statutory duty, is an employer/employee relationship, albeit now determined, which the Court may be called upon to interrogate in order to determine the real issues in controversy.

21. Thus, it can reasonably be stated that the dominant issue arising in the suit is the admitted employment contract between the dominant parties, the other corollary issues notwithstanding. Here, the Court draws guidance from the decision of the Court of Appeal in *Paramount Bank Limited vs. Vaqvi Syed Qamara & another* [2017] eKLR. Therein, the Court in addressing a preliminary jurisdictional question, applied the dominant issue test, in determining which Court, between the Employment & Labour Relations Court (ELRC) and the High Court (HC) had the jurisdiction to entertain a dispute in founded on defamation and malicious prosecution arising in an employment relationship. The Court stated inter alia that: -

“With those uncontroverted facts we turn to consider the ground on the jurisdiction of the Employment and Labour Relations Court. The preamble to *Employment and Labour Relations Court Act* states that the court is established to hear and determine disputes relating to “employment and labour relations” and “for connected purposes”. Among its powers under Section 12, the court hears and determines all disputes relating to and arising out employment and labour relations. In the exercise of that jurisdiction the court has the power to award compensation or damages in any circumstances contemplated under the Act or any other written law and to grant any other appropriate relief that it may deem fit.

The origin of the dispute between the 1st respondent and the appellant was presented as a dispute arising from an employee/employer relationship, where the appellant accused the 1st respondent of theft followed by a criminal charge of stealing by servant. This was further followed by suspension and finally summary dismissal. There cannot therefore be any doubt that, in addition to the claim for unfair termination, the claim relating to general damages for malicious prosecution and defamation, which flowed directly from the dismissal, was equally within the jurisdiction of the court. In the exercise of its powers under Section 12 of the *Employment and Labour Relations Court Act*, the court could entertain the dispute in all its aspects and award damages appropriately. That ground lacks substance and we reject it.”

22. Similarly, in this case the dispute is essentially predicated on an employment relationship founded on a written contract and the reliefs sought by the Plaintiff include general damages; a declaration that the registration of Forest Japan Diagnostic Centre Medical Laboratory operation license issued on 04.05.2022 was unlawful, irregular and unconstitutional; and cancellation of the registration of Forest Japan Diagnostic Centre Laboratory license issued on 04.05.2022. All of which fall within the jurisdiction of the ELRC. The Plaintiff's feeble attempt to assert that no subsisting employer-employee relationship existed between herself and the 2nd Defendant does not aid her cause. Ultimately, despite Article 165(3)(a) of *the Constitution* giving the High Court has unlimited original jurisdiction in civil matters, on the undisputed facts of the case, the ELRC, is the best suited Court to handle the present claim.
23. In the result, this Court is persuaded that the 1st Defendant's PO has merit and it is hereby upheld with costs to the 1st Defendant. However, the Court is disinclined to strike out the claim, but will instead direct that the suit be transferred to the Employment and Labour Relations Court (ELRC) at Nairobi for hearing and determination.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2024.



C. MEOLI

JUDGE

In the presence of

Mr. Weche for the Plaintiff:

Mr. Wachira for the 1st Respondent:

C/A: Erick

