SS Mehta & Sons Limited v Dida (Civil Appeal 34 of 2020)
[2023] KEHC 1724 (KLR) (17 January 2023) (Ruling)

Neutral citation: [2023] KEHC 1724 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 34 OF 2020

OA SEWE, J

JANUARY 17, 2023

BETWEEN

SS MEHTA & SONS LIMITED ..... APPELLANT

AND

GASPER TSORI DIDA ..... RESPONDENT

RULING

(1) This is appeal arises from the judgment and decree passed in Mombasa CMCC No. 1571 of 2017: Gasper Tsori Dida v S.S. Mehta & Sons Limited in which the respondent sued the appellant for compensation in damages for injuries sustained in the course of his employment. The respondent had contended that he was employed by the appellant as a compressing machine operator; and that on or about August 29, 2012, while engaged in the course and scope of his employment at Jaribuni, a colleague who was filling a tyre failed to monitor and control the amount of pressure being released into the tyre. As a result, the pressure exceeded the limit, causing the tyre to burst thereby occasioning the respondent severe injuries.

(2) The respondent had asserted before the lower court that the accident was occasioned by breach of duty on the part of the appellant and/or the negligence on the part of the appellant's employees, servants and/or agents for which the appellant was vicariously liable. Thus, the respondent supplied particulars of breach of duty on the part of the defendant and negligence of its employees at paragraph 6 of his Plaint dated August 28, 2017. He likewise set out the particulars of injuries and special damages at paragraph 7 of the Plaint and prayed for judgment against the defendant for general and special damages together with interest and costs.

(3) The claim was resisted by the appellant through the law firm of M/s C.B. Gor & Gor Advocates. In its Defence dated October 18, 2017, the appellant denied that the respondent was employed by it as a compressing machine operator. While conceding that the respondent was involved in an accident as alleged, the appellant denied that the accident was attributable to any breach of duty on its part or

negligence of its employees. It therefore denied that it was vicariously responsible for the respondent's pain, loss and suffering. In the alternative, the appellant contended that the accident was caused and/or substantially contributed to by the negligence of the respondent. It therefore prayed for the dismissal of the respondent's suit.

4. A perusal of the lower court record shows that, upon hearing the parties, the learned magistrate apportioned liability between the parties at 90:10 in favour of the respondent. In its judgment dated February 25, 2020, the lower court assessed the damages payable to the respondent in the total sum of Kshs. 1,961,960/=; guided by the medical report of Dr. Adede, in which the respondent's permanent partial disability was assessed at 55%. The lower court also awarded the respondent interest on the aforementioned sum along with costs of the suit.

5. Being aggrieved by the judgment of the lower court in its entirety, the appellant filed this appeal on March 4, 2020on the following grounds:

   (a) That the learned magistrate erred in not holding that the respondent's suit was time-barred under section 4(1) of the *Limitation of Actions Act*, chapter 22 of the Laws of Kenya and section 90 of the *Employment Act* (cap 226) by reason of the fact that the suit was not filed until September 18, 2017, well after 3 years from the date on which the cause of action arose.

   (b) That the learned magistrate erred in not holding that the respondent ought to have filed the suit on before the August 28, 2015.

   (c) That the learned magistrate erred in holding that the respondent was only 10% to blame for the accident, contrary to the evidence before him.

   (d) That the learned magistrate failed to give any or any adequate reasons of how he arrived at the figure of 10% contributory negligence on the part of the plaintiff.

   (e) That the learned magistrate erred in failing to consider or adequately consider the evidence of the defence witness, one Raphael Chai Nyawa, whilst determining the aspect of liability.

   (f) That the trial magistrate erred in failing to hold that the respondent was the author of his own misfortune since he was not mindful of his own safety whilst operating the compressor machine.

   (g) That the learned magistrate erred in failing to hold that the respondent was in sole control of the said compressor machine and failed to observe the pressure gauge and filled excess air in the tyre as a consequence whereof the same burst and injured him.

   (h) That the leaned magistrate erred in failing to hold that by reason of the respondent's failure to wear a helmet and goggles the injuries sustained by him were much more severe.

   (i) That the learned magistrate failed to consider or adequately consider section 13(1) of the *Occupational Safety and Health Act*.

   (j) That the learned magistrate erred in awarding a sum of Kshs. 2,000,000/= to the respondent as general damages when in all the circumstances of this case the said amount is so inordinately high that it amounts to a wholly erroneous estimate.

   (k) That the said award of Kshs. 2,000,000/= is altogether disproportionate to the injuries sustained by the respondent and is not in keeping with other comparable awards made in respect of similar injuries.

(l) That the learned magistrate failed to give any or any adequate reasons of how he arrived at the figure of Kshs. 2,000,000/= general damages.

(m) That the learned magistrate erred in failing:

(i) to appreciate the significance of the various facts that emerged from the evidence of Raphael Chai Nyawa (DW1);

(ii) to consider or properly consider all the evidence before him;

(iii) to make any or any proper findings on the aspect of quantum of damages on the evidence before him.

(n) That the learned magistrate erred in failing to consider or adequately consider all the evidence before him and the written submissions filed by counsel for the appellant.

6. Accordingly, the appellant prayed that its appeal be allowed with costs; and that the judgment of the lower court delivered on February 27, 2020 be set aside or varied by this court; and that an appropriate order for costs be made in respect of the appeal and the proceedings in the court below.

7. The appeal was canvassed by way of written submissions, pursuant to the directions given herein on July 2, 2021. Accordingly, Mr. Adede for the appellant filed his written submissions on August 9, 2021. He proposed that the issue of jurisdiction be given precedence. He accordingly faulted the learned magistrate for proceeding with the hearing of the suit notwithstanding that it was time-barred under section 4(1) of the *Limitation of Actions Act*. Hence, counsel urged the court to determine the issue of jurisdiction before delving into the merits of the appeal. He relied on *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] eKLR for the proposition that jurisdiction is at the heart of any proceeding; and that a court should ensure it has the requisite jurisdiction before entertaining and/or disposing of any matter before it, whether or not the issue is raised by the parties.

8. Mr. Adede further submitted that a point on jurisdiction can be raised at any stage; including on appeal. He placed reliance on *Kenya Ports Authority v Modern Holdings (EA) Limited* [2017] eKLR to buttress his argument; and added, on the authority of *Application%202%20of%202011%20 Samuel Kamau Macharia & Application%202%20of%202011%20 a Application%202%20of%202011%20 nother v Kenya Commercial Bank Limited & 2 Application%202%20of%202011%20 ot Application %202%20of%202011%20 hers* [2012] eKLR, that a court of law cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. In the same vein, Mr. Adede submitted that, this being a matter filed after the *Work Injury Benefits Act*, No. 13 of 2007 was passed, the court ought to have awaited the decision of the Supreme Court in *Law Society of Kenya v Attorney General & another*. Accordingly, Mr. Adede urged the court to allow the appeal with costs to the appellant. He relied on *Law Society of Kenya v Attorney General & another* [2019] eKLR and *South Nyanza Sugar Company Limited v Joshua Aloo Aloo* [2021] eKLR to support his arguments.

9. On her part, Ms. Nduku relied on her written submissions dated 15th November 2021. She conceded that the issues in dispute fall within the preserve of the Employment and Labour Relations Court; and on that account urged for the dismissal of the appeal without further ado. On whether the trial court had jurisdiction to hear and determine the matter, Ms. Nduku submitted that the respondent applied for and obtained leave to file the suit out of time for purposes of section 4 of the *Limitation of Actions Act*, vide Misc. Civil Suit No. 962 of 2017 (O.S.); and therefore the submission that the suit is time-barred is misconceived. In any case, she submitted, the point ought to have been taken before the lower court, granted the provision of Order 2 Rule 4 of the *Civil Procedure Rules*.

10. [10] Further to the foregoing, Ms. Nduku also relied on *Owners of Motor Vessel "Lillian S"* (*supra*) but for the holding that:

> " ...A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

11. Counsel took the view that, since the issue of jurisdiction was raised by the appellant for the first time in its submissions herein, the court ought to refrain from determining the appeal on that ground, as it would otherwise be acting as a court of first instance. He relied on *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR for the proposition that parties are bound by their pleadings just as the court hearing the matter. On the merits of the appeal, Ms. Nduku acknowledged that counsel for the appellant opted not to delve into an exposition of the other grounds of appeal, and posited that that was an erroneous approach. On account of that omission, she prayed that the appeal be dismissed for want of prosecution.

12. It is manifest from the foregoing that the appellant raised a technical issue as to the competence of the appeal and therefore the merits of the appeal was not delved into by counsel in their written submissions. In the premises, instead of a judgment on the appeal, this decision is a ruling limited to the issue of jurisdiction. The objection is two-fold in so far as it concerns not only the jurisdiction of the lower court, but also that of this court in handling the appeal.

13. Needless to say that where a court proceeds without jurisdiction, its efforts and the ensuing decision would be in vain. In *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* (*supra*) the court of Appeal made this clear thus:

> " In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae..."

14. The same position had been taken in *Owners of the Motor Vessel "Lillian S" v Caltex Oil* (Kenya) Ltd. (*supra*) thus:

> " 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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

15. Mr. Adede's two-pronged contestation on jurisdiction was resisted by Ms. Nduku, whose submission it was that the point ought to have been taken before the lower court, granted the provision of Order 2 Rule 4 of the *Civil Procedure Rules.* That provisions states:

> "A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable act of God, any relevant statute of limitation or any fact showing illegality."

16. She also relied on *Owners of Motor Vessel "Lillian S"* (*supra*), in which it was held that:

> "...A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

17. However, in a subsequent decision of the Court of Appeal, namely, *Dubai Bank Kenya Limited v Kwanza Estates Limited* [2015] eKLR, it was held: -

> "...It would therefore have been prudent for the appellant to raise the question of jurisdiction before the superior court as that way this court would have had the benefit of reasoning of the superior court on the issue. However, we must now determine whether the issue of jurisdiction can be properly raised by the appellant at this stage. In *Floriculture International Ltd v Central Kenya Ltd & 3 others* (1995) eKLR, the court held that the issue of jurisdiction can be argued at any time. The court remarked as follows:
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> "It has been held in the case of *Kenindia Assurance Co. Ltd v Otiende* (1989) 2 KAR 162 that the normal rule that a party could not raise for the first time on appeal a point he had failed to raise in the High Court, did not, and could not apply when the issue sought to be raised de novo on appeal went to jurisdiction."
>
> The reasoning is that even where the question of jurisdiction is not raised that does not necessarily confer jurisdiction on the court if it has none. Accordingly, we find that the appellants are not precluded from raising the jurisdictional issue for the first time on appeal having not raised it in the superior court..."

18. Similarly, in *Kenya Ports Authority v Modern Holdings [E.A] Limited* [2017] eKLR the Court of Appeal restated its stance thus: -

> We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:
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> "....at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself;
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> - provided only that where the Court raises it suo motu, parties are to be accorded an opportunity to be heard."
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> (See All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, ex nihilo nihil fit (out of nothing comes nothing).

19. It is plain then that the arguments by Ms. Nduku to the effect that the issue of jurisdiction cannot be raised for the first time on appeal is untenable.

20. [20] That said, I now turn attention to Mr. Adede's argument that that the lower court suit was barred by dint ofsection 4(1) of the *Limitation of Actions Act*, which provides for a limitation period 6 years for contractual disputes. The argument appears self-defeating because, under that provision of the law the respondent had up to August 28, 2018 to file the lower court suit; which would mean that the suit was filed within time. However, since it is common ground that the suit was founded in tort, the correct provision of the law that Mr. Adede may have had in mind is section 4(2) of the *Limitation of Actions Act*, which provides that:

> " An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued:
>
> Provided that an action for libel or slander may not be brought after the end of twelve months from such date."

21. It is noteworthy however that undersection 27 of the *Limitation of Actions Act*, it is permissible for a party to seek and obtain extension of time. It provides:

(1) Section 4(2) does not afford a defence to an action founded on tort where—

(a) the action is for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a written law or independently of a contract or written law; and

(b) the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries of any person; and

(c) the court has, whether before or after the commencement of the action, granted leave for the purposes of this section; and

(d) the requirements of subsection (2) are fulfilled in relation to the cause of action.

22. And, Ms. Nduku did demonstrate that such extension was sought and obtained by the respondent in Mombasa SRM's Civil Suit No. 962 of 2017 (O.S.) as per the Order dated October 17, 2017. Under section 60(1)(e) of the *Evidence Act*, the court is entitled to take judicial notice of the sealed Order without proof. I therefore find no merit in Mr. Adede's argument that the respondent's suit was time-barred.

23. The second prong of Mr. Adede's challenge on jurisdiction is that this appeal, being a dispute between employer and employee, ought to have been filed before the Employment & Labour Relations Court. Indeed, in *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court held that:

> " 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 by law. We agree with counsel for the first and second Respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings...Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits.

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 on 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."

24. Similarly, in *Republic v Karisa Chengo & 2 others* [2017] eKLR, the Supreme Court of Kenya was explicit that:

> " ...pursuant to Article 162(3) of the *Constitution*, Parliament enacted the *Environment and Land Court Act* and the Employment and *Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."

25. Thus, pursuant to articles 162(2) and 165(5) of *the Constitution*, section 12 of the *Employment and Labour Relations Court Act* stipulates that:

> " The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Aastitution}} and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations..."

26. As to whether a claim for compensation in tort for work-related injuries falls within the purview of Section 12 aforestated, opinion has been varied. For instance, in the persuasive case of *Julius Oseya Nyende & 2 others v Antoine Regrigeration Eng Co Ltd* [2017] eKLR, Hon. Ngugi J. took the view that:

> " ...Having pleaded the employment relationship as an important element in their claim, a finding of that relationship would have to be one of the central issues in the case. In the circumstances, it is disingenuous for them to claim at this stage that their suit sounded in tort simpliciter...it is my finding that the intended appeal is one from a suit for injuries sustained in the course of employment. Such injuries are "employment and labour relations" matters that belong to the ELRC. I have found no reason to depart from the reasoning in the *John Mackenzie Mbuvi Case* cited above which, in turn, followed the reasoning by my brother Mabeya J. in the *Francis Mutunga Musau Case*..."

27. The learned Judge however acknowledged the need for a clear pronouncement from the Court of Appeal on the matter. He observed that:

I will pause here long enough to agree with the applicants, in line with the Court of Appeal's reasoning in the Kenya Cargo Case that a claim for personal injuries arising in the course of employment may sound in either tort or contracts or both. A plaintiff can carefully place her bets in either and one can imagine a plaintiff keenly drawing her pleadings so that it sounds only in one or the other cause of action. However, in most cases, and for good reasons, Plaintiffs present a mixed case – sounding in

both torts and contracts. In these cases, because the underlying claim is predicated on the employment relationship, it would follow that the contract action would be predominant...I once again readily admit that this is a question that has caused me much anxiety. It seems plain that parties are still facing much uncertainty on this question as there has been no authoritative enunciation yet of the correct legal position by the Court of Appeal. Suffice it to say that I have not been persuaded by the present application that jurisdiction lies with the High Court..."

28. From the standpoint of WIBA, the Supreme Court has pronounced itself in *Law Society of Kenya v Attorney General & another* (supra). Here is what the Supreme Court had to say:

> (63) ... it is evident that by granting the Director authority to make inquiries that are necessary to decide upon any claim or liability in accordance with WIBA, the jurisdiction of the High Court to deal with constitutional questions and violations that may arise from such claims underarticle 165 of the *Constitution* 2010 is not ousted at all. Similarly, the appellate mechanism to the Industrial Court, in the circumstances, cannot be legitimately questioned...
>
> (69) We have stated that section 16 cannot be read in isolation because if read withsection 23 and 52 of the Act, the Act provides for legal redress to the Industrial Court (now the Employment and Labour Relations Court) and therefore judicial assistance can be sought by aggrieved parties from decisions of the Director and the court can make a determination with respect to all relevant matters arising from those decisions. It cannot, therefore, be the case that section 16 amounts to an ouster clause. It is in fact merely facilitative of what may eventually end up in court.
>
> [70] Flowing from the above analysis, it is apparent that in considering the nature and extent of the limitation placed undersection 16 of the Act, it becomes clear that it does not permanently limit the right to access courts by an aggrieved party. It is only the initial point of call for decisions in workers' compensation. When read in whole withsection 23 and 52 of the Act, therefore, a party is not left without access to justice nor do employees or employers have to result to self-help mechanisms. What the section does, is that it allows the use of alternative dispute resolution mechanisms to be invoked before one can approach a court..."

29. It is therefore clear from the decision of the Supreme Court that the appellate jurisdiction of the Employment and Labour Relations Court in such matters cannot be questioned. Indeed,section 12 of the *Employment & Labour Relations Court* No. 12 of 2011, stipulates that:

> (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; -
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> (a) disputes relating to or arising out of employment between an employer and an employee;
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> (b) disputes between an employer and a trade union;
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> (c) disputes between an employers' organization and a trade union's organization;
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> (d) disputes between trade unions;
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> (e) disputes between employer organizations;
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> (f) disputes between an employers' organization and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organization 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.

30. Further, the *Employment Act* No. 11 of 2007 under section 87 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.

31. Hence, this being an appeal arising from a work place injury, is a dispute between an employer and employee for purposes of the *Employment and Labour Relations Court Act*. Accordingly, it is my finding that the Court with jurisdiction to hear and determine this appeal is the Employment and Labour Relations Court. In the premises, it is hereby ordered, in the larger interests of justice, that this appeal be transferred to the Employment and Labour Relations Court, Mombasa, for determination.

32. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF JANUARY 2023.

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OLGA SEWE

JUDGE