



REPUBLIC OF KENYA



KENYA LAW
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**Msigo v Coast Builders & Construction Limited (Civil Appeal
E137 of 2016) [2023] KEHC 2273 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2273 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E137 OF 2016
DKN MAGARE, J
MARCH 20, 2023**

BETWEEN

JOHN KIBUNI MSIGO APPELLANT

AND

COAST BUILDERS & CONSTRUCTION LIMITED RESPONDENT

(Being an Appeal from judgment of the learned Honourable N Njagi SPM made on July 21, 2016 in the Mombasa RMCCC ELRC No. 931 of 2015 delivered on December 2, 2021)

JUDGMENT

1. This is an appeal from the decision of the Hon N Njagi, Senior Principal Magistrate given on July 21, 2016 from Mombasa RMCC 931 of 2015 on December 2, 2021.
2. The decision was to the effect that the appellant had not availed sufficient evidence to prove his case. The appellant filed a Memorandum of Appeal, which sets out 6 grounds of appeal. Ground no 4 is instructive and as such I need to set it out verbatim. It states: -

“4. The learned magistrate erred in law and in fact in holding that the ‘plaintiff’ had not proved the fact of employment with the ‘defendant’ and yet the ‘defendants’ had not challenged his evidence and even expressly admitted employing the ‘plaintiff’ in their submissions.”

3. In the Defence dated June 22, 2015, the respondent denies the existence of an employment contract. The respondent had an alternative averment where they blame the appellant for not working diligently and as such was an author of his own misfortunes. The appellant in paragraph 3 of the Plaintiff also avers that he was a casual employee of the appellant. The dispute of this nature falls within the purview of the *Employment Act* and the injuries are injuries within the meaning of the *Work Injuries Benefits Act*.



4. There is no doubt whatsoever that from pleadings, proceedings and even the Memorandum of Appeal that the dispute arose from injuries that reportedly sustained in the course of employment with the respondent. This is equally admitted in the appellant's submissions. The respondent did not file submissions.
5. Since submissions deal with the merit of the appeal, I need to deal with the competent of the appeal before I proceed to the merit of the appeal. There are other aspects that need to be addressed. However, I must be satisfied that this is the court that needs to address them.
6. It is important to recall that section 4 *Employment and Labour Relations Court Act*, cap 234B establishes a court known as of the Employment and Labour Relations Court. The said section is a normative derivative of the *Constitution*, and it reads -

“(1) There is established the Employment and Labour Relations Court pursuant to article 162(2) of the *Constitution*.”

7. The jurisdiction of the Employment and Labour Relations Court circumscribed under 12 of the *Employment and Labour Relations Court Act*. The section reads , in part as follows: -

“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;

8. The nature of disputes that arose in the court below has been provided. There is also judicial precedence on the same. While addressing an employer-employee relationship. While addressing a similar issue, Hon Mr Justice Alfred Mabeya in *Francis Mutunga Musau v Devki Steel Mills Limited* [2015] eKLR observed as doth: -

“To my mind, it is the Industrial Court is the proper forum as defined in the labour laws set out above that has jurisdiction to deal with matters such as this one. It matters not that it arises from a tortious liability. That cause of action is pegged on and is dependent primarily upon the relationship of employment. Since it is admitted that the negligence pleaded in the lower court arose out of employer employee relationship between the parties herein, I am afraid this court has no jurisdiction to entertain this matter.”

9. Article 162(2) (a) establishes jurisdiction over employment dispute on the Employment and Labour Relations Court. This court was established with exclusive jurisdiction of the matter it governs.
10. On the other hand, this court is established under article 165 of the *Constitution* with specific duties assigned to the court. Further, under Article 165(5) of the *Constitution*, the High Court is prohibited from dealing with matters which are within the exclusive competence of courts of equal status contemplated under article 162 of the *Constitution*.
11. This was buttressed in the Supreme Court in the case of *Republic v Karisa Chengo & 2 others* [2017] eKLR at paragraph 52 the Supreme Court stated as doth: -

“52] In addition to the above, we note 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."

12. Do we have a law specifically placing this dispute on those courts or we are dealing with the application using hyperbole, conjecture guesswork and malafides. Section 87 of the Employment Act places the cases of this nature not in this court but in the Industrial court. The section provides as doth: -

"Part Xii—— Disputes Settlement Procedure

Complaint and jurisdiction in cases of dispute between employers and employees. 87. (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 to the provisions of this Act,

13. The Employment and Labour Relations Court is the successor of the industrial court under Section 36 of the Employment and Labour Relations Court Act. It is that court that hears appeal from employment matters. I also note that the matter falls within the meaning of the work injury benefits act.

14. There have been decisions of courts above this court on the fate of such matters. I am bound by those decisions and as such I have no jurisdiction to overturn them. These decisions include the decision of the supreme court in Law Society of Kenya v Attorney General & another [2019] eKLR, which decision is binding on this court. In that decision, Supreme Court upheld a court of Appeal decision which decided as doth: -

"that there was nothing in section 16 that offended the Constitution; that section 23 did not contravene the Constitution since the powers of the Director of Occupational and Safety Services at the Ministry of Labour are donated by statute and the exercise of that power is circumscribed and not arbitrary; that section 25(1) and (3) of WIBA is not in conflict with section 82 of the former Constitution and did not discriminate against any party; that sections 51 and 52 did not conflict with section 82 of the former Constitution and that a party in whose favor a decision is made, may sometimes still be dissatisfied with the award and to challenge the Director's award at the High Court."



15. In *Bloomingtondale Roses (K) Ltd v Gladys Kathure Nteere* [2018] eKLR, the Court Hon. Justice Nzioki Wa Makau held as doth: -

“(1) The learned judge of appeal went on to cite a series of determinations of various courts ranging from the Supreme Court to the Court of Appeal and the High Court. In the end, it was clear that the best approach in determining the question is the following. Was the law applicable at the time one that permitted the filing of the claim at the Chief Magistrates Court at Meru? The answer is that at that period in time, the issue of jurisdiction had been settled by the ruling of Ojwang J (as he then was) and subsequently the judgment of the learned judge delivered in 2009. Upon reversal by the Court of Appeal on November 17, 2017, the position is that the decision of the High Court was erroneous to a large extent and therefore, any suit now filed and pending before the courts seeking compensation has stalled.”

16. In *Samuel Kamau Macharia & Another Vs KCB & 2 Others* (2012)eKLR, the Supreme Court, the court was particular that there must be jurisdiction and the same cannot be conferred by consent, by connivance or by craft. The court was precise and held as doth: -

“As held in the matter of advisory opinion of the court under article 163 of the Constitutional Petition No 2 of 2011 at para 30, the Court stated, “A Court may not arrogate itself jurisdiction through craft of interpretation or by way of endeavours to discern or interpret the intentions of parliament where legislation is clear and there is no ambiguity.”

17. This is another way of staying that the subject matter determines jurisdiction. It is not the court’s views of fairness, of expedience, feelings, emotion, or other matters outside the jurisdiction of the court. It is worse for the appellate court as it is mostly a creature of statute. You cannot fault a court you are not allowed to fault.

18. On the other hand, also the court cannot by sheer laziness or dislike for a file divest itself of jurisdiction that it has. In support of that contention, Justice Nyarangi quoted in *Motor Vessel, 1989eKLR Lilian S. Justice Nyarangi JA* laid with approval words and phrases legally defined – Vol 3: I to N page 113.

“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 the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to which jurisdiction shall extend or it may partake of both these characteristics. If the jurisdiction is an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction but except where the court or tribunal has been given the power to determine conclusively whether the facts exist. 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.”

19. *Phoenix of E A Assurance Company Limited v S M Thiga t/a Newspaper Service* [2019] eKLR, the court of appeal (Karanja, Gatembu & Sichale, JJ A) stated as doth: -

“Decided cases on this issue are legion and we cannot cite all of them. The case of *Joseph Muthee Kamau & Another v David Mwangi Gichure & Another* (2013) eKLR is however



on all fours and addresses the issue raised by Ms Wambua as to whether the subordinate court could still hear the suit but only allow the maximum damages allowable within its pecuniary jurisdiction. The court succinctly settled this point in the following words:-

“When a suit has been filed in a court without jurisdiction, it is a nullity. Many cases have established that; the most famous being *Kagenyi v Musirambo* (1968) EA 43. The same would apply to pecuniary jurisdiction in a claim for special damages where the liquidated sum claimed exceeds the court’s pecuniary jurisdiction.

We hold that jurisdiction cannot be conferred at the time of delivery of judgment. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

20. What there is the remedy for the filing of this appeal in a wrong court? As I held recently in Nairobi HCCC Petition No 200 Of 2021- Constitution Petition No. E 200 Of 2021- *Stephen Juma -Versus- Mkopa Holdings Ltd (T/A Mkopa Sola (K) Ltd & Anor* (Ur) I stated as doth: -

“I agree with Odunga J as then he was, when in *Wambua Versus Kamondia & 3 Others* (2022) IKEHC 10426 KLR) he noted that there are two types of jurisdictional questions. The first one is where a court has no jurisdiction to embark on investigation into a matter. In such a case, there is nothing to be transferred. The second one where the court has jurisdiction at the inception which is affected subsequently, the later can be transferred.”

21. In the circumstances the issue of jurisdiction cannot be gain said. Where there are mixed issues, then the court has to look for a dominant issue. In this matter there is only one issue, liability for a work injury by an employee during the course of employment.
22. There is no other issue to be able consider the aspect of predominance. The issue of predominance was dealt with in *Mohammed Ali Baadi & Others Versus AG & 11 Others* (2018) eKLR where the court held, at paragraph “The Supreme Court in Republic vs Karisa Chengo & 2 Others^[47] amplified and pertinently held that each of the superior courts established by or under the *Constitution* has jurisdiction only over matters exclusively reserved to it by the *Constitution* or by a statute as permitted by the *Constitution*. The holding in this case however, does not resolve the knotted question of which court among the High Court and the two equal status courts under article 162(2)(b) should be seized of jurisdiction in controversies in hybrid cases. Hybrid cases are cases where issues cut across the exclusive jurisdiction reserved for each of the three courts. As demonstrated by the issues identified above, this is one such hybrid case.”
23. Given that this is a purely employment matter, there is no remedy. The appeal ought to have been filed in the Employment and Labour Relation Court. I therefore find that I cannot go into the merit of the appeal without first having jurisdiction to do so. Having fallen within the former, the appeal herein is struck out for lack of jurisdiction.
24. However, I do not grant the respondent costs and for good measure. On October 3, 2022., the respondents were to place the submissions in the court file. They failed to do so. They have not been active in the matter. Thus, they driven themselves out of costs. In any case, given the employer-employee relationship, that the Court does not see costs as warranted.

Determination

25. The court does not have jurisdiction to handle this appeal for reason of being both an employment matter and a Work injury Benefit Act case.



26. The appeal is consequently struck out with no order as to costs.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF MARCH, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

HON MR JUSTICE DENNIS KIZITO MAGARE

JUDGE OF THE HIGH COURT, MOMBASA

In the presence of:

No appearance for the appellant

Miss Kagiri advocate for the respondent

