



**Mbondo v Bhachu Industries Limited (Civil Appeal E280 of 2020)
[2023] KEHC 18757 (KLR) (Civ) (19 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 18757 (KLR)

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

CIVIL

CIVIL APPEAL E280 OF 2020

DO CHEPKWONY, J

APRIL 19, 2023

BETWEEN

MAURICE SIMBA MBONDO APPELLANT

AND

BHACHU INDUSTRIES LIMITED RESPONDENT

*(Being an Appeal from the order of the Hon. Mr. Edgar Kagoni (PM)
in Nairobi CMCC No.5204 of 2017 delivered on 20th October, 2020)*

JUDGMENT

Background

1. By a Plaintiff dated July 19, 2017 and filed in court on July 20, 2017, the Appellant sought for the following prayers against the Respondent:-
 - a. General damages for pain, suffering and loss of amenities.
 - b. Special damages of Kshs 3,000/=.
 - c. Costs of the suit.
 - d. Interest on (a), (b) and (c) above at court rates.
2. In his Plaintiff, the Appellant pleaded that he was an employee of the Respondent and was in the lawful course of his duties with the Respondent at all material times relevant to this suit.
3. According to the Appellant, on or about November 1, 2016 he was in the lawful course of his duties working with the Respondent when due to the negligence of the Respondent its servants, employees and or agents, he was involved in an accident and was seriously injured.



4. It was the Appellant's averment that it was as a result of the said injuries that he suffered loss and damages for which he holds the respondent liable.
5. The particulars of the alleged negligence are pleaded at Paragraph 4 of the Plaint as follows;
 - a. Failing to take any adequate precaution for the safety of the Plaintiff while he was engaged upon the said work.
 - b. Exposing the Plaintiff to a risk of injury or damage of which they knew or ought to have known.
 - c. Causing or permitting the Plaintiff to carry out the said work without any or adequate safety gear/clothing knowing the same to be dangerous.
 - d. Failing to take any or any adequate measures to ensure that the place where the Plaintiff carried out his work was safe.
 - e. Failing to provide or maintain a safe and proper system of working or to instruct their workmen including the Plaintiff to follow that system.
 - f. Causing or permitting the Plaintiff to be exposed to danger that was likely to be injurious to him.
6. In response to the Appellant's Plaint, on November 13, 2017, the Respondent filed a statement of defence dated November 10, 2017 in court. Therein, the Respondent denied that the accident was caused by its negligence, carelessness and or breach of contract as alleged. The Respondent denied all the particulars of negligence as particularized in the Plaint.
7. The Respondent averred that the subject accident was entirely caused by and or contributed to by the Appellant's negligence and or breach of contractual obligations while carrying out his duties.
8. The Respondent went on to contend that the Appellant's suit as filed before the trial court is bad in law, defective, inept and ambiguous as it does not disclose a reasonable claim or cause of action. The Respondent then intimated that it would raise a Preliminary Objection to have the same dismissed and or struck out with costs.
9. On October 7, 2020, the Respondent orally raised an oral Preliminary Objection before the court that the matter is related to Work Injury Benefits Act(WIBA) and as a result the trial court lacks jurisdiction to entertain the claim.
10. Upon considering the oral preliminary objection by the Respondent, the court delivered its ruling on October 26, 2020 whereby it upheld the Preliminary Objection and struck out the Plaint dated July 19, 2017 with costs.
11. Aggrieved and dissatisfied with the decision of the trial court, the Appellant appealed to this Court vide a Memorandum of Appeal dated October 27, 2020. The Appellant seeks the following orders from this Court:-
 - a. That this Honourable Court be pleased to allow the appeal by reversing and setting aside the order delivered on October 26, 2020 in Nairobi CMCC No 5204 of 2017.
 - b. That the Respondent be compelled to pay costs of this appeal and costs arising in the lower court.
12. The Appellant's appeal is anchored on the following grounds:-



- a. The trial Magistrate erred in law and in fact and misdirected himself in delivering said order dismissing the Appellant’s suit for lack of jurisdiction.
 - b. The trial Magistrate erred in law and in fact in holding that he lacked jurisdiction in determining the matter nonetheless ordered that the suit be dismissed with costs to the Respondent.
 - c. The trial Magistrate erred in law and in principle by adopting the wrong approach or rather principle by failing to down his tools once aware that he lacked jurisdiction but went ahead to confer jurisdiction upon himself and thus dismissed the suit occasioning a miscarriage of justice.
 - d. The trial Magistrate erred in law and fact by awarding the Respondent costs of suit dismissed whereby he established that he lacked jurisdiction.
 - e. The trial Magistrate erred in law and in fact when she made a Judgment which was not supported by law.
 - f. The learned trial Magistrate erred in law in not taking into consideration the submissions tendered on behalf of the Plaintiff or misapprehended and or ignoring the issues raised therein.
 - g. The decision was arrived at on consideration of wrong principle of law.
13. On May 13, 2022, this court issued directions that the appeal be disposed of by way of written submissions. The Appellant complied and filed his submissions dated July 7, 2022. The Respondent did not file any submissions but counsel on record submitted that he would rely on Supreme Court’s decision on *Work Injury Benefits Act* (WIBA) matters.
 14. I have read through the Grounds of Appeal, the submissions in support to the appeal alongside the cited authorities. I wish to indicate that I will consider them in my final analysis and determination of this appeal.

Analysis and Determination

15. This being a first appeal, this Court has an obligation to re-evaluate and re-consider the evidence that was tendered before the trial court afresh and arrive at its own independent conclusion bearing in mind that it did not have the opportunity to see the witnesses testify. (See the case of *Abok James Odera T/A A.J. Odera & Associates v John Patrick Machira & Company Advocates*, [2013] eKLR).
16. I have considered the grounds of appeal, the written submissions by the Appellant and the authorities relied upon by both parties by reading through the record of proceedings before the trial court. Upon perusal of the record of appeal, I note that as enumerated in Paragraphs 3 and 4 of the Plaint dated July 19, 2017, the claim arose in the course of the Appellant’s duties as an employee of the Respondent which in essence is a work injury claim. It is therefore important that this court determines whether or not it is clothed with the jurisdiction to hear and determine this appeal.
17. It should be noted that jurisdiction is a focal point in judicial proceedings and a court acting without jurisdiction is engaging in an exercise in futility as it is a well settled principle in law. This court is guided by the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989]eKLR where Nyarangi, JA held as follows;

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

18. Jurisdiction of court emanates either from the Constitution or an Act of Parliament or both and no court can confer or assume jurisdiction on its own. This was the position by the Supreme Court in the case *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others* [2012]eKLR, where it stated 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. We agree with counsels 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.”

19. The framers of our Constitution deemed it wise to establish specialized courts with equal status of that of the High court under Article 162(2) of the *Constitution* to handle matters relating to employment and environment and land use. The Supreme Court in the case of *Republic v Karisa Chengo* [2017]eLKR held as follows;

“[50] It is against the above background, that Article 162(1) categorises the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of the Constitution intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialized Courts are of “equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other”. Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another.

(52) From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with *suis 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.”

20. On the question of jurisdiction, this court is guided by the provision of Article 162 (2) of the *Constitution* which provides as follows;

(2) Parliament shall establish courts with the status of the High court to determine disputes relating to;



- a. Employment and Labour relations; and
- b. The environment and the use and occupation of and title to land.

21. In compliance with Article 162 (2) of the Constitution, Parliament enacted the Employment and Labour Relations Court Act, 2011 and Section 12(1) thereof provides that:-

“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 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”

22. I have had the opportunity to peruse the original Record of proceedings before the trial court and as clearly spelt out at Paragraph 4 of the Plaint, it is obvious that this is a matter within the jurisdiction of the Employment and Labour Relations Court within the meaning of Article 162 (2) (a) of the Constitution.

23. Flowing from the above analysis and the guidance of the cited authorities, there is no doubt that this matter relates to injuries sustained by an employee at work. It is therefore a dispute between an employee and employer and the High court cannot exercise any jurisdiction thereof. The appeal therefore lacks merit.

24. Based on the foregoing, this Court makes the following orders;

- a. This court has no jurisdiction over this matter.
- b. This appeal be and is hereby transferred to the Employment and Labour Relations Court.
- c. I make no orders as to costs as the appeal is yet to be determined.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 19TH DAY OF APRIL 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

No appearance for and by either party – (Despite Notice having been issued and Judgment causerlisted)

Court Assistant – Martin/Sakina

