



**Ndunda v Gicheha Farmslimited (Civil Appeal 14 of 2021)  
[2023] KEHC 24510 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 24510 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VOI  
CIVIL APPEAL 14 OF 2021  
MN MWANGI, J  
JULY 13, 2023**

**BETWEEN**

**MUSYOKA NDUNDA ..... APPELLANT**

**AND**

**GICHEHA FARMSLIMITED ..... RESPONDENT**

*(Being an appeal from the ruling and order of Honourable  
Khapoya S. Benson, Principal Magistrate, Taita-Taveta Law  
Courts delivered on 11th February, 2021 in CMCC No. 16 of 2018)*

**JUDGMENT**

1. The suit against the respondent in the lower Court was that the appellant was employed by the respondent as a casual general worker at the respondent's Ziwani estate premises in Taita-Taveta County. That on or about 7<sup>th</sup> December, 2012, the appellant was carefully working for the respondent reinforcing an irrigation embankment within the respondent's farm at about 5.30 p.m., and after he had finished working, he turned to walk away but he suddenly slipped on mud and fell sideways. The appellant stated that he tried to support himself with his left hand but it went into the embankment and he was injured, as a result of which, he has suffered loss and damage.
2. It was stated by the appellant that it was a term of the contract of employment that the respondent would maintain a safe system of work, provide proper plant and appliances, and would not expose the appellant to unnecessary risk or danger. He contended that the accident herein was occasioned by the respondent's negligence and/or breach of contract of employment, and the respondent's breach of statutory duty since he was employed in a process involving working on uneven, wet and unkempt ground, but was not provided with adequate, effective and suitable protective footwear and/or gloves contrary to Section 101(1) of the *Occupational Safety and Health Act, 2007*.



3. The respondent failed to enter appearance and file a statement of defence in the lower Court and on 28<sup>th</sup> February, 2021, the plaintiff requested for interlocutory judgment against the defendant *vide* a request for judgment dated 12<sup>th</sup> February, 2020. On 2<sup>nd</sup> March, 2020, the Trial Magistrate entered judgment for the appellant as prayed. On 6<sup>th</sup> November, 2020, the respondent filed a memorandum of appearance and on 11<sup>th</sup> November, 2020, it filed a Notice of Preliminary Objection dated 9<sup>th</sup> November, 2020 challenging the propriety of the suit herein on the following grounds –
  - i. That the Honourable Court is not clothed with the requisite jurisdiction to entertain this suit;
  - ii. That Section 16 read with Section 23(1) of the *Work Injury Benefits Act* divests jurisdiction from the Court to adjudicate over the subject matter herein; and
  - iii. That the suit should therefore be struck out with costs.
4. In the lower Court, a ruling was delivered on 11<sup>th</sup> February, 2021 where the Trial Magistrate upheld the Preliminary Objection dated 9<sup>th</sup> November, 2020 and held that he lacks the requisite jurisdiction to adjudicate upon the dispute between the parties herein. As a result, the Trial Magistrate struck out the appellant’s suit and directed each party to bear its own costs.
5. Being dissatisfied with the Trial Magistrate’s ruling, the appellant filed a Memorandum of Appeal dated 9<sup>th</sup> March, 2021 raising the following grounds of appeal -
  - i. That the learned Magistrate erred in fact and in law in failing to consider fully the central role played by pleadings in civil matters;
  - ii. That the learned Magistrate erred in fact and in law in disregarding without basis the fact that the defendant had not filed a defence;
  - iii. That the learned Magistrate erred in fact and in law in disregarding without basis what was pleaded in the plaint;
  - iv. That the learned Magistrate erred in fact and in law in failing to appreciate that the notice of preliminary objection was premature;
  - v. That the learned Magistrate erred in fact and in law in failing to give due regard to the existence of an entry of judgment in default of defence; and
  - vi. That the learned Magistrate erred in fact and in law in upholding the preliminary objection.
6. The appellant’s prayer is for this Court to allow the appeal with costs, set aside the ruling and order of the Honourable Magistrate, and make an order of dismissal of the Preliminary Objection with costs.
7. The appellant’s submissions were filed on 13<sup>th</sup> January, 2023 by the law firm of Kibunja Nyambura & Company Advocates, whereas the respondent’s submissions were filed by the law firm of Murimi, Ndumia, Mbago & Muchela Advocates on 17<sup>th</sup> January, 2023. For reasons to be explained here below, I will not consider the merits or otherwise of the said submissions.

### **Determination**

8. The appellant’s case against the respondent was that he was injured when he slid and fell after reinforcing an irrigation embankment at his place of work. He averred that the said accident was occasioned by the respondent’s negligence and/or breach of contract of employment. This means that the relationship between the appellant and the respondent was that of an employer-employee. In addition, the appellant alleges that he was injured in the course of duty.



9. Appeals arising out of the *Work Injury Benefit Act* (WIBA) and related claims lie to the Employment and Labour Relations Court established under Article 162(2)(a) of the *Constitution* of Kenya, 2010 and whose jurisdiction is provided for under Section 12 of the *Employment and Labour Relations Court Act*, No. 12 of 2011. Section 12(1)(a) thereof is relevant as it provides as follows-

- “(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; -
- a. disputes relating to or arising out of employment between an employer and an employee...”

10. Further, Section 87 of the *Employment Act*, No. 11 of 2007 provides that -

- “(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.”

11. As stated here before, the dispute between the parties herein is about the injuries that the appellant allegedly sustained in the course of his work. That being a work injury claim is a dispute between an employee and his employer, which means that an appeal arising therefrom falls in the jurisdiction of the Employment and Labour Relations Court. Jurisdiction is everything and it can be raised at any time even on appeal. That was the holding by the Court of Appeal in the case of *Kenya Ports Authority v Modern Holdings [E.A] Limited* [2017] eKLR, where it stated as follows-

“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:

“...at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the Court itself...” (emphasis added).

12. Consequently, this Court finds that the appeal herein should have been filed in the Employment and Labour Relations Court in Mombasa. The Voi High Court where this appeal was filed, has no



jurisdiction to deal with an appeal arising from WIBA. Since the instant appeal was filed in a Court without jurisdiction, it was dead on arrival and it cannot be remedied by an order for transfer to the Employment and Labour Relations Court in Mombasa. See the Court of Appeal holding in the case of Phoenix of East Africa Assurance Co. Ltd v S M Thiga T/A Newspaper Service [2019] eKLR. In the premise, the appeal herein is struck out with costs to the respondent who was dragged to the wrong Court in this appeal.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF JULY, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:**

Mr. Kibunja for the appellant

Mr. Mauko h/b for Mr. Karanja for the respondent

Ms. B. Wokabi – Court Assistant.

