



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 164 OF 2015**

**MADISON INSURANCE CO. (K) LTD.....APPELLANT**

**VERSUS**

**1. MULI MWANZIA**

**2. KENYA TEA DEVELOPMENT AGENCY LTD.....RESPONDENT**

*(Being an Appeal against the whole of the judgment of R.M Kitagwa (RM) delivered on 23/10/2015 in Mombasa CMCC No. 3485 of 2004)*

**JUDGMENT**

1. The Appellant herein was enjoined to the lower court's suit **Mombasa CMCC No.3485 of 2004** as the third party. Both parties herein agree that the cause of action arose from a work injury that was alleged to have occurred on 28/6/2004.
2. I have perused the entire file and submissions as filed by parties and find that among other issues, the parties have questions on the employer and employee relationship between the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent for determination. Further, I note that the Appellant as an insurer of the 2<sup>nd</sup> Respondent has denied that the 1<sup>st</sup> Respondent was an employee of the 2<sup>nd</sup> Respondent.
3. It is now well settled in law that there is established an **Employment and Labour Relations Court** to deal with matters between employers and employees. The **Constitution of Kenya** under **Article 162 (2)(a) of the Constitution of Kenya, 2010**, the **Employment and Labour Relations Court** was established and its jurisdiction is provided for under **Section 12** of the **Employment & Labour Relations Court No. 12 of 2011** that provides: -

**12. Jurisdiction of the court**

**(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;**

**(b) disputes between an employer and a trade union;**

**(c) disputes between an employers' organization and a trade union's organization;**

**(d) disputes between trade unions;**

**(e) disputes between employer organizations;**

**(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.

4. Further, **The Employment Act No. 11 of 2007** at **Section 87** provides as follows: -

**87. Complaint and jurisdiction in cases of dispute between employers and employees**

**(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.**

5. It is clear that the dispute herein is that of an employer and employee, with the Appellant having been enjoined by the 2<sup>nd</sup> Respondent as the insurer and sought for indemnification for the judgment as entered against it.

6. The Appellant in this Appeal claims that the 1<sup>st</sup> Respondent was not an employee of the 2<sup>nd</sup> Respondent and thus should be stopped from claiming indemnity.

7. This being a work injury dispute, this Court finds that it does not have the jurisdiction to delve into whether the 1<sup>st</sup> Respondent was the employee of the 2<sup>nd</sup> Respondent. The Employment and Labour Relations Court is the proper court to hear and determine the same as per the provisions of **Section 12 and 87 of the Employment Act No. 11 of 2007**.

8. It is trite that jurisdiction is everything and that the same can be raised at any time even on appeal as was stated by the Court of Appeal in the case of **Kenya Ports Authority–vs-Modern Holdings(EA) Limited [2017], eKLR;-**

**“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even an 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;**

**Provided only that where the court raised it suo moto, parties are to be accorded an opportunity to be heard”.**

9. In view of the above, I find that this Court lacks jurisdiction to determine the Appeal herein and direct that it be transferred to the **Employment and Labour Relations Court** for further directions.

It is so ordered.

**DELIVERED, DATED and SIGNED VIRTUALLY at MOMBASA MOMBASA this 4<sup>TH</sup> day of MAY, 2021.**

**D. O. CHEPKWONY**

**JUDGE**