



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 135 OF 2019

CHINA ROAD & BRIDGE CORPORATION.....APPELLANT/APPLICANT

VERSUS

KIMUYU MBOO.....RESPONDENT

(Being an appeal from the ruling of Hon C.C. Oluoch delivered on the 30.10.2019 in PMCC No 106 of 2016 at Mavoko)

BETWEEN

KIMUYU MBOO.....PLAINTIFF

VERSUS

CHINA ROAD & BRIDGE CORPORATION.....DEFENDANT

RULING

1. This an appeal from the ruling of Hon C.C. Oluoch delivered on the 30.10.2019 in **PMCC No. 106 of 2016 at Mavoko**. However in view of my findings below it is prudent not to handle the same. The ruling appealed against by the appellant reveals that the suit relates to a cause of action brought about as a result of a work injury claim under the Work Injury Benefits Act of 2007. The issues for determination are whether this court has jurisdiction and what orders may be made.

2. In law no court or person assumes jurisdiction. Jurisdiction is a creation of statute. In Kenya all courts derive their power from the constitution under Article 159. The constitution provides for the establishment of the superior courts under Article 162 and subordinate courts under Article 169. Judicial power is exercised by the courts which consist of:

- a) The Supreme Court
- b) The Court of Appeal
- c) The High Court
- d) Subordinate Courts including Magistrates Courts, Kadhis courts, Court Martial.

3. The guiding principle to all courts is that where a suit is filed in a court that lacks jurisdiction to hear

and determine the suit, then the suit will be deemed a nullity as per the decision of Nyarangi JA in the case of **OWNERS OF MOTOR VESSEL” LILLIAN S” V. CALTEX OIL (K) LTD (1989) KLR 1** who held as follows:

“Jurisdiction is everything without which a court of law has no power to make one more step. Where a court of law 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 the moment it holds the opinion that it is without jurisdiction.”

4. In selecting a court with power over the type of litigation, regard must be made to the enabling law which empowers such court to hear such a case. This matter relates to a work injury where the respondent sustained injuries while in the course of employment with the appellant. Hence the dispute is basically an employment and labour related one which should be handled by the Employment and Labour Relations Court. Pursuant to Article 162 of the constitution parliament enacted the Employment and Labour Relations Act No. 20 of 2011. Section 12(1) provides the jurisdiction 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 employee and an employer.

b) disputes between an employer and a trade union.

c) disputes between an employer’s organization and a trade union’s organization.

d) disputes between trade unions.

e) disputes between employer organization.

f) disputes between an employer’s 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 selection of trade union officials.

j) disputes relating to the registration and enforcement of collective agreements.

5. 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.

6. As the relationship between the respondent and the appellant is one of employee and employer, it follows that the dispute herein ought to be tried before the Employment and Labour Relations Court. Even though the suit might have been pending before the magistrate's court or that it had been finalized there, I find the next forum to determine the application and the appeal should be the ELRC. Hence the appeal ought not to have been filed here in the first place as this court lacks jurisdiction.

7. Having established that this court lacks jurisdiction, the next issue for determination is whether the application and the appeal should be struck out or dismissed for want of jurisdiction. Resorting to such a measure appears to be drastic in my view. I find the best option in the circumstances is to have the matter transferred to the ELRC for determination. This is in the interest of justice for the parties who have a legitimate expectation to have the dispute determined on merit. There will be no prejudice suffered if the order is made.

8. In the result I order this matter be and is hereby transferred to the Employment and Labour Relations Court for determination. Each party to bear their own costs.

It is so ordered.

Dated and delivered at **Machakos** this **5th** day of **February 2020**.

D. K. Kemei

Judge