



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KAKAMEGA**

**CIVIL APPEAL NO. 127 OF 2014**

**(An appeal arising from the judgement and decree of Hon. J. Ong'ondo,**

**Principal Magistrate, of 6<sup>th</sup> October 2014, in Kakamega CMCCC No. 438 of 2011)**

**WEST KENYA SUGAR COMPANY LIMITED.....APPELLANT**

**VERSUS**

**TOM MUZEE MUKHWANA.....RESPONDENT**

**RULING**

1. The appeal herein was filed in 2014. Since then the appellant has never filed a record of appeal and, therefore, the appeal has never been ripe for the taking of directions which would have paved way for its disposal. The last time the matter was in open court before a Judge was 24<sup>th</sup> November 2016. Directions were given that the lower court file be availed and that the proceedings be typed. Directions were then to be given on 2<sup>nd</sup> February 2017. Nothing substantive happened thereafter until the matter was placed before me for dismissal on 25<sup>th</sup> April 2019, and I dismissed the appeal for want of prosecution.

2. That dismissal, apparently, aroused the appellant from its long slumber, for it lodged a Motion herein, dated 23<sup>rd</sup> October 2019, for the setting aside of the dismissal order. Its primary argument being that no notice of the dismissal had been served. It has referred to service of a previous notice of dismissal in 2018 but the court then did not sit on the appointed day for the dismissal. The application was opposed by the respondent.

3. The record is clear. Since 2014 when the appeal herein was filed nothing substantive has been done to have it disposed of. No record of appeal has been filed, and the registry could not, therefore, have it listed for directions. It can very frustrating for registry staff who get stuck with files of parties who appear to be unwilling to have the cases processed for hearing. I see a letter on record, dated 2<sup>nd</sup> October 2017, from the trial court, forwarding the trial court's original records to the High Court. The letter was copied to the advocates for both sides. That ought to have acted as a trigger on the appellant to take some step. It did not. Then it concedes that it was served with a notice for dismissal of the appeal sometime in 2018, came to court for the dismissal, but the court did not sit, so it went back to sleep, until October 2019, when it was served with a decree.

4. There is no doubt in my mind that the appellant has been extremely indolent so far as prosecution of the appeal herein is concerned. The court should not be a place for the parties to file their cases and then leave them parked there and go to sleep, only to wake up whenever the court takes some adverse action. It is up to the parties to prosecute their cases. The court's not a depository for keeping dead files of parties who are unwilling to advance their cases. I am not persuaded that there exists any good reason for the revival of the appeal.

5. I will, however, exercise discretion to reinstate the appeal only because the High Court has no jurisdiction to handle it in the first place. That jurisdiction did not exist in 2014 when the appeal was filed, and my predecessors who handled it ought to have transferred it to the court where it ought to have been filed.

6. The Constitution, 2010, at Article 162(2), establishes a special court to handle disputes that revolve around industrial and labour relations. Article 165(5), of the same Constitution, strips the High Court of jurisdiction over such matters. For avoidance of doubt, Article 162(2) states as follows:

*'Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –*

*(a) employment and labour relations; and*

(b) ...’

On the other hand, Article 165(5) of the Constitution states as follows:

*‘The High Court shall not have jurisdiction in respect of matters-*

(a) ...

(b) *falling within the jurisdiction of the courts contemplated in Article 162(2).’*

7. Parliament in obedience to Article 162(2) of the Constitution, did, through the Employment and Labour Relations Court Act, No. 20 of 2011, establish such a court, known as the Employment and Labour Relations Court. The jurisdiction of the Employment and Labour Relations Court is set out in section 17 of the Employment and Labour Relations Court Act. The said court has exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution, relating to employment and labour relations, which include disputes relating to or arising out of employment between an employer and an employee.

8. The pleadings lodged at the lower court, sometime in 2011, disclose that the parties thereto were in an employer and employee relationship at the time material in the dispute at hand. The cause of action is said to have had arisen in the course of the said employment. It is alleged, in the plaint, that the said cause of action arose on account of breach of the terms of the employment contract by failure to provide a safe working environment. The suit, therefore, turned on matters that related to industrial or employment or labour relations.

9. What a court ought to do, where it forms an opinion that it has no jurisdiction, was settled by the Court of Appeal in *Owners of the Motor Vessel ‘Lillian S’ vs. Caltex Oil (Kenya) Limited* (1989) KLR 1, where it was said:

*‘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 ... A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’*

10. The Constitution, 2010, came into operation on 27<sup>th</sup> August 2010. In my understanding, that is the effective date when the High Court lost jurisdiction over matters in the nature of the instant one. It follows, then, that I, sitting as Judge of the High Court, have no jurisdiction to deal with this matter. I cannot make any one more step in it, besides writing this ruling, and I should down my tools at this point. The dispute in question falls squarely within the exclusive jurisdiction of the Employment and Labour Relations Court. I shall, accordingly, reinstate the appeal and direct that the matter be transferred to the Employment and Labour Relations Court at Kisumu for final disposal or for further directions.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF February, 2020**

**W. MUSYOKA**

**JUDGE**