



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 689 OF 2017

JULIANA KATINI MDARI.....APPELLANT

VERSUS

MASTERMIND TOBACCO KENYA LIMITED.....RESPONDENT

(Being an appeal from the ruling and order of Honourable D.O. Mbeja (Mr.) (Senior Resident Magistrate) delivered on 29th November, 2017 in Milimani CMCC No. 1 of 2012)

JUDGEMENT

1. The respondent herein who was the plaintiff before the Chief Magistrates Court at Milimani instituted a suit vide the plaint dated 5th December, 2011 and sought for the sum of Kshs.993,100/ plus costs of the suit and interest on the same, against the appellant.
2. The claim arose out of the sum of Kshs.993,100/ which was advanced to the appellant by the respondent as a loan amount and in the course of her employment with the respondent, the purpose of which was to further her studies at Strathmore University.
3. The respondent pleaded in its plaint that out of the aforementioned sum, Kshs.293,100/ was to go towards payment of school fees; Kshs.50,000/ was for the purchase of a laptop for the appellant's personal use; while Kshs.650,000/ was the bond value executed by the appellant.
4. It was pleaded in the plaint that it was a further term of the loan agreement that the appellant would work for the respondent for a further period of 36 months upon completion of her studies, failing which she would be required to compensate the respondent the sum of Kshs.1,500,000/.
5. It was further pleaded in the plaint that sometime on or about the 7th day of June, 2010 the appellant suddenly and without notice left the respondent's employment, thereby leaving behind the outstanding debt of Kshs.993,100/ which the respondent sought in the suit.
6. The appellant entered appearance on being served with the summons and filed her statement of defence on 6th May, 2016 to deny the claim.
7. The appellant subsequently filed a notice of preliminary objection dated 1st September, 2017 in which she raised the following grounds of objection:
 - i. THAT contrary to Sections 4 and 9 of the Registration of Documents Act Cap. 285 Laws of Kenya, the plaintiff failed to register the staff bond dated 4th May, 2009.***
 - ii. THAT the plaintiff failed to comply with Sections 5 and 19 of the Stamp Duty Act Cap.480 Laws of Kenya by failing to pay stamp duty on the staff bond dated 4th May, 2009.***
 - iii. THAT contrary to Section 12 of the Employment and Labour Relations Court Act Cap. 234B Laws of Kenya and Section 87 of the Employment Act 2007 the plaintiff instituted the matter in a court that lacks jurisdiction to hear and determine the same.***
8. For the foregoing reasons, the appellant sought to have the respondent's suit dismissed with costs.
9. Upon considering the preliminary objection, the trial court dismissed it vide its ruling delivered on 29th November, 2017.
10. Being dissatisfied with the aforesaid decision, the appellant lodged this appeal against the same vide the memorandum of appeal dated 8th

December, 2017 and put forward the following grounds of appeal:

i. THAT the learned trial magistrate erred in law by finding that the Magistrate's Court has the requisite competent jurisdiction to hear and determine the suit contrary to Section 12 of the Employment and Labour Relations Court Cap. 234B Laws of Kenya and Section 87 of the Employment Act No. 11 of 2007.

ii. THAT the learned trial magistrate erred in law and fact by finding that the staff bond dated 4th May, 2009 is a valid legal instrument contrary to Sections 4 and 9 of the Registration of Documents Act Cap. 285 Laws of Kenya.

iii. THAT the learned trial magistrate erred in law and fact by finding that the staff bond dated 4th May, 2009 is a valid legal instrument contrary to Sections 5 and 19 of the Stamp Duty Act Cap. 480 Laws of Kenya.

iv. THAT the learned trial magistrate erred in law and fact by dismissing the preliminary objection dated 1st September, 2017 with costs.

11. This court gave directions to the effect that the appeal be canvassed by written submissions. On her part, the appellant submits that since it is not in dispute that the parties herein enjoyed an employer-employee relationship at all material times and therefore the issues arising in the suit fall squarely within the provisions of the Employment and Labour Relations Act and under the Employment Act, and within the exclusive jurisdiction of the Employment and Labour Relations Court.

12. The appellant cited *inter alia*, the case of **Maendeleo ya Wanawake Organisation v Hellen Makone & another [2014] eKLR** where the court held that the Chief Magistrate's Court does not have jurisdiction to hear disputes that fall within the jurisdiction of the Industrial Court (now the Employment and Labour Relations Court) and the case of **Naivasha Self Service Stores Limited v Henry Langat Cheruiyot & 3 Others [2012] eKLR** in which the court determined that the dispute between the plaintiff and defendants in that case having arose out of an employment dispute, falls within the jurisdiction of the Industrial Court.

13. It is also the submission of the appellant that since the staff bond relied upon by the respondent in the suit is neither registered nor stamped, it contravenes the relevant provisions of the Registration of Documents Act and the Stamp Duty Act, thereby making it invalid. The appellant relied on the case of **Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR** in which the court determined that any document that is required to be stamped and/or registered by law is invalid in the absence of such stamping and/or registration.

14. In reply, the respondent argues that whereas there existed an employer-employee relationship between the parties, the suit in question concerns itself with debt recovery and is not an employment dispute. According to the respondent, upon the resignation of the appellant from its employment, it was forced to pursue other avenues to recover the monies advanced to the appellant.

15. The respondent is of the view that should this court find that the suit falls within the jurisdiction of the Employment and Labour Relations Court (ELRC) then it would be in the interest of justice to have the same transferred to the ELRC rather than to dismiss the suit altogether. To support its view the respondent cited the holding in the case of **Abdulmajid Mohamed Adam v Nimish Shah t/a Flora Printers [2017] Eklr** in which it was stated *inter alia*:

“However, what does the expression “down tools” mean?

To me the learned Judge, R.O. Kwach, to be precise, meant and can only be taken to have meant that once jurisdiction is established to be lacking, the court cannot purport to deal with the matter further. It cannot be taken to mean that I just down my tools, the pen, and fold the file ad infinitum. That could result in a large numbers of files that are just folded, never to be touched because the court has downed its tools... Being bound and guided by those very wise and well founded words of the court of Appeal, I chose prudence over imprudence and order that, the appeal be and is hereby transferred to the Environment and Land court, Mombasa for hearing and determination.”

16. Concerning the validity of the staff bond, it is the contention of the respondent that the staff bond in question does not relate to immovable property and hence the provisions of Section 4 and 9 of the Registration of Documents Act would not apply to it.

17. It is similarly the contention of the respondent that the onus of proving that the staff bond ought to have been registered fell on the appellant, who failed to discharge such onus.

18. The respondent is of the view that the staff bond in question; being that for acknowledgment of a debt; is exempted from stamp duty charges pursuant to the Schedule of the Stamp Duty Act and hence Sections 5 and 19 of the said Act would not become applicable to the circumstances of the suit.

19. I have considered the contending submissions and authorities cited on appeal. I have likewise re-evaluated the material placed before the trial court. It is clear that the appeal lies principally against the trial court's decision to dismiss the appellant's notice of preliminary objection. I will therefore deal with the four (4) grounds of appeal contemporaneously.

20. The *first* limb of appeal touches on jurisdiction. Upon perusal of the impugned ruling, I note that the subject of jurisdiction was not addressed by the learned trial magistrate.

21. In the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696**, the court defined the term 'preliminary objection' as follows:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

22. The above definition was further advanced in the Supreme Court case of **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others [2015] eKLR** when it held that:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”

23. The question therefore is whether the preliminary objection in the present instance raised pure points of law. Upon considering the same, I am satisfied that the issue on jurisdiction is a pure point of law since the law is well settled that where jurisdiction lacks, a court ought to down its tools.

24. The provisions of **Section 87** of the **Employment Act No. 11 of 2007** which the appellant cited in her preliminary objection, stipulate as follows:

“(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.

(1) No court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

(2) 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.”

25. Further to the foregoing, the appellant also cited **Section 12** of the **Employment and Labour Relations Court Act** which expresses thus:

“(1) 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 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’ organisation and a trade union’s organisation;

(d) disputes between trade unions;

(e) disputes between employer organisations;

(f) disputes between an employers’ organisation and a trade union;

(g) disputes between a trade union and a member thereof;

(h) disputes between an employer’s organisation 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.”

26. Sub-section 3 of the above Section goes on to provide that:

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) interim preservation orders including injunctions in cases of urgency;

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

27. Upon considering the pleadings and material which was placed before the trial court, I established that it is not in dispute that the respondent and the appellant enjoyed an employer-employee relationship at all material times. It is also not in dispute that the claim relates to the payment of a loan which was advanced to the appellant by the respondent in the course of her employment and for the purpose of advancing her professional development and expertise.

28. I further note that it was a term of the agreement (in this instance the staff bond) that the appellant would be bound to continue working for the respondent for a period of at least 36 months from the date of completion of the training/course for which the loan sum had been advanced.

29. It therefore follows that the provisions of the Act would become applicable to the parties herein since the claim arose out of and related to the employment relationship subsisting among the parties.

30. Nonetheless, while it is correct that the Employment and Labour Relations Court has jurisdiction over employment and labour related disputes, it is noteworthy that vide the gazette notice dated 22nd June, 2018 the Chief Justice in exercising the powers conferred to him under Sections 29 (3) and (4) (b) of the Employment and Labour Relations Court Act, 2011 appointed all magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine among others:

“Disputes arising from contracts of employment (excluding trade disputes under the Labour Relations Act, 2007) where employees’ gross monthly pay does not exceed Kshs. 80,000/ as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.”

31. Upon perusing the pleadings and the material placed before the trial court and without going into the merits of the case, it is apparent that the appellant was earning a salary of below Kshs.80,000/. I also observed that the learned trial magistrate falls within the rank of special magistrates conferred with the power to hear and determine employment disputes.

32. Having determined so, I find no basis for determining that the trial court did not have jurisdiction over the instant dispute and I will now consider the *second* limb touching on whether the staff bond dated 4th May, 2009 is valid.

33. In his ruling, the learned trial magistrate upon considering the provisions referred in the preliminary objection, opined that the said provisions relate to immovable property and not property of a movable nature, as was the case in the suit. The learned trial magistrate also opined that since the debt was acknowledged, then it would be exempt from being charged with stamp duty.

34. Returning to the definition of a preliminary objection laid out hereinabove, it is clear that the same must raise pure points of law and cannot be raised where the facts pleaded ought to be ascertained.

35. Going by the pleadings and the material placed before the trial court, it is apparent that while the appellant on the one hand is of the view that the staff bond is invalid for having not been registered and/or stamped, the respondent on the other hand is of the view that the provisions laid out in the preliminary objection in respect to the staff bond would not apply since it relates to immovable property and that the staff bond is exempt from stamp duty.

36. From the foregoing, it is clear that the facts pertaining to validity of the staff bond are disputed and in order to establish the true position, one would be required to delve further into the pleadings and evidence, which departs from the definition of a preliminary objection.

37. The issue touching on the staff bond is not a proper issue for determination as a preliminary objection on a pure point of law. I therefore concur with the decision of the learned trial magistrate to dismiss the preliminary objection, albeit for different reasons which I have set out hereinabove.

38. In the end therefore, the appeal is without merit, it is dismissed.

However, in the circumstances of the appeal, a fair order on costs is to order, which I hereby do that each party bear its own costs of the appeal.

Dated, signed and delivered online via Microsoft Teams at Nairobi this 6th day of November, 2020.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent