REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 62 OF 2016

WILHEMSEN SHIP SERVICES LIMITED.....APPELLANT

VERSUS

GHARIB HASHIM RASHID.....RESPONDENT

J U D G M E N T

1. On the 27/6/2014 the trial court, Hon Wasike (RM) delivered a ruling by which the court declined to strike out the plaintiff suit while being guided by the decision in ***Phoenix Properties Ltd vs Equip Agencis Ltd [2016] eKLR***. In its rendition in the application dated 02/12/2013 the trial court said:-

> **"I have considered the copy of the Statement of Claim in the Industrial Court claim and the submissions and note that the issue of whether the Sim Card was unlawfully blocked by the Defendant is in determination. This indeed poses a huge risk in regard to conflicting judgments. However it is not enough to merit a striking out of a suit. Being guided by the case of Phoenix Properties Ltd (ibid), I decline to allow the Notice of Motion dated 02/12/2013. I however order that his suit be stayed until full and final determination of the Industrial Cause No. 150 of 2012. Costs of this Application shall be in the cause"**

2. The application leading to that decision sought prayer to the effect that:

> **1. "THAT the Plaint as against the Defendant be struck out and the suit herein be dismissed.**
>
> **2. THAT the Plaintiff to pay the costs of this application and of this suit.**
>
> **WHICH APPLICATION is based on the grounds that:-**
>
> **a) The Plaintiff's cause of action herein accrues from his employment with the Defendant and the termination thereof which has already been heard in and is pending determination in the Industrial Court at Mombasa (Industrial Cause No. 150 of 2012 Gharib Hashim Rashid vs Wilshemsen Ships Services Limited).**
>
> **b) The Plaint herein and this suit is, in the premises, frivolous, scandalous and an abuse of the process of this Honourable Court and is likely to delay and/or prejudice the fair trial thereon.**
>
> **c) The Plaint herein therefore ought to be struck out and dismissed with costs to the Defendant".**

3. The basis of that application was the suit filed at the Employment and Labour Relations Court as ELRC No. 895 of 2011 between the same parties which was said to have dealt with the same issues and had them determined.

4. In that suit at ELRC it was specifically pleaded at paragraph 12(c) of the statement of claim without equivocation that the question of deprivation or taking away of the plaintiffs sim card for telephone No. 0722871208 and demand for its return was the subject of the suit giving rise to this appeal. In the claim the Respondents prayers were for a declaration that failure to pay terminal dues in the sum of Kshs.89,075.60 was illegal unlawful, unfair and unjustifiable, payment of the said sum as well as general damages, interest and costs. To that statement of claim was filed a Reply in which it was contended that the reliefs sought therein were identical to those sought in Mombasa CMCC No. 216 of 2010 between the same parties and ought to be struck out. The Appellant further exhibited the submissions by the parties as well as the judgment rendered by the judge in the Employment and Labour Relations Case as well as the judgment.

5. In that judgment the court found for the Respondent and awarded him one month's salary and pay for 11 leave days. There is totally no mention of the dispute on the sim card or any determination over the same.

6. The same application must be seen to have been hinged upon and purposed to further the Notice of preliminary objection dated 27/5/2012 by the Defendant at trial and Appellant here.

7. When served with the Application, the Respondent now, as the plaintiff at trial, filed a Notice of Preliminary Objection dated 28/01/2014 on the 30/01/2014 in which it was contended and argued that the question of jurisdiction of the trial court had been the subject of litigation and determination by that court by its ruling of 31/01/2013 and was not available for re-litigation unless the court be seen to sit on appeal of its own orders and the court had no jurisdiction to entertain or hear the Application on that score alone.

8. In urging the application both sides filed lists of authorities with the Appellants list being dated 15/4/2014 containing some three decisions and the while the Respondents list was dated 3/2/2014 and filed in court the same day citing some 4 decisions.

9. It would appear that the parties did urge the Application orally on the 10/12/2015 when Mr. Ondego appeared for the Appellant/Applicant while Mr. Njoroge appeared for the Respondent both here and in the court below.

10. In the course of urging the appeal a matter arose as to whether or not there had been leave granted to the Appellant to file the appeal. That matter necessitated the Notice of Motion dated 22/11/2017 which then culminated in the Ruling dated 4/2/2019 by which leave was granted and the appeal deemed duly filed. That decision thus concluded the dispute on the competence of the appeal with the consequence that the court is now mandated and tasked to determine the Appeal on the eight grounds of appeal set out in the memorandum of Appeal dated the 29/4/2016. Even if so set in those many grounds, a scrutiny of all the grounds boil down to only three grounds which can be summarized as follows:-

a) The trial court ran into error in failing to find that the matter before her as canvassed in the Notice of Motion dated 9/11/2015 was res judicata R C No. 150 of 2012.

b) The learned trial magistrate erred in law by considering irrelevant matters in arriving of her decision dated 15/4/2016.

c) The learned trial magistrate erred in law in failing to consider the Appellants submissions on the matter before her.

11. In seeking to determine the appeal those grounds shall be deemed my issues for determination and I thus propose to deal with the same distinctively and in a reverse manner starting with the issue on whether or not the submissions offered were considered.

Consideration of the submissions offered by the Appellant

12. The law as established in this country is that submissions are just the opinion of the party or counsel on the matter before court but cannot be deemed as pleadings of indeed evidence[1]. However it must also be noted that offering submissions is a way of seeking to achieve the parties' and counsels' obligation to court under Section 1A (3) of the Civil Procedure Act, to facilitate the just, expeditious, proportionate and affordable resolution of court disputes. That ideally ought to be achieved by parties observing fidelity to that duty by recalling accurately and succinctly the factual evidence as recorded and citing to court all the law both statutory and stare decisis, for and against their respective cases to enable the court appreciate and make a balanced and informed decision. However the reality has been, as the Court of Appeal said in Daniel Toroitich Arap Moi's case, that *'submissions are a marketing language by which parties endeavor to persuade the court that their part of the case is the better one'*.

14. To that extent submissions as offered by parties are not binding upon the court as long as they remain what a party or counsel interpretes the law it considers to support its case. That notwithstanding however, I hold the view that whenever parties offer written submissions a court is, out of courtesy, expected to atleast comment on such submissions if not for anything else but to appreciate the efforts industry and resources put in availing same.

15. In ***Basari Company Ltd vs Mwamburi Wangio [2018] eKLR***. This court when faced with such a ground had this to say:-

> **"It is an established and crystalized point and position of the law that submissions by themselves are not pleadings nor evidence. However when submissions are offered to court to purely assist it come to an award comparable to previous awards for comparable injuries, the same must be seen as assistance offered to court by the litigant or counsel towards discharge of duty to court. In that event a court is obligated to make reference and take regard of such submissions even if such is done at the level of courtesy and appreciation of the parties' industry. It would be to this court unwarranted for parties to take time and employ material resources in offering submissions to court only for the court to wholly ignore same".**

Did the court here ignore the submissions offered?

16. In this matter the submission by the parties were offered orally and supported by decision of the Employment and Labour Relations Court in the related matter as well as the trial courts decision on a preliminary objection dated 27/06/2014 to be found respectively at pages 285 to 295 and 213 to 218 of the Records of Appeal.

17. The appellant, additionally, by their letter dated 8/01/2016 forwarded to court the decision in ELRC No. 346/2014 but there are comments on the said letter to the effect that the same would not be considered having not been served on the Respondent. However the copy proceedings availed to court does not reveal that any other decided case was cited to court by either sides to guide or persuade the court

on the point at hand.

18. A reading of the ruling now appeal against reveal that the court did have deep regard to the submissions offered. I do not consider this ground to merit upsetting the decision challenged before me and accordingly dismiss it as unmerited.

Did the trial court give any regard to irrelevant matter?

19. Throughout the submissions by counsel nothing came out to support this ground of appeal. Infact having given a summation of the facts leading to the appeal, the counsel for the Appellant was content to say:

> **"In ruling in question…..the court said the matter of conversion did not fall within the ambit of ELRC".**

20. That to me cannot be an irrelevant matter in my view the argument offered to court may as well suggest that the counsel himself did not believe in this ground appeal. The submission to say the least was utterly bare. However, this court's mandate on first appeal taking the nature of a rehearing I have had the benefit of reading the materials provided to the court in support as well as in opposition to the appeal and the resultant decision and I am unable to find any consideration of irrelevant factors. This ground of appeal equally fails and is thus dismissed.

Was the matter in the suit res judicata?

21. To answer this question the court must consider and appreciate the dispute between the parties at the Employment and Labour Relations Court as compared to what was pleaded and prayed for before the lower court.

22. I have perused the Amended plaint in the matter exhibited in the supplementary record of Appeal filed in court on the 24/7/2017. That pleading pleads the tort of conversion as against the defendant in contradistinction to the claim for unlawful termination and recovery of terminal dues sought before the ELRC. While I do appreciate that even a matter that is not pleaded but was ought to so pleaded is subject to the res judicata Rule pursuant to Section 7 explanation 4, of the Civil Procedure Act the law provides as a fundamental requirement that the trial court that decided the previous matter must have had jurisdiction to try and determine the matter that was substantially in issue for the Rule to apply.

23. In this matter having found that the plaintiffs claim was grounded on the tort of conversion, I respectfully find that it was not a matter that fell within the jurisdiction of the ELRC which the constitution provide to be exercised over Employment and Labour Relations Disputes. In my view the claim by the Respondent that he was the registered owner of the telephone no. 0722 was not such a dispute relating to or arising out of employment between him and the Appellant[2]. It was to me a common tort that did not attach to an employment dispute.

24. The expression Employment and Labour Relations must be given its natural and ordinary meaning. I am in no doubt that as enacted, the statute enacted by parliament pursuant to article 162(2), at Section 12(1)(a) concerns the first mandate of the court to deal with employment disputes, while the rest of the subsection b-j are essentially the other mandate concerning labour relations. In my understanding a dispute that falls for determination by the court under Section 12 (1)(a) must be a dispute between an employer and employee and directly arising out of the employment relationship.

25. It may include any wrong done to either party as such employee or employer in the cause of his engagement and by virtue of such engagement of such employment. It must however not include every wrong to include all wrong committed to an employee by an employer and vice versa. To allow each and every dispute between an employer and employee to fall for the determination would to water down the intention of Kenyans in creating that court as a specialized court. If for example an individual employer were to have a dispute, for example of eloping with the other spouse or child such a dispute even if it happens in the context of and environment of employment must go to the family court. It would not be proper that just because the two were engaged in an employment relationship their dispute must go to the ELRC.

26. Like in this matter what the employer is alleged to have done was to this court a common tort that need not be founded upon the contract of employment.

27. In coming to this conclusion in no doubt seek to contradict the well reasoned decision by my brother James Rika J, in NAQVI SYED OMAR VS PARAMOUNT BANK LTD. In that matter the plaintiff sued the defendant for defamation and malicious prosecution. The cause was grounded on a report by the Defendant as an employer of the plaintiff to the effect that while in its employment the plaintiff did commit an offence of theft which then led to prosecution which ended in the plaintiffs favour. The suit was thus for both unfair dismissal as well as malicious prosecution and employment related defamation. Those facts are distinguishable for the facts here.

28. Accordingly I do find that in coming to the finding that the tort of conversation was never pleaded in the dispute before the ELRC and was thus not a matter substantially in issue before that court, the trial court no to error as to entitle this courts to interfere with the decision thereby reached. The suit was not res judicata but instead it was the application that was on account of the decision by Hon. Odenyo PM on the Preliminary Objection dated 28/1/2012.

29. The upshot is that I find no merit in the entire appeal and order that the same be dismissed with costs to the Respondent.

Dated and delivered at **Mombasa** this **14th** day of **May 2019**.

P.J.O. OTIENO

JUDGE

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[1] Nganga & Another vs Owiti & Another [2008] 1 KLR 749 and Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi [2014] eKLR

[2] Section 12 1(a) Employment & Labour Relation Court Act