



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL APPEAL NO. 87 OF 2018**

**RAPID KATE SERVICES LTD.....APPELLANT**

**VERSUS**

**STEPHEN OTIENO OUMA.....RESPONDENT**

**R U L I N G**

1. The appeal before court arises from the decision of the trial court Nyakweba (Mr), Principal Magistrate, in Mombasa CMCC No. 734 of 2019 dated 24/4/2018 by which the court held the Appellant liable to the Respondent for injuries said to have been suffered by the Respondent while at work place.
2. Having come to the knowledge of the existence of the appeal and the application for stay pending appeal, the Respondent filed both Replying Affidavit and a Notice of preliminary objection. When parties attended court, it was agreed that there being an objection based on jurisdiction the same be canvassed first.
3. In arguing the preliminary objection the Respondent relied upon the provision of articles 165(3) of Work Injury Benefits Act and submitted that this court lacks jurisdiction to entertain the appeal as the appellate jurisdiction is exclusively vested upon the Employment and Labour Relations Court. He cited to court the decisions in case of ***Said Mohammed vs Diamond Industries [2018] A.G. vs LSK & Another [2017] eKLR*** as well as the celebrated case of Re ***Lilian 'S' [1989] KR*** to support his arguments.
4. For the Appellant, the preliminary objection was opposed on the basis that the suit giving rise to the appeal was based on the tort at work place and therefore the High Court had requisite jurisdiction. He cited to court the decisions in ***Kenya Cargo Services Ltd vs Ugwang [1985] eKLR*** for proposition that a person injured at work place has the option to file his suit at the High Court or the Industrial court (as the court was then called). The counsel additionally cited to court two decisions in ***Julius Oseya vs Antonin Refrigeration Engineering Co. Ltd [2017] eKLR*** and ***Elija Okemwa vs Clerk, County Assembly of Nyamira & 4 Others [2018] eKLR*** for the proposition that there exist incidental and concurrent jurisdiction between this court and the Employment and Labour Relations Court and that where that be established, the court has the option to order the matter transferred instead of striking out. Without citing any decision, the counsel adverted to the well-known principle of law that striking out is a draconian remedy that should be resorted to and employed in the clearest of the clear cases.
5. In rejoinder to the Appellants submissions, the Respondent stressed the point that the High Court is not superior to the court of equal status but conceded that some of the decisions cited to court were pre 2010 constitution and must therefore be read and construed in line with the new constitution.
6. Having read the memorandum of Appeal and the submissions offence together with the authorities cited, I would isolate only one issue calling upon the court for determination:-whether or not this court is seized of jurisdiction to hear and defence the appeal. However if the objection be upheld then there arises the incidental

question of what becomes the fate of the appeal. But before then, a preliminary objection must be self-evident from fact pleaded and placed before court<sup>[1]</sup>.

### **Analysis and determination**

7. Whether this court has or lacks jurisdiction to entertain the suit is a matter of the law because the jurisdiction is a pure matter of the law.

The starting point must however be the constitutional provision at article 165 which provides:-

**165(3) Subject to clause (5), the High Court shall have:-**

- a) unlimited original jurisdiction in criminal and civil matters;**
  - b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated,  
  
infringed or threatened**
  - c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;**
  - d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-
    - i) the question whether any law is inconsistent with or in contravention of this Constitution;**
    - ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;**
    - iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and**
    - iv) a question relating to conflict of laws under Article 191;****
- and**
- e) any other jurisdiction, original or appellate, conferred on it by legislation.**

**(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.**

**(5)The High Court shall not have jurisdiction in respect of matters-**

- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**
- (b) falling within the jurisdiction of the courts contemplated in Article 162 (2).**

8. To understand the ousted jurisdiction of the High Court pursuant to article 165(5), foregoing, one must go back to article 162(2) which empowers parliament to establish courts of equal status to the High Court to hear and determine disputes relating to (for Employment and Labour Relations Court):-

- a) "Employment and Labour Relations"

9. The answer sought in this determination shall however be found in what is the meaning to be assigned to the phrase '**Employment and Labour Relations**'. That endeavor must be informed by the cause of action the Respondent pleaded before the trial court and the defence the appellant filed therein. That is the only way this court can know what was the dispute before the trial court. That task can only be done once all the

material is availed.

10. In the file before me, none of the parties has made any attempt to avail to court such pleadings nor the judgment to the extent that this court is totally in the dark as to what was dark as to why the Respondent suddenly deems the matter to belong to the exclusive jurisdiction of the Employment and Labour Relations Court. A preliminary objection is argued on the basis that what is asserted by a party is conceded by the opposite side or just undeniable for being clear to everybody to see without stringent scrutiny of facts or evidence<sup>[2]</sup>.

11. Without the facts said to declare the dispute between the parties to be that capable of being called Employment and Labour Relations Dispute. I am unable to accede to the objection and hold that to proceed that way would be to grope in the dark.

12. The upshot is that the objection was improperly taken or prematurely taken and thus cannot succeed but must dismissed.

13. Let the application dated 4/7/2018 be heard on the merits and the parties be at liberty to file and exchange written submissions. Hearing on 7/11/2018.

**Dated and delivered at Mombasa this 2<sup>nd</sup> day of October 2018.**

**P.J.O. OTIENO**

**JUDGE**

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<sup>[1]</sup> Per Law JA, in Mukisa Biscuits Co. vs West End Distributors Ltd [1969] EA 696 at page 700 para D.

<sup>[2]</sup> Per Sir Newbold P, in Mukisa Biscuits (ibid) at page 701 para B