REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 1 of 2016

SPINNERS & SPINNERS LIMITED.....APPELLANT/RESPONDENT

VERSUS

JULIUS MUTUNGA MUTISO…….....…..…RESPONDENT/APPLICANT

RULING

1. The application for consideration is the one dated 23/09/2016 ("Application"). It asks the Court to strike out the appeal filed in by the Appellants on the ground that this Court has no jurisdiction to hear the appeal and that the appeal rightly belongs to the Employment and Labour Relations Court (ELRC).

2. Consequently, the singular issue presented by the Application is whether an appeal from the judgment and decree of Thika Chief Magistrate?s Civil Case No. 1027 of 2014 lies to this Court or the ELRC. A secondary and necessarily consequential issue is whether, if I reach the conclusion that an appeal rightfully lies to the ELRC the only course of action would be for me to strike out the appeal.

3. The facts are not in dispute: In the court below, the Applicant herein filed a suit against the Respondent claiming general and special damages for injuries sustained while the Applicantwas in the course of his employment. The suit sounded as one in torts (common law negligence) as well as breach of statutory duty of care. At the conclusion of the Trial, the Learned Magistrate awarded general damages in the sum of Kshs. 100,000/= and Special damages of Kshs. 3,000/=.

4. The Respondent was dissatisfied with that decision and timeously appealed to this court. The Applicant has responded with the present Application.

5. The Applicant?s argument is straightforward: Article 165(5) of the Constitution prohibits the High Court in mandatory terms from exercising jurisdiction over matters reserved for courts contemplated under Article 16(2) (2Article 162(2) Courts"). This includes the ELRC.

6. The Applicant argues that the Plaint in the Court below made it very clear that the matter was an employment matter. He cites paragraph 3 of the Plaint which stated: "At all material times the Plaintiff was employed by the Defendant at its company" (sic). It therefore follows, the Applicant argues, that a central issue for determination in the court below was whether or not the Applicant and the Respondent were in an employer-employee relationship. If that was the central issue, the Applicant argues, it follows that the High Court cannot have jurisdiction since only the ELRC has such jurisdiction.

7. In aid of his Application, the Applicant has cited two cases: my own decision in ***Kiambu HCCA No. 6 of 2016 Devki Steel Mills Ltd v John Mbuvi Mackenzie*** and ***Francis Mutunga Musau v Devki Steel Mills Limited 2015 eKLR (Nairobi Misc. No. 91 of 2015***).

8. The Application is, naturally, opposed. The Respondent contests that this is an employment matter. The central issue, the Respondent claims, is negligence which is a tort. Indeed, the Respondent points out that the Applicant particularized the allegations of negligence in paragraph 8 of the Plaint. The fact that there was employer-employee relationship does not per se turn the matter into an employment matter. The Applicant cited ***Kiamokama Tea Factory Co. Ltd v Joshua Nyakoni (Kisii HCCA No. 169 of 2009***). In that case, the issue was whether a suit arising out of workplace injury is one in torts or contracts for purposes of the Statute of Limitations. In finding that such a suit sounded in torts not contracts, Justice Muriithi stated as follows:

As I understand the matter, the duty of care stipulated by the statute in employment cases is a civil obligation which arises where a relationship of employment exits, hence the need to plead the contract of employment. The contract of employment is a condition precedent for the crystallization of the statutory duty of care. This duty remains a tort which only arises in the context of a contract of service. Breach of the statutory duty of care is not a breach of the contract but breach of duty of care in tort and therefore the subject of the limitation period prescribed for actions based on tort in the Limitations of Actions Act …. Accordingly, I find the Plaintiff?s suit herein is an action in tort.

9. To recap the controversy here, the Applicant has submitted that this Court does not have jurisdiction to entertain the intended appeal because, he argues, the intended appeal is from a matter arising out of an employer-employee relationship and thus falling within the jurisdiction of the Employment and Labour Relations Court as the Court with the constitutional and statutory jurisdiction to entertain appeals from magistrates? courts on employer-employee matters.

10. The Applicant?s position is that the plain reading of the Constitution at Article 165(2) and section 12(2) and (3) of the Employment and Labour Relations Court Act warrants the conclusion that the Employment and Labour Relations Court (ELRC) has the exclusive appellate jurisdiction over the matter contemplated in the intended appeal since the cause of action arose out of workplace injury.

11. The question, then, is whether an appeal from an award of damages for an injury sustained in the course of employment is an "employment and labour relations" matter that belongs to the ELRC. The Applicant thinks so; the Respondent thinks not. As the Applicant pointed out, I dealt with this same question in the ***John Mackenzie Mbuvi Case*** cited above. After analysis, I followed the reasoning by my brother Mabeya J. in the ***Francis Mutunga Musau Case***.

12. I must admit that this is a question that has caused me much anxiety. The Respondent is surely correct that parties are facing much uncertainty on this question as there has been no authoritative enunciation yet of the correct legal position by the Court of Appeal. Suffice it to say that I have not been persuaded by the present appeal that jurisdiction lies with the High Court. This is partly because I think the decision by Muriithi J. cited to me is distinguishable. The question the Judge was dealing with in the ***Joshua Nyakoni Case*** is not one of jurisdiction but one of the application of the Statute of Limitations. My view is that a claim based on work place injury is a sui generis suit which combining a claim for compensation for the injury (tort) but based on the contractualized relationship between the parties (employer-employee) and, due to its uniqueness, governed by particular occupational statutes. As such, one can find a work injury compensation suit more tort-like for purposes of the Statute of Limitations – but that does not answer the question as to the Court with the appropriate jurisdiction to hear the matter.

13. In the ***John Mackenzie Mbuvi Case*** I cited Section 12 of the ELRC Act which defines the jurisdiction of the ELRC. It stipulates that the 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, and the provisions of this Act, or any other written law which extends jurisdiction to the Court relating to employment and labour relations.''*

14. On the other hand, section 87(1) of the Employment Act provides as follows:

Subject to the provisions of this Act, whenever – [a] an employer or employee neglects 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 on 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.

15. And Section 87 [2] states categorically: "*No other Court other than the Industrial Court shall determine any complaint or suit referred to in subsection [1].''*

16. In the ***Francis Mutunga Musau case*** cited above, after analyzing these provisions of the law, Justice Mabeya concluded as follows:

An employment dispute in my view may be defined as a controversy between an employer and employee relating to each other?s rights and obligations arising out of the contract of employment between them which includes the conditions of employment.

Justice Mabeya then went on to conclude that the ELRC is the proper forum to deal with matters where negligence is pleaded in the lower court as arising out of employer-employeerelationship since the cause of action is pegged on and is dependent primarily upon the relationship of employment.

18. I had earlier agreed wholly with the reasoning of Justice Mabeya. This is what I stated in the ***John Mbuvi Mackenzie Case***:

A workplace injury claim is predicated firstly on the employment relationship between the parties. Section 87 of the Employment Act expressly envisaged that such matters will fall under the jurisdiction of the ELRC. Both for reasons of comity, the need for consistency and predictability in legal decisions as well as independent reasoning, I am persuaded to follow the reasoning by Justice Mabeya in the ***Francis Mutunga Case***. I therefore hold that this Court does not have jurisdiction to entertain this matter.

I still hold the same opinion despite the obvious difficulties this exposes to would-be appellants in such cases. For me, the bottom-line is that the prevention and compensation of work place injuries forms part of the typical nature of the employer-employee relationship. It thus must fall within the jurisdiction of the ELRC. This is, indeed, one reason Kenyans wanted all employment matters to be heard by the ELRC: its specialization in employment matters including its specialization in national insurance-related matters.

20. Having concluded that the High Court is not the appropriate forum for this appeal, I must answer a second, consequential question: must I then strike out the appeal? The Respondent has urged me not to take the "draconian" step of striking out the appeal but instead to transfer it to ELRC. He cites, in his aid, the needs for substantive justice and the fact that the filing of the appeal here is a result not of his own shortcoming but of the legal uncertainty on this question. To demonstrate this, he has reminded me that these questions are still very much alive as demonstrated in the on-going case,

Malindi Law Society v The AG and 3 Others (Civil Appeal No. 65 of 2016).

21. The question, then, is whether this Court can transfer to the ELRC the appeal filed herein after it has concluded that it does not have the jurisdiction to entertain the appeal. I recently dealt with this question in the related issue whether this Court can transfer to the appropriate Equal Status Court a suit that has been wrongly but in good faith filed before it. In reaching the conclusion in that case, ***Pamoja Women Development Programme & 3 Others v Jackson Kihumbu Wang'ombe & Another (Kiambu H.C. Civil Suit No. 16 of 2016***), I had this to say:

Kenyans desired specialised courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What

Kenyans bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial

time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts.

Kenyans? objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenyans did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits.

This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit.

I see no useful purpose that is served by this other than punishing a party that acted in good faith. This would be an appropriate course of action where it can be shown that the Plaintiff acted in bad faith in suing in the wrong court but not where the Plaintiff acted in good faith.

22. I then distinguished between substantive and incidental jurisdiction and concluded that even in the absence of express statutory provisions the High Court and, indeed, any of the Equal Status Courts, has inherent incidental jurisdiction to transfer matters which are improperly but in good faith filed before them but they more appropriately belong to one of the other Equal Status Courts. In reaching that conclusion, I said the following which I reiterate here:

I agree there is ***no substantive concurrent jurisdiction*** shared between the High Court of Kenya and the two Article 162(2) Equal Status Courts. Indeed our Constitution advertently aimed to isolate the jurisdiction of the Equal Status Courts and prohibit the High Court from exercising jurisdiction in areas of specialisation of these Courts.

However, I believe the constitutional architecture provides for ***incidental concurrent jurisdiction***. For example, there is no longer any serious questions that the two Equal Status Courts have case-wide jurisdiction to hear and determine any additional other issues raised or pleaded in a case which is primarily on their area of specialisation even if those issues normally fall outside their jurisdiction. This is the reason Equal Status Courts can deal with any issues raised respecting the violation of the Bill of Rights for example.

In my view, this ***incidental concurrent jurisdiction*** includes the ability of both the High Court and the Equal Status Courts to deal with certain procedural or administrative questions that present quasi-judicial issues where the Court in question is requested to act in the interests of justice or due administration of justice. This is where I would locate the ability of any of the threesuperior courts of cognate jurisdiction to transfer to the counterpart superior court any case filed before it that would more appropriately be adjudicated in the cognate superior court. Under this ***incidental concurrent jurisdiction***, the High Court was able, for example, to transfer certain matters to the Environment and Land Court and the Environment and Labour Relations Court initially.

23. I have found no reason to depart from this reasoning.

24. Consequently, my decision on the matter is that while this Court does not have jurisdiction to hear the appeal, the Court has incidental concurrent jurisdiction to transfer it to the appropriate Equal Status: The Employment and Labour Relations Court.

25. The orders, then, shall be as follows:

> a. The appeal herein to wit Kiambu High Court Civil Appeal No. 1 of 2016 shall be transferred to the Employment and Labour Relations Court in Nairobi for hearing and disposal.

b. The Applicant is awarded the costs of this Application.

26. Orders accordingly.

Dated and delivered at Kiambu this 3rd day of February, 2017.

JOEL NGUGI

JUDGE