REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

MISC. CIVIL APPLICATION NO. 12 of 2017

JULIUS OSEYA NYENDE…….....….....1ST APPLICANT

WILLIAM KITOTO AMWAYA ……..……2ND APPLICANT

CALEB OCHIENG DIMO …….3RD APPLICANT

VERSUS

ANTOINE REGRIGERATION

ENGINEERING CO. LTD…….....…….RESPONDENT

RULING

1. On 17/01/2017, the Applicants herein took out a Notice of Motion which, in the main, seeks the leave of the Court to file an appeal out of time against the whole judgment of the Senior Resident Magistrate Hon. Karen Njalale in Limuru SPMCC No. 228 of 2014 as consolidated with SPMCC No. 229 of 2014 and SPMCC No. 230 of 2014.

2. When the parties appeared before me to argue that application, on perusal of the documents filed, I invited the parties to address me on the question of jurisdiction. This is because I noted that the judgment was in respect to claims arising from injuries sustained while in the course of employment duties. In particular, paragraph 5 of the Plaints in each of the cases, as gleaned from the judgment appealedagainst, alleged that the "Plaintiffs were lawfully engaged in their duties with the defendant, when the defendant, its agent or servant provided them with unsafe, dangerous system of work that while they were travelling along Nairobi-Limuru road in the defendant?s motor vehicle reg. no. KAJ 475W it was negligently driven that it lost control, veered off its lane and collided with motor vehicle reg. no. KBA 890Q thereby occasioning them severe injuries and have since suffered loss and damage."

3. I asked the parties to address the issue of jurisdiction because in two previous cases: ***Spinners and Spinners Limited v Julius Mutunga Mutiso [2016] eKLR (Kiambu HCCA No. 6 of 2016)*** and ***Kiambu HCCA No. 6 of 2016 Devki Steel Mills Ltd v John Mbuvi Mackenzie [2016] eKLR,*** I had been persuade to follow the lead of my brother Mabeya J. in ***Francis Mutunga Musau v Devki Steel Mills Limited 2015 eKLR (Nairobi Misc. No. 91 of 2015***) in concluding that when a suit has been filed in the Court below alleging injuries arising from breach of employment contract, jurisdiction for appeal appropriately lies in the Employment and Labour Relations Court (ELRC) and not the High Court.

4. The parties filed their written submissions and wholly relied on them. As would be expected, the Respondent adopted the position I took in the two cases cited above and argued that I should remain consistent in my jurisprudence on this question.

5. On the other hand, the Applicants sought to persuade me to change my mind and conclude that the High Court has jurisdiction. Their argument is that there is a need to distinguish between employment disputes related to labour relations with "matters arising out of perceived negligence and/or predominantly so as in the instant case." In their view, only the former belong to the ELRC; the latter belongs to the High Court.

6. The Applicants cited in their aid ***Everest Odhiambo v Gilgil Telecommunications Industries Ltd [2007] eKLR*** which cited with approval ***Kenya Cargo Handling Services Limited v Ugwang 1985 KLR 593*** where the Court of Appeal stated as follows:

> A claim for personal injuries arising in the course of employment may be the subject of an action either for a breach of an implied term in the contract of employment or in tort simpliciter, and a claimant may make an election as which of those actions he intends to pursue.

7. The Applicants argue that the pleadings, proceedings, witness testimonies in the Subordinate Court and the judgment clearly demonstrates that the Applicants herein elected to pursue a claim in tort. In the alternative, they argue that the case was a mixed one – involving both tort and contract – and that this is evident in paragraph 6 in the Plaints filed in the Subordinate Court.

8. I will pause here long enough to agree with the Applicants, in line with the Court of Appeal?s reasoning in the ***Kenya Cargo Case*** that a claim for personal injuries arising in the course of employment may sound in either tort or contracts or both. A Plaintiff can carefully to place her bets in either and one can imagine a Plaintiff keenly drawing her pleadings so that it sounds only in one or the other cause of action. However, in most cases, and for good reasons, Plaintiffs present a mixed case – sounding in both torts and contracts. In these cases, because the underlying claim is predicated on the employment relationship, it would follow that the contract action would be predominant. This is why I stated the following 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.

9. In the instant case, I have looked at the pleadings made available and, in particular, the judgment of the lower Court.

It seems plain to me that the suit sounded in both torts and contracts – but that, in fact, the predominant thread was in contract. The Learned Magistrate cites paragraph 5 of the Plaint (reproduced above) which forms the foundation of the case: [That the] "Plaintiffs were lawfully engaged in their duties with the defendant, when the defendant, its agent or servant provided them with unsafe, dangerous system of work…."

10.This is straight from the Applicants? own pleadings.

Having pleaded the employment relationship as an important element in their claim, a finding of that relationship would have to be one of the central issues in the case. In the circumstances, it is disingenuous for them to claim at this stage that their suit sounded in tort simpliciter.

11. Having come to this conclusion, I am inclined to follow my own reasoning in the two cases cited above. To recap, it is my finding that the intended appeal is one from a suit for injuries sustained in the course of employment. Such injuries are "employment and labour relations" matters that belong to the ELRC. I have found no reason to depart from the reasoning in the***John Mackenzie Mbuvi Case*** cited above which, in turn, followed the reasoning by my brother Mabeya J. in the ***Francis Mutunga Musau Case***.

12. I once again readily admit that this is a question that has caused me much anxiety. It seems plain that parties are still 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 application that jurisdiction lies with the High Court.

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 „?*exclusiveoriginal 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.

17. 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-employee relationship since the cause of action is pegged on and is dependent primarily upon the relationship of employment.

18. 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.

19. Having concluded that the High Court is not the appropriate forum for this appeal, I will also follow the reasoning in ***Spinners & Spinners Case*** and ***Pamoja Women Development Programme& 3 Others v Jackson Kihumbu Wang'ombe & Another (Kiambu H.C. Civil Suit No. 16 of 2016***) and transfer the Miscellaneous Application to the ELRC rather than strike it out. In the latter case, I dealt at length with the question 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, 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.

20. 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 three superior 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.

21. In this case as well, I have found no reason to depart from this reasoning.

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

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

> **a. The appeal herein to wit Miscellaneous Civil Application No. 12 of 2017 shall be transferred to the Employment and Labour Relations Court in Nairobi for hearing and disposal.**

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

24. Orders accordingly.

Dated and delivered at Kiambu this 15th day of June, 2017.

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JOEL NGUGI

JUDGE