



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA.**

**CIVIL APPEAL NO. 127 OF 2013**

**MUMIAS SUGAR CO. LTD..... APPELLANT.**

**VERSUS**

**WILLIAM OKUMU..... 1<sup>ST</sup> RESPONDENT**

**DORCAS CHEPSOI ..... 2<sup>ND</sup> RESPONDENT**

*consolidated with*

**CIVIL APPEAL NO. 145 OF 2013.**

**DORCAS CHEPSOI ..... APPELLANT**

**VERSUS**

**WILLIAM OKUMU..... 1<sup>ST</sup> RESPONDENT**

**MUMIAS SUGAR CO. LTD ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. The two appeals herein arose from the judgment delivered on 09/10/2013 in Mumias SPMCC No. 295 of 2012 by Hon. G.N. Sitati, Resident Magistrate.
2. On 03/10/2012, **WILLIAM OKUMU MASINDE** through his Advocates Messrs Otsiula Kweyu & Company Advocates instituted Mumias SPMCC No. 295 of 2012 (hereinafter referred to as “**the suit**”) by lodging a plaint at the Registry. The plaint, categorized as “**multi-track**”, is dated 27/09/2012.

The firm of Omwenga & Company Advocates thereafter entered appearance for **MUMIAS SUGAR COMPANY LIMITED** which was sued as the first defendant. That was on 23/10/2012 and on 06/11/2012 a Statement of Defence was duly filed.

On 29/01/2013, the firm of Chemitei & Company Advocates entered appearance for **DORCAS CHEPSOI**, the second defendant in the suit, which firm was replaced by Chepkitwany & Company Advocates on 12/02/2013 through a Notice of Change of Advocates. The Advocates also filed a Statement of Defence for the second defendant on the same day.

3. On 05/04/2013, the firm of Omwenga & Company Advocates filed a Notice of Motion evenly dated seeking that the suit be selected as a test suit on the issue of liability between the parties in the suit and 37 other civil suits which arose from the same cause of action. A stay of proceedings in the said 37 suits was also sought. All the suits were pending before the Mumias Senior Principal Magistrate's Court.
4. I have intently perused the record before the lower court and have not seen if this application was disposed of but there is an order of the Court issued on 18/11/2013 where the said suits were stayed. However, Counsels in the appeal informed the Court that the suit proceeded on the basis of a test suit and the other suits are pending the outcome of this appeal.
5. The hearing of the suit began on 26/06/2013 before Hon. G.N. Sitati, Resident Magistrate culminating with the delivery of judgment on the 09/10/2013. And, being dissatisfied with the said judgment the then Defendants separately lodged appeals before this Court.

### **THE APPEALS**

6. The then first defendant, **MUMIAS SUGAR COMPANY LTD** lodged its appeal on 28/10/2013 whereas the then second defendant, **DORCAS CHEPSOI** lodged her appeal upon grant of leave to do so, on 10/12/2013. They are Appeal Nos. 127 of 2013 and 145 of 2013 respectively. These appeals were consolidated with Civil Appeal No. 127 of 2013 becoming the lead appeal.
7. On 17/02/2013, the parties herein recorded a consent before Court allowing a stay of execution of the judgment, decree and all consequential orders arising from the suit pending the determination of the appeal alongside a stay of proceedings in all the 37 other suits aforesaid on condition that the entire decretal sum and assessed costs be deposited in a joint-interest earning account in the names of Omwenga & Co. Advocates and Otsula Kweyu & Co. Advocates within 30 days and in default the first Respondent (who was the Plaintiff in the suit) be at liberty to levy execution.
8. Directions towards the disposal of the appeals herein were given on 23/10/2014 where parties agreed to file written submissions with the liberty of highlighting on 02/12/2014. Parties managed to comply and eventually tendered their highlights on 16/02/2015 thereby resulting to this judgment.
9. I have carefully perused the entire record together with the submissions filed and the highlights thereto and have noted that in both appeals, the Appellants raised their first ground on the issue of the jurisdiction of the trial Court to hear and determine the matter. For precision purposes, the ground was tailored by the Respondents as followed.

#### **In Civil Appeal No. 127 of 2013.**

1. ***THAT*** the learned trial magistrate erred in law and fact in hearing and determining the matter when he had no jurisdiction to do so.

#### **In Civil Appeal No. 145 of 2013.**

1. ***THAT*** the learned trial magistrate erred in law and fact in hearing and determining the matter when she had no jurisdiction to do so.

The grounds are indeed similar.

10. The Appellants also raised several other grounds which were all canvassed in the submissions and at the hearing of the appeals.

11. As the issue of jurisdiction in a matter before Court takes precedence over any other matters raised

therein, this Court will first address itself on whether the trial Court had the jurisdiction to deal with the suit. Needless to say, the outcome thereof shall determine whether or not this Court will deal with the other grounds raised in the appeals.

**On whether the trial magistrate had the requisite jurisdiction to hear and determine the suit.**

12. Jurisdiction is everything. Taking jurisdiction as a cage and a Court as an animal, the animal can, but only move within the cage. That is what jurisdiction is all about.
13. It is now settled, having been held times without number, that without jurisdiction a Court has no power to take one more step. Indeed jurisdiction is a fundamental matter in the dispensation of justice.

**The Supreme Court** in the decision of **Re: The matter of the Interim Independent Electoral Commission, Constitutional Application No. 2 of 2011** (*unreported*) at paragraphs 29 and 30 discussed the issue of jurisdiction in the following manner:-

***“29. Assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in***

***Owners of Motor Vessel “Lilian S’ vs. Caltex Oil (Kenya) Limited (1989) KLR 1, which bears the following passage (Nyarangi, JA at page 14.):-***

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step.”***

***30. The Lilian ‘S’ case establishes that jurisdiction flows from the law, and the recipient – Court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the***

***craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”***

14. I have equally perused the Appellants’ Statements of Defence in the suit and noted that they both denied the jurisdiction of the trial Court. However, for reasons not being part of the record or due to inadvertence on the part of the Counsels or the trial Court, this crucial issue was not dealt with prior to the hearing of the suit.

It is always incumbent upon a Court of law to satisfy itself at the earliest possible opportunity that it has the requisite jurisdiction in a matter prior to engaging itself into dealing with the same. This is important in avoiding the setting aside and/or nullification of proceedings and decisions later on when it is found that the Court did not in the first instant have the requisite jurisdiction. (See: **Francis vs. Boniface (1969) EALR 146, Phillips vs. Copping (1935) 1 KB 15, Desai vs. Warsame (1967) EALR 351, Allarkhia vs. Aga Khan (1969) EALR 613.**)

15. The Appellants’ main contention on this ground was that the trial Magistrate, Hon. G.N. Sitati, Resident Magistrate, was not possessed of the jurisdiction to try the suit by dint of the provisions of the Kenya Gazette Notice No. 9243 dated 27/07/2011 issued pursuant to the provisions of the Labour Institutions Act (N0. 12 of 2007). It is their argument that the gazette notice created special Courts with clear jurisdiction and designated all Courts in the 47 Counties in the country which are presided over by Magistrates of the rank of a Senior Resident Magistrate and above as

such special Courts. In other words Resident Magistrates were clearly ousted.

16. It was further contended that the pleadings and the evidence tendered confirmed that the Respondent herein (**WILLIAM OKUMU MASINDE**, the Plaintiff in the suit) was an employee of **MUMIAS SUGAR COMPANY LTD** and as such, the Court erred in assuming jurisdiction over the matter.

17. But the Respondent herein, **WILLIAM OKUMU MASINDE**, holds a contrary view. To him, the Hon. G.N. Sitati, Resident Magistrate had the requisite jurisdiction to deal and so rightly exercised her jurisdiction over the suit. It was submitted in support of this position that the claim in issue arose out of a common law doctrine of tort of negligence and besides that there was no employer-employee relationship between the Respondent and the second Appellant, **DORCAS CHEPSOI**. It was further submitted that the Occupational Safety and Health Act No. 15 of 2007 defines a Court as a "Resident Magistrate Court" hence that power cannot be taken away by a Gazette Notice since a Gazette Notice cannot oust clear provisions of an Act of Parliament. The Respondent further submitted that the law gave jurisdiction to the Industrial Court in regard to issues relating to the Employment Act 2007, the Labour Institutions Act and the Labour Relations Act, 2007 and not those under the Occupational Safety and Health Act, the Workmen Injury Benefit Act or the common law and that what was done from the Industrial Court to the special Courts vide the Gazette Notice by the Chief Justice did not touch on these Acts of Parliament.

18. I will therefore deal with the twin issues raised by the Respondent herein as under:-

i. **Whether the Gazette Notice No. 9243 ousted the jurisdiction of Resident Magistrates.**

19. Upon the promulgation of the Constitution, the Industrial Court was constituted pursuant to Article 162 as a Court of equal status as the High Court. The Court has original jurisdiction to hear all employment and labour relations matters in Kenya. As a Court with equal status as the High Court, the Industrial Court has unfettered jurisdiction to interpret the Constitution and to deal with all matters falling within the provisions of **Section 12** of the Industrial Court Act Chapter 234 of the Laws of Kenya. This position was rightly stated by my brother Justice Majanja in the case of **United States International University (USIU) vs. Attorney General (2013) eKLR** which decision was cited with approval by the Court of Appeal at Nairobi in **Civil Appeal No. 6 of 2013 Prof. Daniel N. Mugendi vs. Kenyatta University & 3 others** (unreported).

20. The jurisdiction of the Industrial Court is then clearly defined in **Section 12(1)** of the Industrial Court Act as follows:-

***"12 (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' organization and a trade unions organization;***
- d. ***disputes between trade unions;***
- e. ***disputes between employer organisations.***
- f. ***disputes between an employer's organization and a trade union;***
- g. ***disputes between a trade union and a member thereof;***
- h. ***disputes between an employer's organization 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.***

21. In exercising the said jurisdiction, the Industrial Court has the following powers pursuant to **Section 12(3)** of the said Act:-

**(3) 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.**

22. It has always to be remembered that well before the birth of the Constitution of Kenya, 2010 there were various laws which regulated the various relations between employees and employers and the entire labour sector in general. These Acts of Parliament included the Labour Institutions Act 2007, the Employment Act 2007, the Occupational Safety and Health Act 2007, the Labour Relations Act 2007, the Work Injury Benefit Act 2007 among others. Under the Constitution and the Industrial Court Act all disputes which were being dealt with pursuant to the said Acts of Parliament or under any other law touching on labour relation issues were all brought to the exclusive jurisdiction of the Industrial Court. However, the reading of **Section 12(1)** of the Industrial Court Act gave the Industrial Court both **original and appellate jurisdiction**. This was then the genesis of the gazette notice number 9243. One of the aims of the said gazette notice seem to create appeals to the Industrial Court so as to enable the Court exercise its appellate jurisdiction.

23. **Article 161** of the Constitution establishes the Office of the Chief Justice of the Republic of Kenya as the head of the Judiciary. This responsibility demands that the Honourable Chief Justice ensures that the entire Judiciary, as an arm of government, works orderly and properly and as such the Honourable Chief Justice is empowered to take all such steps towards achieving this objective. This is indeed the essence of **Section 27** of the Interpretation and General Provisions Act, Chapter 2 of the Laws of Kenya which empowers the Honourable Chief Justice to issue practice directions.

24. **The Labour Institutions Act, 2007 under Section 16(2)** thereof makes it clear that:-

***“16 (2) The Chief Justice may, after consultation with the Minister and the Principal Judge by order in the gazette designate any Magistrate’s Court to hear matters relating to labour laws.”*** (emphasis added).

The law therefore clearly gives the Honourable Chief Justice the power to designate any Magistrate’s Court to hear matters dealing with labour laws in the Country. This is the power which gave rise to the gazette notice number 9243.

The gazette notice then created special Courts throughout the 47 counties to hear specific labour disputes. These Courts are however to be presided over by Magistrates of the rank of a Senior Resident Magistrate and above. For ease of clarity, I will reproduce the relevant part (to this analysis) of the said Gazette Notice No. 9243 as under: -

***“IN EXERCISE of the powers conferred by section 16(2) of the Labour Institutions Act and in consultation with the Minister and the Principal Judge, the Chief Justice designates all Courts the 47 Counties presided over by magistrates of the rank of Senior Resident Magistrate and above as Special Courts to hear and determine employment and labour cases within their respective areas of jurisdiction.***

*The matters relate to the following specific areas:*

1. *Work Injury related matters.*
2. ....
3. ....
4. ....
5. ....

*Dated the 27<sup>th</sup> July, 2011.*

**WILLY MUTUNGA**

***Chief Justice/President of the Supreme Court of Kenya.”***

(emphasis added).

25. I however wish to make it clear that the parties herein did not challenge the constitutionality or otherwise of the said gazette notice hence this analysis only rests on whether or not the trial Magistrate had the jurisdiction in the suit in view of the gazette notice.

26. There is however the argument that under the Occupational Safety and Health Act 2007 the Court therein has been defined as a “**Magistrate’s Court**” hence the gazette notice cannot override a statute. I wish to consider this issue as hereunder.

**Section 2 of the Magistrate’s Court Act**, Chapter 10 of the Laws of Kenya defines a “**Resident Magistrate’s Court**” to mean a Court established by Section 3 thereof. **Section 3(1)** thereof states as follows:-

***“3 (1) There is hereby established the Resident Magistrate’s Court, which shall be a court subordinate to the High Court and shall be duly constituted when held by a Chief Magistrate, a Senior Principal Magistrate, a Principal Magistrate, a Senior Resident Magistrate or a Resident Magistrate.”***

It therefore does not mean that Resident Magistrate’s Court must always be presided over by a Resident Magistrate. The prevailing legal position is that a Resident Magistrate’s Court is properly constituted when held by any of the Magistrates stated in Section 3 (1) aforesaid. The Respondent’s contention thereof that since the Occupational Safety and Health Act describes a Court to be a Resident Magistrates Court hence the same is to be presided over by a Magistrate of the rank of a Resident Magistrate is misconceived and remains contrary to the clear provisions of the law. It is hereby rejected. I wish to add that even under the Occupational Safety and Health Act, 2007 the Honourable Chief Justice can designate any of the Magistrates to deal with the matters therein and is not bound to appoint only Magistrates of the rank of Resident Magistrates.

27. The gazette notice therefore did not come into conflict with any law since it has clear basis in law. The upshot therefore is that a Magistrate of a rank of a Resident Magistrate does not have jurisdiction to deal with any of the matters specifically stated in the Gazette Notice No. 9243 of 27/07/2011.

ii. ***Whether the suit fell within the matters contemplated in the Gazette Notice No. 9243:***

28. The suit was instituted by way of a Plaint. Paragraphs 4 and 5 thereof state as follows:-

***4. At all material times relevant to this suit the 2<sup>nd</sup> Defendant was contracted by the 1<sup>st</sup> defendant to offer transport services.***

5. On or about 7<sup>th</sup> September, 2012 the Plaintiff was in the course of his employment with the 1<sup>st</sup> defendant and was lawfully travelling as a passenger along Mung'ang'a – Nucleus Murram road at Mung'ang'a area or thereabout when the 2<sup>nd</sup> Defendant's motor vehicle Reg. No. KAM 367L Mitsubishi Lorry hired and or contracted by the 1<sup>st</sup> Defendant was negligently and without any due care and attention driven by the Defendant's agent and or servant that it lost control and crashed thereby occasioning the plaintiff to sustain serious personal injuries. The accident is attributed to the dangerous manner in which the 2<sup>nd</sup> Defendants motor vehicle was being driven by the Defendant's agent and/or servant to which the Defendants are vicariously liable.

**PARTICULARS OF NEGLIGENCE ON THE PART OF THE DEFENDANTS' AGENT AND/OR SERVANT**

- a. *Driving the said motor vehicle in an excessive speed.*
- b. *Driving the said motor vehicle without any special look out or due regard to other road users.*
- c. *Failing to ensure plaintiff's safety.*
- d. *Exposing the plaintiff to anger it knew or ought to have known.*
- e. *Failing to keep any proper look out and/or any sufficient regard to other road users.*
- f. *Failing to stop, slow down, swerve, brake and/or manage to control the said motor vehicle from overturning.*
- g. *Driving a defective motor vehicle.*
- h. *Causing or permitting the accident to occur.*
- i. *Overtaking another motor vehicle without proper regard to other road users.*
- j. *Turning without any due care and regard to other road users.*
- k. *Failing to keep his line while on road.*
- *Failing to stop and/or give way before turning into a feeder road.*
- m. *Failing to provide proper or alternative means of transport.*

29. When the Respondent herein testified before the trial Court as PW3 he confirmed that he was employed at Mumias Sugar Company Limited, the First Appellant herein, as a cane cutter and went ahead to produce a payslip to that effect. He further testified that he was on duty on 07/09/2012 and boarded a motor vehicle registration number KAM 367L which was to ferry them to Nucleus Estate to cut cane. However, as a result of the accident on the way they did not reach the desired end and instead sustained injuries on the head, chest, right shoulder and both thighs. He was in Court praying for compensation and costs incurred.

**Section 2** of the Employment Act, 2007 defines an **employee** as:-

*“A person employed for wages or a salary”.*

A **contract of service** is so defined in the said **Section 2** as follows:-

*“An agreement, whether oral or in writing, and within expressed or implied to employ or to*

*serve as an employee for a period of time.”*

**Section 2** of the **Occupational Safety and Health Act, 2007** defines an “**employee**” as:-

*“A person who works under a contract of employment and related expressions shall be construed accordingly.”*

The said section also defines “**premises**” to be any place, and, in particular includes –

- a. *any vehicle, vessel, aircraft or housecraft;*
- (b) .....

**Section 2** of the **Work Injury Benefits Act, 2007** defines an “**accident**” to mean:-

*“an accident arising out of and in the cause and scope of an employee’s employment and resulting in personal injury.”*

An “**injury**” under the said Act is defined as:-

*“a personal injury and includes the contracting of a scheduled disease.”*

And an “**employer**” under **Section 4** thereof is defined to include:-

*“(a) .....*

- b. *any person controlling the business of an employer;*

30. Going by the Respondent’s pleadings and the foregoing analysis, the Respondent contends that he was in employment of Mumias Sugar Company Limited where he was involved in an accident and sustained injuries hence he is entitled to compensation. He therefore sustained the alleged injuries while at work and such injuries are the ones specifically stated in the gazette notice as:-

- a. *Work injury related matters.*

This Court therefore finds that the cause of action as pleaded falls within those matters relating to work injury in view of the relationship between the Respondent and Mumias Sugar Company Limited. The alleged relationship between the Appellants herein does not in any way oust the matter from being a ‘**work injury related matter**’. The suit therefore falls within the confines of the matters contemplated under the gazette notice 9243 of 27/07/2011.

### **DISPOSITION**

31. Having found that the suit relates to a work injury claim and that it was instead dealt with by a Resident Magistrate, this Court will not deal with the other grounds of appeal and accordingly disposes the appeals herein at this stage and makes the following orders:-

- a. *Civil Appeal No. 127 of 2013 and Civil Appeal No. 145 of 2013 be and are hereby allowed;*
- b. *The proceedings and the judgment by Hon. G.N. Sitati Resident Magistrate in Mumias SPMCC No. 295 of 2012 be and are hereby set aside for want of jurisdiction;*
- c. *The suit being Mumias SPMCC No. 295 of 2013 shall be remitted back to Mumias Law Courts for a fresh hearing and determination before a competent Court and as so guided under the Gazette Notice No. 9243 of 27/07/2011.*

- d. *Any sums of money deposited in any Bank Account pursuant to orders of this Court in these Appeals be released to the depositor or its Advocates forthwith.*
- e. *The competent trial Court shall give priority to the hearing and determination of the suit since it is a test-suit and was filed way back in 2013;*
- f. *Given that the Appellants did not raise the issue of jurisdiction at the earliest possible opportunity each party shall bear its own costs.*

Orders accordingly.

**DELIVERED, DATED and SIGNED this 13<sup>th</sup> day of May, 2015**

**A. C. MRIMA.**

**JUDGE**