



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS APPLICATION NO. 91 OF 2015

FRANCIS MUTUNGA MUSAU.....PLAINTIFF

VERSUS

DEVKI STEEL MILLS LIMITED.....DEFENDANT

RULING

1. The Defendant filed a Notice of Motion dated 4th February, 2015 seeking stay of execution pending hearing and determination of Nairobi High Court Civil Appeal No. 33 of 2015. The application was essentially based on grounds that the orders of stay informally obtained expired on 16th February, 2015; that the appeal has overwhelming chances of success and shall be rendered nugatory in the event the orders sought are not granted; that the Plaintiff will be unable to refund the judgment sum in the event the appeal succeeds for the reason that he is a casual labourer. The Defendant's willingness to furnish security was also expressed.
2. The Motion was objected to be a preliminary objection dated 12th February, 2015. The grounds were that the High Court has no jurisdiction to entertain an application arising from a suit involving an employer and an employee; that the application dated 4th February, 2015 is incurably defective and incompetent to the extent that the party suing or initiating the motion is described as the Defendant and that the Appellant having exhibited a memorandum of appeal being Nairobi Civil Appeal No. 33 of 2015 the notice of motion would lie in Civil Appeal No. 33 of 2015 and not its own as presented to this court. That the notice of motion is in the circumstances wholly incompetent and for dismissal.
3. The Defendant filed a response to the preliminary objection on 2nd March, 2015. It was contended that the claim between the parties herein was tortuous in nature and not a labour dispute and that the High Court having unlimited original jurisdiction has full discretion to entertain the motion; that ground 2 of the objection lacks merit since the objection is based on a technicality or want of form and does not affect the substance of the application therefore the Plaintiff is barred from raising the objection under Order 51 Rule 10 (2) of the Civil Procedure Rules and under Article 159 (2) (d) of the Constitution and that the choice of procedure is in the province of the Applicant and there is no prejudice suffered by the Respondent. That the High Court can be moved by all processes procedurally as provided under Article 165 (3) (e) of the Constitution.
4. This court on 16th February, 2015 ordered that the preliminary objection dated 12th February, 2015 shall act as grounds of opposition. It shall therefore be so treated. The Defendant filed written submissions while the Plaintiff's submissions are not on record. It was submitted that the Industrial Court's jurisdiction is limited to hearing and determination of disputes relating to employment and labour relations under which this claim does not fall. As to the second ground it was contended that the Defendant has been described as the Defendant/Respondent and further that the Defendant has not filed a fresh suit. It was argued that the objection is based on a technicality and is barred by Article 159 (2)(d) of the Constitution and Order 51 Rule 10 (2) of the Civil Procedure Rules. It

was argued that there was no specific provision under Order 42 Rule 6 providing that if an appeal has been filed in the appeals division an application for stay must be filed in that division. That the Civil appeals division of the High Court is limited to hearing and determining appeals arising out of the lower court and not applications for stay of execution of judgments of the lower court. That the High Court having unlimited original jurisdiction as well as other jurisdiction original or appellate conferred to it by Article 165 (3)(e) it can be moved by all processes procedurally and objection lacks merit.

5. The Plaintiff contended that this court has no jurisdiction to entertain this application for the reason that the lower court suit the subject of this appeal concerned an employer employee relationship. I am therefore called upon to determine whether or not this court has jurisdiction to entertain this application. The Industrial Court is a court established under Section 4(1) of the Industrial Court Act pursuant to the Article 162 (2) of the Constitution of Kenya to hear and determine **disputes relating to employment and labour relations**. Section 12 (1) (a) of that Act provides that the Industrial Court shall hear and determine **disputes relating to or arising out of employment between an employer and an employee**. In this regard, I suppose that it is necessary to define what those disputes are.
6. The **Black's Law Dictionary, 9th Edition** defines Labour Disputes as follows:-

"a controversy between an employer and its employees concerning the terms or conditions of employment, or concerning the association or representation of those who negotiate or seek to negotiate the terms or conditions of employment." (Emphasis mine)

7. **The Major Law Lexicon, 4th Edition Vol. 4** defines Labour Disputes as:-

" A controversy between an employer and labourers regarding their conditions of employment. Disputes between labourers and their employers."

It further states that Labour Disputes ***"includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."***

8. An employment dispute therefore 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.
9. Under Section 12 of the Industrial Court Act, that Court is bestowed with 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 the Act, or any other written law which extends jurisdiction to the Court relating to employment and labour relations. The said jurisdiction is extended to the Industrial Court by the Employment Act Number 11 of 2007 and the Labour Relations Act Number 14 of 2007. Section 87(1) of the Employment Act states that:-

"Subject to the provisions of this Act, whenever – (a) an employer or employee neglects to fulfil 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." Section 87 (2) states that ***"No other Court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1)."***

10. The Supreme Court in the case of **Samuel Kamau Macharia v. KCB and Others [2012]e.KLR** held that Jurisdiction flows from either the Constitution or Legislation or both. In this regard, a Court can only exercise jurisdiction as conferred by the Constitution or any written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
11. To my mind, it is the Industrial Court is the proper forum as defined in the labour laws set out

above that has jurisdiction to deal with matters such as this one. It matters not that it arises from a tortious liability. That cause of action is pegged on and is dependent primarily upon the relationship of employment. Since it is admitted that the negligence pleaded in the lower court arose out of employer employee relationship between the parties herein, I am afraid this court has no jurisdiction to entertain this matter.

12. In the circumstances, the application is struck out with costs. Let the Applicant seek redress before the proper forum.

Dated, Signed and Delivered at Nairobi this 10th day of July, 2015.

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A. MABEYA

JUDGE