IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & MUSINGA (JJ.A)

CIVIL APPEAL NO. 109 OF 2018

BETWEEN

DOCK WORKERS UNION LIMITED................APPELLANT

AND

MESSINA KENYA LIMITED...........................RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court

at Mombasa (Rika.J,) delivered on 23rd October, 2017

in

Mombasa ELRC No. 6 of 2015)

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JUDGMENT OF THE COURT

1. By a judgment delivered on 23rd day of October, 2017, the Employment and Labour Relations Court **(ELRC)** dismissed a petition filed by **Dockworkers Union Kenya** (the appellant), on the basis that the trial court lacked the jurisdiction to entertain a dispute relating to terminal dues allegedly owed to the respondent's former employees (***grievants***). The appellant had filed the said petition on behalf of the grievants and as their recognized trade union. In dismissing the petition, the trial court, (**Rika, J**), found that the court's jurisdiction was ousted by an arbitration agreement contained in the grievants' contracts of employment; through which the parties had agreed to refer any disputes to arbitration in the first instance. It was also the trial Judge's finding that any dispute regarding trade union dues did not constitute a constitutional dispute and could therefore not be ventilated through a constitutional petition as was purported to be done herein. Accordingly, the petition was struck out with no order as to costs. That decision has precipitated this appeal.

2. As per the memorandum of appeal, it is contended that the learned Judge erred by; derogating the jurisdiction of the court given pursuant to the Constitution of Kenya and the Employment and Labour Relations Act, 2014 (***the Act***); by misconstruing the process of arbitration as provided for under the employment contract; failing to adjudicate on the Constitutional petition in accordance with **Articles 22** and **23** of the **Constitution of Kenya** and the Constitution of Kenya (Rights and fundamental freedoms), practice and procedure rules; misapplying the law and concluding that the terms of the contract were synonymous with the Bill of Rights; failing to find that the denial of the respondents' right to join a trade union of their own choosing directly violated and infringed on the appellant's right to establish a trade union as guaranteed under the Bill of rights in the Constitution of Kenya; failing to consider the procedures established under the Arbitration Act in so far as termination of the employment contract is concerned; failing to find that the respondent was a member of the Federation of Kenya Employers (FKE); failing to appreciate that breaches under the fundamental bill of rights could only be pursued by the appellant by instituting a Constitutional petition pursuant to Articles 22 and 23 of the Constitution of Kenya 2010; failure to interrogate a self defeatist clause in the contract of employment in so far as arbitration is concerned, because once a contract of employment has ended acrimoniously, the parties will hardly agree on a voluntary arbitration forum; failing to find that the said arbitration clause had the effect of removing the appellant from the seat of justice and; misconceiving the issues in dispute and thus causing serious injustice to the appellant.

3. The appeal was ventilated through written submissions, duly filed by both parties. According to the appellant's counsel, **Mr. Ochieng**, the impugned judgment failed to appreciate that the issue of arbitration was never raised by the respondent. Counsel was of the view that there were no arbitrable issues in this case that warranted the striking out of the petition. To the contrary, **section 6** of the **Arbitration Act** required the court to conduct an enquiry as to whether there were arbitrable issues but the court failed to do so. It was further submitted that the genesis of the dispute concerned the non-remission of union dues. According to the appellant, despite the provisions of **sections 48** and **50** of the **Labour Relations Act**, the respondent has never commenced deduction of the workers' trade union dues.

4. He added that by the time the petition was filed before court, the grievants' respective employment contracts had long been terminated on diverse dates between 22nd and 24th July, 2015 and since there was no subsisting contract between the grievants and the respondent, there was no arbitration clause to be invoked and the grievants were no longer bound to refer the matter to arbitration as held by the learned Judge. The decision in the case of **Marsabit Registered Trustees v. Technotrade Pavillion Ltd** [2014] eKLR was cited in support of the foregoing proposition. In addition, citing the provisions of **section 7** of the **Employment Act**, counsel argued that no person can be employed under an employment contract except as per the provisions of the Employment Act. By extension, he said, the only grievance resolution mechanism in respect of a labour dispute is as provided for under the Employment Act and not under the Arbitration Act. Counsel reiterated that the arbitration process is largely consensual and ought not be forced down the throats of parties by courts. In conclusion, it was contended that the appellant cited the relevant provisions of the Constitution which had been infringed, to wit, **Articles 27**, **36** and **41** of the **Constitution** and that the learned Judge erred in striking out the petition.

5. Opposing the appeal was learned counsel Mr. Otieno for the respondent, who submitted that the main issues for determination before the trial court were only two; one was the unlawful termination of the grievants and two, the alleged refusal by the respondent to remit the grievants' union dues. He stated that the learned Judge did not err, as the court simply gave the parties back their powers to have the matter arbitrated as provided for under the arbitration agreement under the employment contract. He argued that even though the employment contracts were terminated, the court was nonetheless bound to give effect to the arbitration agreement.

6. One of the main issues before this Court and the court below is whether the trial court had jurisdiction to determine the dispute at hand. It is trite law that the issue of jurisdiction, once raised, must be determined at the earliest opportunity. As re-stated by this Court in the case of **Owners and Master of The Motor Vessel "Joey" V Owners And Masters of The Motor Tugs "Barbara" And "Steve B" [2007] eKLR;**

> ***"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ………."***

The question of jurisdiction in the instant case, stems from a clause contained in the grievants' letter of appointment dated 1st June, 2008.

Under the said contract, an arbitration clause was contained therein in the following terms:

> *'save as may be hereinbefore otherwise specifically provided, any disputes arising between the parties hereto, not mutually settled and agreed between them shall be referred to arbitration by a single arbitrator to be appointed by agreement of the parties In default of agreement by the parties hereto, appointment shall be by Chief Executive for the time being of the Federation of Kenya Employers and every award made under this clause and expressed to be made under the Arbitration Act 1995 or other Acts or enactments for the time being in force in Kenya in relation to arbitration.'*

According to the respondent and the court below, the import of this clause was that all disputes between the parties should have been referred to arbitration; a position that the appellant strongly disagrees with. The appellant's contention is that the said clause was no longer applicable to this case, given the termination of the grievants' employment contracts and further that, since this was a labour dispute, redress thereto lay under the Employment Act and not under the Arbitration Act as held by the learned trial Judge.

7. As to whether the employment contract ceased operation once the grievants' employment was terminated; by their nature, contracts are designed to define the rights and liabilities of the parties thereto. Indeed, as submitted by the appellant, **section 7** of the **Employment Act 2007** stipulates that no person shall be employed under a contract of service except in accordance with the provisions of this Act. For avoidance of doubt, a contract of service is described under section 2 of the Act as:

> ***'contract of service" means an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership ...'***

Consequently, the terms of the contract are determined by the parties themselves, subject to the limitations stated in the Act. However, there is nothing in the Act to indicate that employment grievances are under the exclusive jurisdiction of the Employment and Labour Relations Court. Also important is that there is no provision under the Act, nor has any been cited in support of the argument that arbitration is inapplicable to labour disputes.

8. On the contrary and as rightly held by the learned trial Judge, the parties herein had categorically agreed to refer any ensuing dispute as regards the contract of employment herein to arbitration. Parties have the freedom to choose the regime of the law they want to be governed under and embody it in their contracts. If parties opt to have an arbitration agreement in their contract of employment which spells out how disputes between them would be resolved, that is perfectly within their rights. The parties entered into the said agreement freely and opted to oust other means of dispute resolution mechanisms other than arbitration. They cannot turn around and denounce the arbitration agreement. It is also worth of note that the Constitution of Kenya itself has given prominence to arbitration by acknowledging it as one of the alternative modes of dispute resolution that courts should encourage.

The learned Judge cannot therefore be faulted for finding that the arbitration agreement in the parties' contract was valid.

9. In this case, the parties were bound under the contract to refer the matter to arbitration. No reference in this regard appears to have been commenced. It was emphatically submitted on behalf of the appellant, that the parties would most likely have disagreed on the choice of arbitrator. Even if this were so, the contract went on to address this scenario by stating that in such a case, the Chief Executive of the Federation of Kenya Employers then appoints an arbitrator. None of these avenues were ever explored prior to the filing of the petition before court.

10. The contention by the appellant that the contract in question ceased to have effect upon termination of the grievants' employment simply does not lie. Adopting such an argument would lead to an absurdity because aside from the law, a contract is what contains the substratum of the rules governing the parties. In fact, it is under that very contract that the appellant contends that terminal dues and union dues were never remitted. The appellant cannot call in aid the contract only when it pleases them. Rather, the contract applies both ways; in the same spirit as it accords the parties rights, so do liabilities arise.

11. As to whether this was a constitutional dispute relating to enforcement of fundamental rights, our view of the matter is that all rights, be it the right to work, right to food, right to shelter and the entire gamut of fundamental rights have underpinnings in the Constitution of Kenya, which is the *'Grundnorm'* from which all other statutes derive their existence and legitimacy. Technically speaking therefore assertion of all manner of rights can therefore be pegged on the Constitution. A claim for wages or terminal benefits can be traced to the fundamental right to work, to food and all other interrelated rights. Does this make a claim for wages or all labour disputes Constitutional issues? Definitely not.

12. We agree with **Lenaola, J**, (as he then was) in **Bernard Murage vs. Fineserve Africa Limited & 3 others [2015] eKLR** where he succinctly expressed himself as follows:

> ***"I am bound to follow that principle of law since it flows from the other important principle that not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first. In that regard the words of the Court in Harrikinson v Attorney General of Trinidad and Tobago [1980] AC 265, hold true today as they did then;***
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> ***"The notion that whenever there is a failure by an organ of Government or a Public authority or public office to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under Section 6 of the Constitution for redress when any human right or fundamental freedoms is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action."***

The Court concluded thus;

> "***The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom***."

Similarly dealing with a similar issue in the case of **Lawrence Nduttu & 600 others vs. Kenya Breweries Ltd & another [2012] eKLR** the Supreme Court pronounced itself as follows:-

> ***' it is not the mere allegation in pleadings by a party that clothes an appeal with the attributes of constitutional interpretation or application'***.

This principle was affirmed in ***Samuel Kamau Macharia & Another v.Kenya Commercial Bank Ltd. & 2 Others*** Sup. Ct. Appl. 2 of 2011 [2012] eKLR and ***Malcolm Bell v. Daniel Toroitich Arap Moi & Another*** Sup. Ct. Appl. No. 1 of 2013 [2013] eKLR.

13. It is clear from the above that the appellant's claim which was based on a contract of employment, was a labour dispute that ought to have been resolved in the first instance in accordance with the parties' arbitration agreement. There was no logic, or justification in invoking the provisions of the constitution in order to circumvent the Arbitration agreement. The learned Judge was also right in his finding that the appellant ought to have predicated the claim on terminal dues on the relevant statutes as opposed to the constitution. We find no merit in this appeal and dismiss it with no order as to costs.

Dated and delivered at Mombasa this 7th day of March, 2019

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

D. MUSINGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR