



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KARANJA, SICHALE & J. MOHAMMED, J.J.A)**

**CIVIL APPEAL NO. 257 OF 2018**

**BETWEEN**

**NATIONAL BANK OF KENYA LIMITED.....APPELLANT**

**AND**

**LEONARD GETHOI KAMWETI.....RESPONDENT**

(An appeal from the ruling of the High Court of Kenya at Nairobi (Ougo, J.)

dated 24th October, 2014 in H.C.C.C No. 370 of 2013)

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**JUDGMENT OF THE COURT**

**BACKGROUND**

1. Jurisdiction is a fundamental issue to a court when it comes to any dispute before it. Its centrality is well captured by the definition given by John Beecroft Saunders in his treatise, *Words and Phrases Legally Defined Vol. 3: I-N* at Page 113:

**“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”**

In *Owners of the Motor Vessel “Lillian S” V Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, JA, as he then was, stated as follows:

**“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”**

Therefore, jurisdiction of a court to entertain any matter either exists or it does not. Likewise, it can neither be acquiesced nor granted by consent of the parties. This much was appreciated by this Court in *Jamal Salim vs. Yusuf Abdulahi Abdi & Another* [2018] eKLR which stated as follows:

**“It follows that even where a party initially admits to jurisdiction ... the same does not clothe a court with jurisdiction it did not have to begin with. Similarly, an objection to jurisdiction can be raised at any stage. Nonetheless, such an objection ideally should be raised at the earliest opportunity.”**

2. At the heart of this appeal is the issue of jurisdiction, that is, which court between the High Court and the Employment and Labour Relations Court (ELRC) is clothed with the authority to entertain the suit filed by **National Bank of Kenya Limited**, the appellant herein, against **Leonard Gethoi Kamweti**.

3. A brief background of the pertinent facts will place the crux of this appeal in perspective. **Leonard Gethoi Kamweti**, the respondent was employed by the appellant as its Company Secretary. His duty included taking, maintaining and safeguarding minutes of meetings held by the appellant’s Board of Directors. Following the restructuring of the appellant, the respondent was sent on early retirement with effect from

31st July, 2013.

4. According to the appellant, sometime in early August, 2013 it learnt that the respondent had maliciously and without its authority made an unauthorised and unlawful recording of a meeting held by its Board of Directors on 8th July, 2013. Further, that the respondent disclosed the aforesaid confidential information to third parties including, the Director of Bank Supervision of Central Bank of Kenya, Capital Markets Authority and the Law Society of Kenya vide letters dated 2nd August, 2013 and 9th August, 2013 as well an MP3 recording.

5. As far as the appellant was concerned, the respondent's actions were actuated by malice because firstly, he had not been authorised to disclose the information and secondly, he had distorted the said information. In addition, the respondent's aim was to disrupt its business operations and damage its reputation. In the appellant's view, the respondent had breached his fiduciary duty of care, trust and confidence by disclosing the confidential information to unauthorised third parties. Moreover, according to the appellant, it had suffered loss and damage as a result of the said breach.

6. It is the above state of circumstances that prompted the appellant to file a suit against the respondent in the High Court, the subject of this appeal, seeking *inter alia*:

**a. An order that the court file in respect of this matter be kept and secured in a strong room due to the sensitive and confidential nature of the matters arising in this suit pending the hearing and determination of this suit.**

**b. A permanent injunction restraining the defendant by himself, his servants, workmen, agents or otherwise howsoever from disseminating, or revealing to unauthorised persons other than the plaintiff's Board of Directors and/or using or exploiting in whatsoever manner, the plaintiff's confidential information particularly pertaining to all of the minutes of the plaintiff's Board of Directors meeting held on 8th July, 2013.**

**c. General damages for breach of confidence.**

**d. Aggravated and exemplary damages for distress, embarrassment and damage to the plaintiff's reputation.**

7. Contemporaneously with the suit, the appellant also filed a notice of motion dated 5th September, 2013 seeking an interim injunction restraining the respondent and/or his agents from disseminating or divulging the confidential information pending the hearing and determination of the suit. In response, the respondent filed grounds of opposition contending that the application was incompetent and misconceived. The application was then set down for *inter partes* hearing on 27th November, 2013. Nevertheless, on the said date there was no appearance for the respondent and the application proceeded *ex parte*. By a ruling dated 16th January, 2014 the High Court (Ougo, J.) issued an interim injunction as sought by the appellant.

8. Thereafter, the respondent filed an application dated 18th March, 2014 seeking the setting aside of the *ex parte* proceedings of 27th November, 2013 as well as the ruling and order dated 16th January, 2014. His application was anchored on the ground that failure to attend the *inter partes* hearing was attributable to an excusable mistake by his former counsel. In turn, the appellant filed a replying affidavit opposing the application.

9. However, before the application was heard, the respondent filed his statement of defence on 19th May, 2014 raising an objection to the High Court's jurisdiction to entertain the suit. Consequently, the High Court dealt first with the objection which was to the effect that since the appellant's suit was anchored on the respondent's contract of employment, the proper forum was the Employment and Labour Relations Court (ELRC). The appellant opposed this objection arguing that the High Court was properly seized of the matter.

10. Ultimately, the High Court (Ougo, J.) in a ruling dated 24th October, 2014 upheld the objection. In doing so, the learned Judge expressed as follows:

**"It is evident that the terms of contract will be an issue to be considered at the hearing of the main suit. The damages the plaintiff seeks is as a result of the alleged breach of confidence the defendant was expected to keep at the time of his employment. It is therefore in order that this matter be heard by the Industrial Court. Under section 12 (3) the Industrial Court act the said Court can grant Preservatory Orders and Prohibitory Orders as an award of compensation. Though this Court has been asked to strike out the suit, in the interest of justice I order that the suit be transferred to the Industrial Court for hearing and determination. No orders as to costs. Orders accordingly."**

11. It is that decision that provoked this appeal wherein the appellant faults the learned Judge for-

**a. Misinterpretation of the provisions of Section 87(3) of the Employment Act.**

**b. Misconstruing that the nature of the appellant's suit.**

**c. Misapprehending that the contract of service referred to in the suit was secondary to the main issue in dispute, that is, breach of confidentiality and trust by the respondent.**

#### **SUBMISSIONS BY COUNSEL**

12. At the plenary hearing, learned counsel **Ms. Rubeena Dar** appeared for the appellant while the respondent appeared in person. Ms. Dar

opted to rely entirely on the written submissions filed on behalf of the appellant. Similarly, the respondent relied on his written submissions and also made oral highlights.

13. Making reference to the English cases of *Saltman Engineering Co. Ltd. vs. Campbell Engineering Co. Ltd.* [1948] 65 R.P.C 203 and *Attorney General vs. Observer Ltd.* [1990] 1AC 109, it was submitted on behalf of the appellant that the cause of action before the High Court was based on the equitable doctrine of confidentiality which is distinct from a claim anchored on a contract of service. It was reiterated that the subject of the suit was breach of the respondent's duty of confidence and trust towards the appellant.

14. Therefore, according to the appellant, the learned Judge in determining the question of jurisdiction should have focused on the nature of the information which was the subject of the dispute rather than the relationship between the parties. In that regard, reliance was placed on the House of Lords decision in *Campbell vs. MGN Ltd.* [2004] 2 AC 457.

15. In addition, the appellant asserted that jurisdiction is determined on the basis of pleadings and not on the substantive merits of a case. Further, the jurisdiction of the ELRC is clearly delineated under **Article 162 (2) (a)** of the **Constitution** and **Section 87(1) & (2)** of the **Employment Act**. Besides, it was urged, **Section 87(3)** of the **Employment Act** clearly provides that if the contract of service is secondary to the main dispute, then such a matter does not fall within the jurisdiction of the ELRC. It followed therefore, that since the issue in contention is the breach of confidentiality and trust on the part of the respondent, the suit was properly before the High Court.

16. It was argued that in as much as it is a settled principle of law, that a court cannot entertain a suit which falls outside its jurisdiction, the converse is also true. A court is bound to entertain proceedings which fall within its jurisdiction. In other words, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. It is on those grounds that the Court was urged to allow the appeal.

17. On the other hand, the respondent was convinced that the learned Judge's decision was well reasoned, legally justifiable and beyond any reproach and filed grounds affirming the decision dated 3rd August, 2018. The respondent submitted that the issues raised in the appellant's suit had since been determined by the ELRC in **ELRC No. 273 of 2014** which was subsequently filed at his instance. In his view, the appellant was simply trying to have the concluded issues re-tried by the High Court contrary to **Sections 6, 7 & 8** of the

#### **Civil Procedure Act.**

18. Delving into the merits of the appeal, the respondent submitted that it was not in dispute that he was an employee of the appellant by virtue of a written contract. Equally, it was not in contention that his services were terminated unlawfully hence he filed ELRC No. 273 of 2014 which was determined in his favour on 12th October, 2016. He asserted that it was clear from the appellant's own pleadings that its claim stemmed directly from the employment contract thus could only be determined by the ELRC.

19. Elaborating further, the respondent posited that the appellant's claim gave rise to a number of issues namely, whether he was employed by the appellant and the terms of his employment; whether he had breached those terms; and if so, what remedies were available? In the respondent's opinion, all the above issues were strictly employment issues. He added that the issue of confidentiality was merely a sub issue in dispute which could be properly dealt with by the ELRC.

20. The respondent further contended that the position as postulated under **Section 87** of the **Employment Act** had changed with the promulgation of **Constitution** in that while the section in question provided that the High Court was clothed with jurisdiction over all civil matters, the **Constitution** subsequently removed labour related matters from the ambit of the High Court. The respondent submitted that the change is evident from the provisions of **Article 162(2)** of the **Constitution** and **Section 12(1)** of the **ELRC Act**. More importantly, **Article 165 (5)** of the **Constitution** expressly limits the High Court's jurisdiction as not extending to labour matters.

21. All in all, he argued that **Section 87** of the **Employment Act** has to be read within the context of the **Constitution's** supremacy. To bolster that line of argument, we were referred to this Court's decision in *Daniel Mugendi vs. Kenyatta University & 3 others* [2013] eKLR and the High Court's decision in *Charles Oyoo Kanyangi & 41 others vs. Judicial Service Commission of Kenya* [2018] eKLR.

22. The respondent asserted that the appellant's position was not only misguided but also aimed at misleading the Court. Expounding on that proposition, the respondent contends that the appellant had overlooked the Latin maxim of *aequitas sequitur legem* (equity follows the law). Moreover, he stated that the ELRC is also enjoined to give effect to the doctrine of equity and the remedies thereunder. According to him, the appellant was simply shopping for a forum to overturn the judgment delivered in ELRC No. 273 of 2014.

23. The respondent went on to urge us to dismiss the appeal since, in his opinion, allowing the same would firstly, breach the doctrine of *res-judicata*; secondly, be unconstitutional and thirdly, create confusion with regard to the demarcation of jurisdiction between the High Court and the ELRC. In conclusion, the respondent urged us to allow the ELRC to deal with the matter.

#### **DETERMINATION**

24. We have considered the record of appeal, submissions made on behalf of the parties and the law. It is common ground that the jurisdiction of a court is donated either by the **Constitution** and/or an Act of Parliament. The Supreme Court of Kenya succinctly addressed the source of a court's jurisdiction in *Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others* [2012] eKLR as follows:

**“A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”**

The distinction between the jurisdiction of the High Court and the specialised courts established under **Article 162 (2)** of the **Constitution** is settled. Further, the deliberate intention of the drafters of the **Constitution** to separate the sphere of the aforementioned courts' jurisdiction is evident in **Article 165(5)(b)** of the **Constitution**. Whilst recognizing that the High Court has original and unlimited jurisdiction in civil and criminal matters, the said Sub-Article ousts that jurisdiction when it comes to matters falling within the scope of the specialised courts under **Article 162(2)** of the **Constitution**.

25. The jurisdiction of the ELRC which is a specialised court is delineated under **Article 162 (2) (a)** of the **Constitution**:

“162

1. ...

2. Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

a. employment and labour relations;...

Notwithstanding the broad manner in which the jurisdiction of the ELRC is set out, the **Constitution** also empowered the Legislature to elaborate on the limits of that jurisdiction in an Act of Parliament. See **Article 162 (3)** of the **Constitution** and this Court's decision in **Karisa Chengo & 2 others vs. Republic** [2015] eKLR. Towards that end, Parliament enacted the **ELRC Act** which at **Section 12 (1)** sets out the court's jurisdiction in the following terms:

“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 ...” [Emphasis added]

26. In summing up the extent of the ELRC jurisdiction, this Court in **Paramount Bank Limited vs. Vaqvi Syed Qamara & Another** [2017] eKLR held,

“The preamble to Employment and Labour Relations Court Act states that the court is established to hear and determine disputes relating to “employment and labour relations” and “for connected purposes”. Among its powers under Section 12, the court hears and determines all disputes relating to and arising out employment and labour relations. In the exercise of that jurisdiction the court has the power to award compensation or damages in any circumstances contemplated under the Act or any other written law and to grant any other appropriate relief that it may deem fit.”

[Emphasis added]

27. The above position was also reiterated in the case of **Hassan Magiya Kiage vs. Attorney General & Another** [2017] eKLR where this Court rendered itself as follows:

“From the foregoing, it is clear to us that the ELRC is clothed with jurisdiction to entertain not only employment and labour disputes but also any incidental issue (s) that may arise or is connected to employment or labour relations.” [Emphasis added]

28. There is also **Section 87** of the **Employment Act** which outlines the nature of disputes to be entertained by the ELRC. Of relevance is the place or import of **Section 87(3)** which reads :

“This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.”

29. It is instructive to note that the **Employment Act** was enacted prior to the promulgation of the **Constitution**. As a result, the above provision has to be constructed in line with **Section 7(1) of the Sixth Schedule** of the **Constitution**.

Simply put, it must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the **Constitution**.

30. We find that the provisions of **Section 87(3)** do not contradict or limit the ELRC jurisdiction as stipulated under the **Constitution** or the **ELRC Act**. We understand it to be simply re-echoing the position that all matters connected or arising from employment or labour relations are within the ambit of the ELRC. However, the provision goes a step further to reinforce that the predominant issue(s) in dispute have to be connected or related to employment or labour relations for a matter to properly fall before the ELRC. Consequently, the mere mention of employment or labour relations does not automatically cloth the ELRC with jurisdiction over a matter.

31. Does the suit filed by the appellant fall within the circumscribed jurisdiction of the ELRC? Do the issue(s) therein arise from and/or connected to employment or labour relations? The answer lies with the nature of the appellant's cause of action. This Court in **Attorney General & another vs. Andrew Maina Githinji & Another** [2016] eKLR defined a cause of action in the following terms:

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

On his part, Lord Diplock in Letang vs. Cooper [1964] 2 All ER 929 at 934 rendered the following definition:-

**“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”**

32. In The Anatomy of Tort Law by Peter Cane, Hart Publishing, 1997 page 80, it is stated:

**“... the most commonly accepted view is that breach of confidence is breach of an obligation of confidence which arises either out of a contract or out of some “equitable” idea of “trust” or “good faith”. On this view, breach of confidence is either a breach of contract or an equitable wrong, but not a tort.**

33. Hirst J. in Fraser & Others vs Thames Television Limited & Others (1984) 1 Q.B. 44 cited the treatise in Copinger and Stone James on Copyright 12th edn. (1980) on the basic principles of the law of confidence stating :-

**“There is a broad and developing equitable doctrine that he who has received information in confidence shall not take unfair advantage of it or profit from the wrongful use or publication of it. He must not make any use of it to the prejudice of him who gave it, without obtaining his consent or, at any rate, without paying him for it... If, therefore, a defendant is proved to have used confidential information, directly or indirectly obtained from a plaintiff, without his consent, express or implied, he will be guilty of an infringement of the plaintiff’s rights.”**

34. On his part, Megarry J. in Coco vs A. N. Clark (Engineers) Ltd. - [1969] RPC 41 highlighted the distinction between breach of confidence as it arises in contract and in equity. Megarry J. referred to the case of Saltman Engineering Co. Ltd. v. Campbell Engineering Co. Ltd. (supra) in stating that :-

**“I think it is quite plain from the Saltman case that the obligation of confidence may exist where, as in this case, there is no contractual relationship between the parties. In cases of contract, the primary question is no doubt that of construing the contract and any terms implied in it.**

**Where there is no contract, however, the question must be one of what it is that suffices to bring the obligation into being; and there is the further question of what amounts to a breach of that obligation.”**

35. It is trite that a cause of action can be determined from the pleadings. Our position is fortified by this Court’s sentiments in Daniel N Mugendi vs. Kenyatta University & 3 others (supra) to the effect that-

**“Pleadings should clearly and specifically set out facts in order to enable the court to grasp what the cause of action is and what orders to consider.”**

36. Our reading of the plaint on record reveals that the cause of action is not founded on the respondent’s contract of employment or labour relations. Although, there is mention of the respondent’s contract of employment, the same, we find, was to set the stage of how he came into contact with the alleged confidential information. Specifically, paragraph 6 of the plaint reads:

**“At all material times, the plaintiff is and was the owner of confidential information in respect of which the defendant by virtue of his position as Company Secretary of the plaintiff was entrusted and professionally obliged to ensure and maintain the confidentiality of the same at all times.”**

37. In the circumstances of this case, we therefore find that the plaintiff’s cause of action is founded on the tort of breach of confidence as can be discerned from paragraph 13 of the plaint which states:

**“In the premises, the defendant having been the plaintiff’s company secretary, an Advocate of the High Court of Kenya and a Certified Public Secretary of Kenya, unprofessionally and maliciously communicated the said confidential information despite at all material times being under a fiduciary duty of care, trust and confidence.”**

38. The appellant also sets out the alleged particulars of the breach of confidence in paragraph 15 of the plaint. Besides, none of the prayers sought are anchored on the contract of employment and in point of fact the appellant seeks damages for breach of confidence amongst other orders. Consequently, we find that the appellant’s suit was rightly before the High Court.

39. Last but not least, on the issue of **ERLC No. 273 of 2014**, it is not in dispute that the respondent filed the same after the suit filed by the appellant (**HCCC No 370 of 2013**). All the respondent told this Court is that the cause of action therein was based on the unlawful termination of his services by the appellant. Nonetheless, he failed to demonstrate that the issues in **ERLC No. 273 of 2014** were similar to the issues raised in **HCCC No 370 of 2013**.

40. Accordingly, we find that the appeal herein has merit and is hereby allowed. We set aside the ruling of the High Court (Ougo, J.) dated 24th October, 2014 and substitute therefore an order dismissing the respondent’s objection to the High Court’s jurisdiction with costs to the appellant.

**Dated and delivered at Nairobi this 25<sup>th</sup> day of October, 2019.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**