REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI ,NAMBUYE & KIAGE, JJA)

CIVIL APPEAL NO. 98 OF 2015

BETWEEN

ROYAL COURT HOTEL LIMITED..APPELLANT

VERSUS

THE MINISTER FOR LABOUR..1ST RESPONDENT

KENYA UNION OF DOMESTIC, HOTELS EDUCATION INSTITUTIONS,

HOSPITAL & ALLIED WORKERS………………...…...2ND RESPONDENT

(*Appeal from the Judgment and Decree of the Employment and Labour Relations Court (Nduma Nderi, J.) Dated 1st April, 2014*

in

Industrial Court at Nairobi Cause No. Appeal (M) 1 OF 2011)

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JUDGMENT OF THE COURT

This is an appeal from the Judgment of the Industrial Court of Kenya (as it was then known), now the Employment and Labour Relations Court (ELRC) – (**Mathews N. Nduma Principal Judge**) dated the 1st day of July, 2014.

The background to the appeal is that, the appellant is a limited liability Company operating a Hotel facility within Mombasa Municipality, (as it was then known), now Mombasa County. In the year 2007, the second respondent, approached the appellant's employees numbering one hundred and five (105) according to the appellant, and fifty (50) according to the second respondent, with a view to recruiting them into its Trade Union membership. It was the 2nd respondent's contention that the appellants' employees were agreeable and signed up schedules authorizing the appellant to deduct union dues from the respective employees' salaries and remit these to the 2nd respondent through a check off system. The second respondent forwarded the mentioned schedules to the appellant for action but the appellant either refused, neglected and or ignored, thus provoking the 2nd respondent's letter to the appellant dated the 28th day of January, 2010, whose contents read in part as follows:-

> ***"RE: DEDUCTION OF UNION DUES.***
>
> ***Reference is made to the check-off system dated 17/04/2007 duly signed by your employees authorizing you to deduct Union dues from their wages and send the same to this office for receipting. We have noted with great concern that you have not implemented the said check off system contrary to sections 48, 49 and 50 of the new Labour Relations Act 2007.***
>
> ***You are therefore being asked to Honour the same and remit union dues to this office on or before 10th of every month upon deduction to avoid unnecessary disputes.***

…………………

The 2nd respondent also alleged that the above communication also received no positive reaction from the appellant, prompting them to report to the Minister for Labour and Human Resources (The Minister), the existence of a trade dispute between it and the appellant, vide its letter dated the 22nd day of August, 2007 whose contents read in part as follows:

"REF: <u>TRADE DISPUTE</u>

In accordance with section 4 of the Trade Disputes Act Cap. 234, we wish to report existence of a Trade dispute between this Union and the management of Royal Court Hotel of P.O. Box 41247 Mombasa over the following issues:-

"Refusal by the management to sign Recognition Agreement"

The parties have exhausted their own voluntary negotiations machinery but have failed to reach an amicable solution. Your Ministry is therefore being asked to take legal action under section 7 of the Trade Disputes Act by appointing an investigator to investigate the existing dispute and endevour settlement for the interests of both parties."

………….

The Minister accepted the invitation to intervene in the matter vide his letter dated the 16th October, 2007, whose contents also read in part as follows:-

<u>Trade Dispute:</u>

Please refer to the Union letter Ref: No. KW/5G/RCH/CJ bos/07 dated 22nd August, 2007 in which they reported the existence of a Trade dispute between yourselves in accordance with section 4 of the Trade Disputes Act Cap. 234.

I understand the issue in dispute to be:-

"Refusal by the management to sign Recognition Agreement."

Having consulted the Tri partite committee under section 5(1) of the Act, I confirm that I accept the report of the dispute and will endeavour to effect a settlement by investigation. For this purpose and in accordance with section 7 of the Act, I have appointed Mr. D.K. Njagi of Mombasa labour office to act as an investigator. Mr. Njagi will get in touch with both parties direct.

The parties are requested to submit in writing to the investigator their respective memorandum within seven days from the date of this letter.

……………………."

The investigations were duly carried out with the participation of both parties, resulting in the findings contained in the Ministers' letter dated the 11th day of February, 2011, Ref MC/IR/3/94/2007 addressed to both the appellant and the second respondent. The Ministers findings and recommendations were as follows:-

<u>Findings</u>

Investigation revealed thus:-

- ***"Royal court is a registered concern in Mombasa dealing with Hotel business.***
- ***There is no rival Union in the hotel claiming a right to represent unionisable employees in the establishment.***
- o ***By the time the dispute was declared, the union had recruited 51% of the total permanent work force of 50 permanent employees.***
- ***The management did not give any tangible proof that check off forms were not forwarded to them by the Union."***

……………………..

"Recommendations

Having gone through the parties submissions coupled with the above findings, I find that the management failed to prove their case beyond reasonable doubt to justify their refusal to recognize the union. Therefore, I recommend that the Union be accorded recognition by the management to pave the way for negotiation of terms and conditions of employment for the employees in the establishment.

Finally, both parties are requested to accept the above recommendations as the basis of resolving this dispute."

The appellant was aggrieved by the above Ministers' findings. They preferred an appeal to the industrial court, raising various grounds in a statement of grounds of appeal dated the 4th day of March, 2011. That appeal was resisted by a response to the statement of grounds of appeal filed by the second respondent and dated the 12th day of June, 2012, resulting in the impugned Judgment in which the learned Judge rendered himself *inter alia* thus:-

"12. The appellant received the minister's order on 21st February, 2011 and lodged an appeal on 7th March, 2011 well within the 14th days permitted under the section. In its appeal, the appellant primarily contests an issue of fact to the effect that the union had not attained a simple majority and therefore the findings by the Minister was wrong. The Minister relied on the evidence placed before him by the Respondent union comprising of a check off system sent to the General Manager on 17th April, 2007 annexed to the Response to the statement of Appeal. The appellant did not annex to the memorandum of Appeal or to the submission it filed before court any evidence contradicting the findings by the minister as at the time the Minister s decision was made.

13. There is no basis therefore for the Court to fault the findings and the recommendation by the Minister dated 11th February, 2011.

Accordingly, in terms of the proviso to section 5(2) of the Trade Disputes Act, Cap 234 of the laws of Kenya (now repealed) the court endorses the decision of the Minister aforesaid without any amendment and directs the appellant Royal Court Hotel, Mombasa to recognize the Respondent Union (KUDHEIHA) for negotiating and collective Bargaining purposes.

The appeal is therefore dismissed with costs to the respondent Union. This decision has resolved the dispute in this appeal and cause No. 2075 of 2011 between the same parties."

The appellant was aggrieved and unrelenting, it is now before this Court raising five (5) grounds of appeal, namely, that the learned Judge:-

1. Misapprehended and misinterpreted the provision of the Trade Disputes Act Cap 234 and the Evidence Act Cap 80 and thereby failed to appreciate the evidence adduced before the superior court.

2. Failed to determine the matter that he was called upon to determine in the appeal.

3. Failed to appreciate that the respondents answer itself showed that they had not secured the 50% plus 1 of the employees working at the Appellant's establishment at the material time.

4. Erred in law in ordering the consolidation of the Industrial Appeal No. M1 of 2011 with Industrial cause No. 2075 of 2011.

5. Failed to appreciate the content of the documents produced before the court by the 1st respondent pursuant to the courts' order of 11th December, 2012.

The appeal was canvassed by way of written submissions filed by the appellant and which learned counsel **Mr. Mark Odaga** for the appellant adopted but elected not to highlight. In the said written submissions, the appellant compressed the five grounds of appeal into three grounds, with grounds (ii), (iii) and (v) forming ground one (1), ground (i) as ground two, (2) and ground (iv) as ground three (3).

In support of ground one (1); it is the appellant's complaint that the learned Judge failed to consider the list of the appellant's employees submitted to the investigator which indicated that as at the material time, the appellant had one hundred and five (105) employees in its workforce establishment, and if the 2nd respondent had recruited only twenty five (25) of these, then the mandatory requirement of 50% plus one (50+1) had not been met. Secondly, that even if it were to be taken that the appellant's employees at the material time were only fifty (50), then the 2nd respondent's recruitment of only twenty five (25) of these did not give it a simple majority entitling it to demand recognition by the appellant in terms of section **5(2)** of the Trade Disputes Act, hereinafter referred to as the TDA.

To buttress the above submissions, the appellant cited **Abok James Odera T/A A.J. Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR** on the primary role of a first appellate court; the **Independent and Electoral and Boundaries Commission & another versus Stephen Mutinda Mule & 3 others [2014] eKLR** for the proposition that in an adversarial system of litigation, parties are bound by their own pleadings; **Bake 'n' Bite Limited versus Rachel Nungare & 16 Others [2015] eKLR** for emphasis that a court is bound by the parties' pleadings and should only adjudicate on specific matters in dispute as raised before it by the respective parties; and, lastly **Benjoh Amalgamated Ltd & another versus Kenya Commercial Bank Ltd [2014] eKLR** for the proposition that an appellate court has the mandate to do what is necessary to correct wrong decisions from the Court below.

In support of ground two (2), the appellant submitted that the learned Judge misapprehended both the law and the facts on the burden of proof, when he failed to fault the Minister's findings that the appellant had not disproved the 2ndrespondents assertions, when in law, the burden of proof lay with the 2nd respondent to prove that it had recruited 50+1% of the appellant's workforce, and thereby arrived at the wrong conclusion that there was no basis for faulting the Minister's recommendations.

To buttress the above submissions, the appellant relied on section **107** of the Evidence Act, **Phipson on Evidence, 16th Edition, paragraph 6-06** and **Republic versus Kenya Medical Laboratory Technicians & Technologists & 2 others Exparte Victor Odhiambo Dinda [2015] eKLR**, all on the principle that the party that asserts has the evidentiary burden to prove those assertions.

In support of ground three (3), the appellant submitted that the learned Judge's *suo motu* order on the consolidation and smultenous determination of both the appeal and the cause was in breach of the principles of natural justice as the appellant was never accorded an opportunity of being heard on the said issue before the said order was made. Secondly, that the order which also came at the tail end of the appellant's submission also contravened **Rule 23** of the Industrial Court Procedure Rules 2010, which only permits the consolidation of suits where some common questions of fact or law arises; and also where it is practicable and appropriate to proceed with the issues raised in the causes simultaneously. Thirdly, that the learned Judge failed to appreciate that the proceedings in the cause had also been stayed pending the hearing and determination of the appeal, pursuant to a consent made on the 21st September, 2012 and which consent order had not been discharged as at the time the learned Judge made the impugned order.

To buttress the above submissions, the appellant cited **Rajesh Pranjivan Chudasama versus Sailesh Pranjivan Chudasama [2014] eKLR** for the proposition that where a matter is fixed for mention, the court has no business determining the substantive issues in the matter on such a mention date, without the consent of the parties; and also without according such parties an opportunity of being heard; the **Law society of Kenya versus Centre for Human Rights & Democracy & 12 Others** [**2012] eKLR** on the essence of consolidation of suits, which is that, consolidation is meant to facilitate the efficient and expeditious disposal of disputes; second, to provide a frame work for a fair and impartial dispensation of justice to the parties; third, it is never meant to confer any undue advantage upon the party seeking it, nor is it intended to occasion any disadvantage towards the party that opposes it; and fourth, that before a consolidated order issues, it is essential for the court to consider whether the matters sought to be consolidated turn upon the same or similar issues. The Court also has to satisfy itself that no injustice would be occasioned to any party to the proceedings.

Rising up to oppose the appeal, learned counsel **Miss Schola Mbilu** leading learned counsel **Amelia Chesiyna,** for the 1st respondent submitted that the learned Judges' decision is un assailable as he properly appreciated the record and the law , considering that he was not bound by the strict rules of evidence in terms of section **24** of the Labour Institutions Act; that the order consolidating both the appeal and the cause made in terms of **Rule 23** of the Labour Institution Act Rules (The Rules) was made in the presence of both parties without any objection from the appellant and in this regard, the appellant's complaint against the consolidation order was not only belated but also raised in bad faith. In learned counsel's view, a common issue for determination arose as between the appeal and the cause, because the appeal sought to overturn the Minister's decision, while the cause sought to enforce it, which position in her view, met the threshold set out in Rule 23.

Learned counsel **Mr. Martin Njiru** instructed by the firm of Mumia & Njiru for the 2nd respondent associated himself fully with the submissions of learned counsel **Schola Mbilu,** but added that the learned Judge acted on the record as placed before him; that the criteria the 2nd respondent applied when seeking recognition from the appellant, for collective bargaining, was not as a result of the second respondent attaining recruitment of the 50+1 of the appellant's total workforce as alleged by the appellant, but 50+1 percent of the Unionizable workforce which threshhold in **Mr. Njiru's** view, had been met by the second respondent. The 2nd respondent therefore satisfied the legal threshold as demonstrated by the supportive documents laid before the Minister, and on the basis of which the learned Judge acted to affirm the Ministers' decision which learned counsel urged us not to interfere with.

Rising to reply to the respondents' submissions, learned counsel **Mr. Mark Odaga** contended that the learned Judge misapprehended the facts placed before him as he failed to consider the basis on which the Minister arrived at his decision; that he also misconstrued section **5(2)** of the TDA and misapplied it to the facts before him; that the consolidation order was made *suo motu*, and without jurisdiction and therefore did not lie; and, lastly that the learned Judge also misapprehended the law on the burden of proof which is now trite that he who asserts has the burden to prove those assertions, which in the instant appeal lay with the 2nd respondent.

This is a second appeal. Our mandate is therefore restricted to considering matters of law only and not to interfere with the findings of fact of the two lower courts unless we are satisfied that the two courts below had misapprehended the evidence or that their conclusions were based on incorrect bases. See **Onyango and Another versus Luway [1986] KLR 513**.

We have revisited the record and considered it in the light of the rival submissions set out above, and the case law cited by the appellant. In our view, the issues that fall for our determination are the same three issues that the appellant raised in their written submissions namely:-

1. Whether the learned Judge failed to determine the matter he was called upon to determine or alternatively whether he failed to properly consider the evidence placed before him in the appeal.

2. Whether the learned Judge misapprehended and/or misinterpreted the provisions of the TDA and the Evidence Act by failing to appreciate the content and effect of the evidence adduced before the Industrial court.

3. Whether the learned Judge erred in law in ordering the consolidation of Industrial Court Appeal number M1 of 2011 with Industrial cause No. 2075 of 2011.

With regard to issue number 1, the mandate of the learned Judge as a first appellate court, as stated by this Court on numerous occasions is to reconsider the evidence, re-evaluate it and make its own conclusion, but with a caveat that it should only interfere with a finding of fact by the trial court where such a finding:

See **Sumaria & Another versus Allied Industries Limited [2007] 2KLR 1,**

a. was based on no evidence; or

b. was based on a misapprehension of the evidence; or,

c. The court below was shown demonstrably to have acted on a wrong principle in reaching the finding reached.

See **Sumaria and another versus Allied Industries Ltd** (Supra) and **Musera versus Mwechelesi & another [2007] 2KLR 159**.

The core issue before the learned Judge revolved around the determination as to whether the 2nd respondent had recruited fifty percent plus one (50%+1)of the appellant's Unionizable workforce and was therefore eligible for recognition by the appellant for purposes of negotiations for a collective bargaining agreement. In support of its assertion that it met the required threshhold, the 2nd respondent put forth two check off system schedules. The first one indicated to have been endorsed on the 25th day of March, 2007 had twenty five names. Twenty two of these had appended their signatures thereto. The second schedule indicated to have been endorsed on the 26th day of March, 2007 had signatures endorsed against all the twenty five names. The two dates on which the two schedules were endorsed were earlier in time than the 17th April, 2007 when the 2nd respondent allegedly forwarded the aforementioned respective schedules to the appellant to effect the deductions of union dues from the signed up employees salaries and remit these to the 2nd respondent; and the one dated 20th April, requesting for a meeting with the appellant's management for purposes of collective bargaining recognition.

The appellant countered the 2nd respondent's supportive facts with its memorandum to the investigator dated the 31st October, 2007 in which it denied that the 2nd respondent had recruited fifty one (51%) percent of its employee work force, but without giving any specifications. The said memorandum was later followed up by another communication dated the 27th day of November, 2007. Annexed to it was a schedule of one hundred and five (105) names, titled Royal court staff list. Some of these names had signatures endorsed against them. There was however, no indication as to when the said list was endorsed or why it was endorsed, by some employees and not others, unlike the one presented by the 2nd respondent, which indicated clearly the endorsement was for purposes of authorizing the deduction and remittance of union dues from those signatories' salaries to the 2nd respondent through the check off system.

It is also undisputed that before the appeal was heard and determined, the appellant sought an order from the court to compel the Minister to file before court all the supportive documents parties had filed before him during the investigation proceedings. The orders were issued on the 11th day of December, 2012. The Minister responded vide his communication dated the 13th day of February, 2013. What appears to have been annexed to the said letter is the Minister's findings dated the 11/2/2011; the Minister's communication to the appellant and the 2nd respondent vide his letter dated the 16th day of October, 2007 acknowledging the existence of a Trade dispute between them and expressing willingness to intervene in the matter; and the letter dated the 22nd day of August, 2007 from the 2nd respondent reporting the dispute to the Minister. The record of the proceedings before us indicates clearly that the matter of the production of supportive documents produced before the conciliator or investigator were revisited by the court on 11/12/2012, 28/1/2013 and 20/3/2013 in the course of which the Minister's representative indicated to the court that what they had supplied to the court in response to the order is what they had as supportive documents of the proceedings before the Minister.

The 2nd respondent also went on record as intimating that they had filed all that they had received from the appellant during the conciliation proceedings. The proceedings of 20/3/2013 went as follows:-

> ***" Ogado". We have not been supplied with the minutes of the conciliation hearing but we have the report.***
>
> ***Macharia. Report was provided. There are no formal minutes. That is what we have.***
>
> ***Ogado. We shall proceed with the hearing of the matter."***

What we make of the above entries on the record of the proceedings is that, the learned Judge could only appraise, re-assess and re-analize the record as had been placed before him. Both the Minister and the 2nd respondent confirmed to the learned Judge on record that what he had before him comprised what had been assessed by the conciliator or investigator when performing a quasi Judicial function. The conciliator weighed the supportive documents presented before him by the respective parties, and settled for those presented by the 2nd respondent and made findings with regard thereto, and which findings were affirmed by the learned Judge. This was a finding of fact by the investigator as the first adjudicating tribunal, and affirmed by the learned Judge on a first appeal. The appellant elected to proceed with the appeal before the learned Judge on the basis of the record as it was before the learned Judge. As already observed above, and without appearing to be interrogating those facts, save for purposes of determining the existence of any misapprehension of those facts if any, the supportive documents presented by the 2nd respondent were generated before the dispute wasdeclared. There was no denial by the appellant that the persons indicated on the check off system schedules were employees in its workforce establishment. As we have already observed above, the list presented by the appellant had no date as to when it was generated, why, and also whether those listed were unionazable employees or otherwise. On the totality of the above, we find no basis for the appellant's submission that the Judge misapprehended the facts and therefore failed to determine the issues placed before him.

With regard to issue number 2, the provisions of the Evidence Act, Cap 80 Laws of Kenya that the appellant complains were misapprehended and or misinterpreted are those relating to the burden of proof, namely sections **107, 108** and **109** thereof. The guiding principle in all the three provisions is that the party who asserts has the burden of proving those assertions. It is not disputed that it is the 2nd respondent which asserted before the Minister that it had met the threshhold under section 5(2) of the TDA with regard to the recruitment into its union membership of fifty percent plus one (51%+1) percent of the appellant's unionizable workforce; that it had accordingly forwarded check off system schedules to the appellant to effect deductions of the Union dues from its duly signed up unionizable employees and remit the same to the 2nd respondent, which request the appellant had either ignored and/or neglected to comply with.

The Minister believed the 2nd respondent's version as against that of the appellant, which belief the learned Judge affirmed. We find no legal absurdidity demonstrated to exist as contended by the appellant in its submissions. Those findings were based on the sound basis that the schedules for check off system were earlier in time than the date of the complaint; that there was no denial that the persons who had endorsed those schedules were the appellant's employees as at the material time when the request was made; and that the documentation relied upon by the appellant to counter those of the 2nd respondent had no dates or reasons as to why there was endorsement against some names and not others. Neither was there any indication that the list submitted by the appellant comprised the names of the appellant's unionizable

workforce.

With regard to alleged misapprehension, misinterpretation or miscomprehension of the provisions of the TDA, the learned Judge had this to say:-

> ***"8. From a reading of part 11 of the Trade Disputes Act, the Minister invoked the provisions of section 5(1) (f) and caused an investigation of the Trade dispute reported to him to be conducted in terms of section 7(1) but instead of making an order for the Employer to recognize the Union in terms of section 5(2) he proceeded to make a recommendation for recognition and negotiation of a collective bargaining Agreement.***
>
> ***9. The effect of the recommendation was however that the Minister was satisfied that the requirements under section 59 (2) had been achieved by the Union by attaining a simple majority of the Unionizable employees at the employers establishment.***
>
> ***10. In terms of the proviso to section 5(2) of the Trade Disputes Act, the employer had a right to appeal against the order of the Minister to the Industrial Court within fourteen days from the date of communication of the order to the party making the appeal or his representative and the Industrial court may revoke or endorse with or without amendment any such order.***
>
> ***11. Section 5(3) made it a criminal offence for any employer who fails to comply with an order of the Minister under section 5(2) and liable to a fine of ten thousand shillings for each month or part thereof during which such failure continues."***

We have revisited those provisions and construed them on our own. We agree with the learned Judges' Construction and/or interpretation of those provisions. We find no misconstruction, misapprehension or misapplication of those provisions to the facts on the record.

With regard to issue number 3, the proceedings resulting in the making of the consolidation order went as follows:-

> ***"Court: Notes that the additional members were recruited on 26/3/2007 and 27/3/2007 yet the list was not part of the investigation.***
>
> ***Industrial court cause No. 2075/2011. Pending court. This matter is consolidated with this matter and will be***
>
> ***determined together.***
>
> ***Bubi: My submissions here are sufficient to deal with the other matter though*** (sic) ***had not filed a response.***
>
> ***Mr. Njiru: My submissions here suffices to deal with cause No. 2075/2011.***
>
> ***Order: Industrial Court cause No. 2075/2011 be placed before me together with this matter.***
>
> ***I object to the two cases Bisquit case and Oraro case. Article 41 of the constitution on the right to fair labour***
>
> ***practice should be upheld by the court.***
>
> ***Mrs. Bubi:***
>
> ***Our appeal is in the form of a letter. There was no standard form under the Trade Dispute Act. We copied it to the Union and attached a statement setting out the grounds Page 6 &7 of our submissions deal with this.***
>
> ***No prejudice will be occasioned in any event. Authority No. 9 supports this.***
>
> ***Order***
>
> ***Judgment on notice."***

The above extract of the court proceedings when read together with the submissions of learned counsel for the respective parties, leave no doubt that appeal no M1/2011 and the cause were interrelated in that they arose from the same set of facts, but with the appeal seeking to overturn the ministers findings, while the cause sought to enforce those findings. We agree with the appellant's assertions that the court *suo motu* called for the file for cause No. 2075/2011 to be placed before him and to be dealt with as one with the appeal. Learned counsel on board for the respective parties went on record as intimating to the court that their submissions as already presented to the court for and against the appeal would suffice for any issues that may have been raised in the cause, notwithstanding, the appellant's indication to the court that it had not yet as at that point in time, responded to the said cause.

By observing as above, we are not in any way suggesting that by the respective parties intimating to the court that their submissions for and against the appeal would suffice for the disposal of the cause, in effect conferred jurisdiction on the court to consolidate the two matters and determine them as such. The position in law on what does or does not amount to want of jurisdiction was long crystallized by case law. See **Owners of the Motor Vessel 'Lillians"**

versus Caltex Oil (Kenya) Ltd [1989] KLR1, wherein **Nyarangi, JA** as he was

then had this to say:

> ***Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ……….***
>
> ***"By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court had cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristic. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it 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 the light of the above principle, jurisdiction has to be founded on a legal instrument and not by either acquiescence or by the conduct of the parties. In the appeal under review, reliance was placed on Rule 23 of the Industrial court (procedure) Rules 2010 as providing the necessary jurisdiction to make the consolidation order. It provides as follows:-

> ***"23. Consolidation of cases.***
>
> ***The court may consolidate suits if it appears that in any number of suits.***
>
> ***a. Some common questions of fact or law arises; or***
>
> ***b. It is practical and appropriate to proceed with the issues raised in the suits simultaneously."***
>
> The citation of the Rules reads as follows;-
>
> ***"These Rules, may be cited as the Industrial court (Procedure) Rules 2010."***

From the above provisions, it is our view that there is no indication in the above citation as to whether the Rules apply to the proceedings of the court in the exercise of its original or appellate jurisdiction. Rule 24(3) of the same Rules goes further to excempt the court from the strict compliance with the Rules of Evidence. It provides:

> ***"24(3) The court shall not be bound by rules of evidence under the Evidence Act."***

In the light of the above provisions, learned counsel **Miss Mbilu** cannot be faulted for submitting that the learned Judge was justified to conclude that Rule 23 (supra) applies to both the original and appellate jurisdiction of the Court. It was therefore properly invoked for purposes of consolidating the cause with the appeal for hearing and disposal, especially when it was not disputed that the two sets of proceedings related to the same subject matter. In our view, and on the basis of the same provision (Rule 23), the cause could have been introduced into the appeal by way of a cross petition, in view of the uncontroverted admission by learned counsel for the appellant that there was no formal procedure under the rules for the filing of an appeal, and that one could even be introduced by way of a letter which is the mode adopted by the appellant when they filed the appeal under review. In the same vein, there was no formal way of introducing a cross appeal. Nothing therefore ruled out the possibility of a cross appeal being introduced by way of a cause and then subsequently being consolidated with the appeal for purposes of final determination and disposal as was the case in the instant appeal. In this regard, we find no merit in this complaint as well.

There was also complaint by the appellant that the cause was incapable of being consolidated and disposed of with the appeal as parties had stayed its proceedings by way of a consent made on the 21st day of September, 2012 and which consent had not been discharged as at the time the cause was consolidated with the appeal, heard and disposed of. The excerpts of the record for the proceedings leading to the making of the consolidation order already highlighted above does not reveal any mention of existence of a stay order having been endorsed in the cause, staying the proceedings therein, pending the disposal of the appeal. Neither have we traced anything on the record with regard to the same. Since it is the appellant which asserted its existence, it ought to have included it in the court record for our perusal. In this regard, it is our finding that in the absence of proof of existence of an order staying the cause pending the determination of the appeal, the consolidation order for the appeal and the cause for hearing and disposal cannot be faulted.

The upshot of the above reasoning is that the appeal has no merit. It is accordingly dismissed with costs to the respondent both on appeal and in the court below.

Dated and Delivered at Nairobi 16th Day of February, 2018.

P.N. WAKI

…………………………………………………

JUDGE OF APPEAL

R.N.NAMBUYE

………………………………………………

JUDGE OF APPEAL

P.O. KIAGE

…………………………………………

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Deputy Registrar