



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: OUKO (P), KIAGE & MURGOR, JJ,A)**

**CIVIL APPEAL NO. 66 OF 2017**

**BETWEEN**

**INDUSTRIAL AND COMMERCIAL**

**DEVELOPMENT CORPORATION.....APPELLANT**

**AND**

**THE INDUSTRIAL COURT (AS ESTABLISHED**

**UNDER THE LABOUR INSTITUTIONS**

**ACT NO. 12 OF 2007.....1<sup>ST</sup> RESPONDENT**

**ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JAMES MACHUKA.....3<sup>RD</sup> RESPONDENT**

*(Appeal from the judgment and order of the Industrial Court Milimani at Nairobi (M.N. Nduma, J.) delivered 5<sup>th</sup> December 2014*

**in**

**Industrial Court Miscellaneous Application No. 16 of 2012)**

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**JUDGMENT OF THE COURT**

In this appeal, *the appellant, Industrial and Commercial Development Corporation* seeks to set aside the judgment and orders of the Employment and Labour Relations Court (ELRC), formally the Industrial Court, which had dismissed its application for leave to file Judicial review proceedings, *Miscellaneous Application No. 16 of 2011*, for reasons that, the application was statutorily time barred.

As a brief background the interested party, *James Machuka, (James)* who is the 3<sup>rd</sup> respondent filed a Memorandum of Claim dated 9<sup>th</sup> September 2009 against the appellant and Kenatco Taxis Limited (in Receivership) (The Company) in *Industrial Cause No 514 (N) of 2009* in *the Industrial Court*, the 1<sup>st</sup> respondent herein, as established under the Labour Institutions Act No. 12 of 2007 (*the Tribunal*). The Attorney General was the 2<sup>nd</sup> respondent. In the claim, James contended that he was initially engaged by the appellant, where he earned a monthly salary.

Following his retirement from the appellant on 31<sup>st</sup> December 2005, he was offered the position of Receiver/ Manager of the appellant, whereupon he entered into various agreements with the appellant for the provision of the services of a Receiver/ Manager. On 10<sup>th</sup> June 2009, James’ services with the appellant were terminated for reasons which we need not set out for the purposes of this appeal, thereby giving rise to the claim before the Tribunal.

In response, on 18<sup>th</sup> January 2010, the appellant issued a notice of its intention to raise a preliminary objection to challenge Tribunal’s jurisdiction to hear and determine the Claim as, by virtue of *section 12* of the *Industrial Institution Act 2007* and *Part XII of the*

**Employment Act 2007**, its jurisdiction was limited to employment disputes. The appellant contended that since James had been engaged as the Receiver/Manager under a debenture, pursuant to the Companies Act, Chapter 486 (*now repealed*), any dispute between the parties would require to be determined within the provisions of the Companies Act.

In dismissing the preliminary objection on 2<sup>nd</sup> June 2011, the Tribunal (Madzayo, J.) ruled that though a working relationship existed between James and the appellant, there was uncertainty as to the extent of their relationship, the existence of which could only be determined after hearing the suit on its merits. In so concluding, the Tribunal proceeded to hear James' claim against the appellant.

After considering the pleadings, the evidence, as well as the parties' submissions, the Tribunal delivered an award on 11<sup>th</sup> June 2012. In its award, it found that James was an employee of the appellant, and that the termination of his services by the appellant was unfair, unlawful and malicious, null and void.

The appellant was aggrieved by the Tribunal's decision and on 15<sup>th</sup> August, 2018 filed an application for leave to file Judicial review proceedings in *Industrial Court Miscellaneous Application No. 16 of 2012* in the ELRC where it sought an order of certiorari against the Tribunal and the Attorney General to quash the award and decree of the Tribunal, and for leave to operate as a stay of execution of the award and decree, until the determination of the judicial review application. The application and orders sought were granted *ex parte* by Abuodha, J, on the same day.

In the substantive Notice of Motion of 30<sup>th</sup> August 2012 in respect of the Judicial review application, it sought for an order of certiorari to be issued to the Tribunal to remove to the ELRC to quash the Tribunal's award dated 11<sup>th</sup> July 2012 in *Industrial Cause No 514 (N) of 2009*, and any subsequent orders thereon.

The application was premised on the grounds that the Tribunal had no jurisdiction to entertain the suit since James was appointed a receiver and manager under a debenture instrument pursuant to the Companies Act, and as such, he was not an employee of the appellant or the company in receivership; that as a consequence, the judgment and decree of the Tribunal issued by Madzayo, J. on 11<sup>th</sup> July, 2012 was rendered null and void and of no effect.

In their grounds of opposition to the motion filed on 8<sup>th</sup> November 2012, the Tribunal and the Attorney General stated that the application was without merit and based on a misconception of law; that the Tribunal acted within its mandate and powers under **sections 12 and 15** of the **Labour Institutions Act, 2007** and **section 87 (1) of Employment Act**; that the appellant sought to challenge a final decision and the findings of the Tribunal by way of Judicial review instead of an appeal, as provided by **section 27** of the **Labour Institutions Act 2007**; that the material before the Tribunal made it clear that during the period in question, James was an employee of the appellant within the meaning of "employee" and "employer" as specified by the Employment Act and the Labour Institutions Act No. 12 of 2007.

By a Notice of Preliminary objection in response to the Judicial Review application, James contended that the application was an abuse of the court process as it questioned the Tribunal's jurisdiction which issue was determined in the Tribunal's ruling of 2<sup>nd</sup> June 2011; that the appellant did not appeal against or apply for a review of the ruling; that subsequently, the substantive claim was heard and determined on its merits, and therefore, the appellant was precluded from disputing the decision of the Tribunal in this manner.

It was further asserted that the Judicial review application for orders of certiorari was time barred and should be dismissed with costs as it was not filed within six month from 2<sup>nd</sup> June, 2011, which was the date that the Tribunal had rendered its decision on jurisdiction.

The appellant opposed the Preliminary objection asserting that the objections did not raise points of law, and that the judicial review application should be heard on its merits.

Dismissing James' preliminary objection, the ELRC concluded that, as to whether the Judicial review application was time barred was not a pure point of law that was capable of determination without going into the merits of the application, and further that, the objection was not properly before the court as it ought to have been brought by way of an appropriate application to the judge who initially granted leave to file the Judicial review proceedings.

The dismissal of James' Preliminary objection was to pave way for the hearing of the Judicial review application, and in a judgment delivered on 5<sup>th</sup> December 2014, the court framed three issues for determination which were; 1) whether the application for judicial review was time barred in terms of **order 53 rule 2 of the Civil Procedure Rules** and **section 9 (3) of the Law Reform Act** and should therefore be dismissed; 2) If the answer to 1 was in the negative, whether the Tribunal had jurisdiction to hear and determine the dispute in *Industrial Cause No. 514 (N) of 2009*, and 3) If the answer to 2 was in the affirmative, whether the Tribunal followed due process and the law in determining the matter in its award dated and issued on 11<sup>th</sup> July 2012.

The ELRC concluded that the Tribunal's ruling of 2<sup>nd</sup> June 2011 found that an employee-employer relationship existed between the appellant and James, and that upon delivery of the ruling, the appellant ought to have instituted the Judicial review proceedings or applied for a review of the ruling under **rule 32** of the **Industrial Court Rules 2010** or filed an appeal against the decision of the court. The court further stated that time for filing the Judicial review application started running from 2<sup>nd</sup> June 2011 and not from the date of the award on the substantive claim delivered on 11<sup>th</sup> July 2012; that **section 9 (3) of the Law Reform Act Cap 26** provided that a Judicial review application must be brought within six months of the impugned decision and under **order 53 rule 2** of the **Civil Procedure Rules** an application for an order of certiorari required to be filed within six months from the date of the decision, and that therefore the Judicial review application was time barred as it was filed after the stipulated six month period had lapsed.

The appellant was further aggrieved by the decision and appealed to this Court on the grounds that the ELRC wrongly concluded that the Tribunal's ruling of 2<sup>nd</sup> June 2011 found that an employer and employee relationship existed between the appellant and James and that it had

the requisite jurisdiction to hear and determine *Industrial Cause No. 514 (N) of 2009*; that the ELRC erroneously concluded that the appellant's Judicial review application was statutorily time barred, and in so finding, wrongly set aside the leave granted to institute the Judicial review proceedings; in holding that the Tribunal rightly concluded that the dispute between the appellant and James was based on an employee-employer relationship; and in failing to appreciate the legal arguments that were before the court.

**Mr. G. Obura**, learned counsel for the appellant filed written submissions on 16<sup>th</sup> August 2017 which were highlighted in Court. Counsel submitted that the issue of whether an employer - employee relationship existed between the appellant and the 3<sup>rd</sup> respondent was material as, the Tribunal being a creature of statute was subject to a specific jurisdiction and could only act within the powers donated to it by the Act; that such jurisdiction was limited to disputes arising between an employer and an employee. It was further argued that since the relationship between the appellant and the 3<sup>rd</sup> respondent was founded on a debenture dated 25<sup>th</sup> September 1989 and various contracts, any dispute between them would require to be determined by the High Court under the provisions of the Companies Act, and not by the Tribunal. Counsel faulted the trial court for erroneously concluding that in its ruling of 2<sup>nd</sup> June, 2011, the Tribunal had determined the question of whether an employer-employee relationship existed between the parties, when it had not.

On the issue of whether the application was statute barred, counsel submitted that, the ruling by the learned judge that the Judicial review application was filed out of time was premised on the wrong assumption that time for filing the application began to run from the Tribunal's decision of 2<sup>nd</sup> June 2011. Counsel stated that the application was not time barred since, the Tribunal determined that it had jurisdiction on 11<sup>th</sup> July 2012 when it pronounced the award, and therefore, time for filing the application began to run from that date.

On the question of whether an employee-employer relationship existed, it was argued that the learned judge misdirected himself when he concluded that the Tribunal rightly found that the Receiver/ Manager was an employee of the debenture holder. Counsel submitted that on the basis of the contracts signed between the receiver manager and the debenture holder, James was not an employee, any claim for remuneration was a matter for determination by the High Court, and not the Tribunal.

On her part, **Ms. Odhiambo** filed written submissions on 30<sup>th</sup> January 2018. When highlighting the submissions, counsel stated that whether an employee and employer relationship existed was based on the facts of the case; that the respondent had opted for early retirement, but had remained in employment at the appellant's request. As a consequence of this, an employment relationship had come into existence.

**Mr. Nyabena**, learned counsel for the 3<sup>rd</sup> respondent also filed written submissions on 25<sup>th</sup> January 2018. Counsel submitted that the Judicial review application was time barred and that the 3<sup>rd</sup> respondent was an employee of the appellant. It was further submitted that the record showed that following the decision of the court on the preliminary objection, the appellant did not appeal against or seek to review the decision; that on this basis, the dispute proceeded to be heard on its merits, following which a decision was rendered; that once again, no appeal or review was sought after that decision; that on 15<sup>th</sup> August 2012, the appellant filed the Judicial review application which did not question the award, but the ruling of 2<sup>nd</sup> June 2011; that by this time, the period for filing of the Judicial review application had already lapsed. It was further submitted that, to circumvent the provisions of **section 9 (3) of the Law Reform Act and order 53 of the Civil Procedure Rules**, the appellant has sought to challenge the award on the pretext of its having been a determination on the issue of the Tribunal's jurisdiction. Counsel finally asserted that the trial court rightly found that as a matter of fact an employment relationship existed between the parties, which was not a matter for consideration in a Judicial review application.

We have considered the various pleadings and the parties' submissions and are of the view that the issues for our consideration are;

- i) Whether the Tribunal determined that an employer employee relationship between the appellant and James, and established that it had jurisdiction to hear and determine the claim, and if so, when such determination was made.*
- ii) Whether the appellant's application for leave to institute judicial review proceedings was time barred;*
- iii) Whether the court rightly dismissed the judicial review application; and*
- iv) Whether an employer employee relationship legally existed between the appellant and James.*

But before addressing the issues, we bear in mind the caveat appertaining to our mandate in matters of this nature. In the case of **Maina vs Mugiria (1983) KLR 79** it was held, *inter alia*, that:-

***“The Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”***

On whether the Tribunal ruled that an employer and employee relationship existed, and therefore found that it had jurisdiction to determine the claim, the learned judge had this to say;

***“15. It is not in doubt that the Tribunal in its ruling of 2<sup>nd</sup> June 2011 found that there existed an employee and employer relationship between the Claimant and the Respondent and went ahead to dismiss the Preliminary Objection dated 8<sup>th</sup> January 2010 challenging the jurisdiction of the Tribunal to entertain, hear and determine the dispute.***

**16. The Court effectively found it had the jurisdiction and it is on the strength of that finding that it proceeded to hear the matter on its merits. Had the ruling of the Tribunal been otherwise, it would have downed its tools forthwith and dismissed the substantive suit.”**

The appellant has argued that, the trial court misdirected itself in arriving at this conclusion as, the Tribunal’s ruling made it clear that whether an employment relationship existed between the parties was not a matter that was capable of being disposed of by way of a preliminary objection; that the merits of the case required to be considered before a determination could be reached; that therefore, the Tribunal did not pronounce itself on the question of jurisdiction when it dismissed the Preliminary objection on 2<sup>nd</sup> June 2011.

Against these assertions, it is necessary to review the relevant part of the Tribunal’s decision of 2<sup>nd</sup> June 2011 so as to discern its meaning and effect. The ruling specified that;

**“This is a court of equity. It is of fundamental importance where a claim filed for and on behalf of the claimant, the court shall exercise an equitable jurisdiction. Further, it is not in doubt that at one time there existed a working relationship between the claimant and the respondent. To what extent that relationship developed into, can only be achieved if each party is accorded an opportunity to be heard.”**

It is clear from this extract that, though the Tribunal was satisfied that the parties had worked together, it was not certain of the extent or degree of that relationship, given that on the one hand, there was the contention by the interested party that the working relationship was one of employer and employee, while on the other, the appellant contended that the working relationship was one of principal and agent. In essence, the Tribunal’s concern was that the relationship between the parties could not be properly discerned without delving into the merits of the case.

But, an analysis of the learned judge’s extrapolation of the Tribunal’s ruling, shows that the learned judge incorrectly concluded that the Tribunal determined that an employer- employee relationship existed between the parties, and that the Tribunal “...effectively found that it had jurisdiction...”. To the contrary, the Tribunal reached no such conclusion. There was no specific pronouncement on the existence of an employee and employer relationship or any other relationship, or on the question of its jurisdiction. Indeed, it is safe to conclude that the Tribunal considered that it would be fair and just to exercise its discretion to dismiss the preliminary objection, in order to enable it to consider all the material that was before the court so as to arrive at a determination of the issues in contention.

Further support for this view is to be found in the Tribunal’s award of 11<sup>th</sup> July 2012 on the merits of the case where it stated thus;

**“The 1<sup>st</sup> Respondent maintained that the Claimant was not an employee of its company having offered him an appointment in their subsidiary company i.e Kenatco Taxis Limited and could therefore, not seek to be bound by the terms governing the employees of the 1<sup>st</sup> Respondent as the contract entered into between the 1<sup>st</sup> Respondent and the Claimant was based on the debenture, while the Claimant maintained that he was an employee. Under Section 3 of the Labour Institutions Act, No. 12 of 2007, Laws of Kenya, an “employee” is defined as follows:-**

**“employee” means “a person who has been employed for wages or a salary and includes an apprentice or indentured learned”.**

**And the “employer” is defined as follows:**

**“employer” means any person, including the Government, who employs or has employed an employee and where appropriate includes:-**

**a) An heir, successor, assignee or transferor of an employer; or**

**b) An agent, director or any person authorized to represent an employer.”**

**In the instant case, the definition of employee does not exclude any employee who at the end of every month receives his or her salary. The intention of the legislature to frame this enactment was to confer the benefits of the Labour laws on person who would be covered by the definition of “employee”.**

**According to records, the 1<sup>st</sup> respondent duly signed the contract of service on its own behalf with the claimant on all the three written contracts of service.”**

Clearly, having stated in its ruling of 2<sup>nd</sup> June 2011, that the question of jurisdiction would be addressed upon hearing the merits of the claim, it was indeed in the award that the Tribunal stated that James was an employee as defined by the Labour Institutions Act, No. 12 of 2007. Again, though it did not specifically pronounce itself on the question of jurisdiction, it can be concluded that the Tribunal considered that the matter was properly before it when it proceeded to arrive at a determination of the matters in contention.

When the decisions in the ruling and the award are compared, becomes clear that the Tribunal determined that an employment relationship existed between the appellant and James in the award, and not in the ruling of 2<sup>nd</sup> June 2011. We find therefore that the learned judge misdirected himself by wrongly concluding that the decision on jurisdiction was made on 2<sup>nd</sup> June 2012 instead of in the award on 11<sup>th</sup> July 2012.

We turn to the next issue of whether the appellant's application for leave to institute Judicial review proceedings was time barred and if so, whether the ELRC rightly dismissed the Judicial review application.

As seen above, the decision on jurisdiction was determined on 11<sup>th</sup> July 2012. The application for leave to file the Judicial review application was filed on 29<sup>th</sup> August 2012. This was one and a half months after the Tribunal's award was rendered, meaning that it was filed in compliance with the requirements of **section 9 (3)** of the **Law Reform Act** and **order 53 rule 2** of the **Civil Procedure Rules**. Accordingly, the application for leave to file Judicial review proceedings having been filed within the statutory stipulated period, we find that the learned judge wrongly set aside the application for leave to file the Judicial review proceedings for reasons that it was time barred.

Finally, it is apparent that having come to the conclusion that leave to file the Judicial review application was filed out of time, the learned judge did not pronounce himself on whether in fact an employer and employee relationship existed between James and the appellant. In view of this omission, we consider that, on this question, the appellant is entitled to such determination by the ELRC. In the circumstances, we deem it necessary to have the matter remitted back to that court for such determination.

In sum, the appeal is allowed and the judgment and orders of the ELRC dated 5<sup>th</sup> December 2014 are hereby set aside. We order that the suit be and is hereby remitted back to that court for a determination of the question of whether an employer and employee relationship legally existed between the appellant and James, the 3<sup>rd</sup> respondent, which should be heard on a priority basis by any judge of that court, other than Nduma, J.

The appellant shall have the costs of the appeal.

***It is so ordered.***

***Dated and delivered at Nairobi this 22<sup>nd</sup> day of June, 2018.***

**W. OUKO (P)**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**