IN THE COURT OF APPEAL

AT MOMBASA

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

CIVIL APPEAL NO. 55 OF 2017

BETWEEN

VICTOR WAUDI.....1ST APPELLANT

CASABLANCA HOLDINGS LIMITED..... .....2ND APPELLANT

AND

SAMMY NZIOKA BITA..... .....1ST RESPONDENT

MUTIO GEORGE MUTIO.....2ND RESPONDENT

SYLVSTER OTIENO.....3RD RESPONDENT

VICTOR OCHIENG.....4TH RESPONDENT

CASABLANCA RESTAURANT CLUB.....5TH RESPONDENT

(An appeal from the judgment and decree of the Employment and Labour Relations Court at Mombasa (Makau, J.) dated 28th April, 2017

in

Labour Relations Court Cause No. 397 of 2014)

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JUDGMENT OF THE COURT

1. At the heart of this appeal is the primary issue as to whether there existed an employer/employee relationship between the appellants herein and the 1st – 4th respondents. This is because unless such a relationship existed between the parties, then evidently the issue of jurisdiction which is the soul of all litigation comes into play. When a question on jurisdiction is raised in a dispute, ideally it should be determined *in limine*, unless of course in the circumstances of the case, it would be more efficacious, effective or prudent to hear the whole dispute and make the Ruling on jurisdiction in the final determination. This happens when the dictates of economic and judicious utilisation of judicial time and other resources so require.

2. When this happens, the court seised of the matter then determines the issue of jurisdiction on priority because if it succeeds, then the rest of the suit falls on the way side. It is important to note that in their amended responses to the 1st – 4th respondent's amended memorandum of claim, at paragraph 4 thereof, the 5th respondent gave notice that it would raise a preliminary objection pertaining to the competence and/or validity of the entire claim. The Appellants on the other hand had also expressed at paragraph 7 of their joint response to the amended memorandum of claim that the court lacked jurisdiction to deal with the claim there being no employer/employee relationship between the claimants and the appellants.

3. The suit nonetheless proceeded to full hearing following which the Employment and Labour Relations Court (ELRC) (**Makau, J.)** rendered the decision now impugned on 28th April, 2017.

4. A brief summary of the case will help place the matter in proper context. Sammy Nzioka Bita, Mutio George Mutio, Sylvester Otieno and

Victor Ochieng (1st – 4th respondents herein) were the claimants in Industrial cause No.397 of 2014 which they filed against Casablanca Restaurant Club; Victor Waudi t/a Casablanca Restaurant Club and Casablanca Holdings Limited. Victor Waudi and Casablanca holdings limited are the appellants herein. The suit against Casablanca Restaurant (1st respondent in ELRC) was struck out after the court ruled that it was a mere business name and could not be sued in its name. In effect, the court upheld the objection raised by the 1st respondent in its response to the amended memorandum of claim, which we mentioned earlier.

5. According to paragraph 3 & 4 of the Amended memorandum of claim amended on 27th May 2015, the 1st – 4th respondents were employed by Casablanca Restaurant Club (5th respondent herein) and Victor Waudi (1st appellant) on diverse dates. From paragraph 4 of the said claim the 1st respondent was employed on 8th January 1996; 2nd claimant on 8th December 1995; 3rd claimant in 1997; and the 4th claimant in 2008.

6. They nonetheless averred that they were later transferred without their knowledge and consent to the 2nd appellant (Casablanca Holdings Limited). It is necessary to point out at this stage that contrary to the said averments, the 1st to 4th respondents were not employed by the 1st appellant as they claimed but by his father Joseph Okoth Waudi who died on an unspecified date between 2010 and 2014. We assume so because from the evidence adduced by the 1st – 4th respondents, they were introduced to the 1st appellant by his late father sometime in 2010. They also said that it was then that the 1st appellant was introduced as a director of the 2nd appellant. On the other hand, there was evidence that the liquor licenses exhibited in court for the years 2012 and 2013 were in the name of Joseph O. Waudi meaning that he was still operating the businesses.

7. From the above narrative, even at this stage, it is clear that the appellants were not the 1st – 4th respondent's employers for the entire time claimed in the memo of claim. Even though the 2nd appellant is said to have been incorporated in 2010, it is clear that the deceased continued operating the two businesses in his name. There is therefore no evidence of transfer of the business either in 2010 as claimed by the respondents, or by 2013 because the licences were still in the name of the deceased.

8. In their *viva voce* evidence before the ELRC, the four respondents narrated how on 25th July, 2015 each of them was called by the manager, one Tony Kenga who told them that they had been dismissed for writing demand letters for increased salaries. None of them was able to talk to the 1st appellant to confirm that indeed, he had given instructions for their sacking. Learned counsel for the appellants and the 5th respondent submitted that such evidence remained hearsay and therefore in admissible.

9. Following their meeting with Tony Kenga, the 4 respondents were dismissed and they thereafter filed the suit before the ELRC claiming several reliefs.

10. The learned Judge exonerated the 1st respondent in the suit on the grounds we have stated earlier but entered judgment against the two appellants herein and awarded compensation for unfair termination and for lack of notice aggregating to Kshs.670,150.00 plus costs and interest thereon.

On the vexed issue of employer/employee relationship between the parties, the learned Judge rendered himself as follows:-

> ***"There is no dispute that the claimants were initially employed by the first respondent before it was taken over by the third respondent on 2009.***
>
> ***There is also no dispute that the second respondent was a director of the third respondent. There is further no dispute that the claimants were all dismissed on 25th July 2014…"***

11. That is the Ruling that provoked the appeal before us in which the appellants have proffered six grounds of appeal in their memorandum of appeal dated 10th August, 2017. The said grounds in our view raise only two issues, namely, that the appellants were not the employers of the four respondents and that the compensation awarded to them was too high.

12. The appeal was ventilated by way of written submissions with brief highlights by Mr. Ogengu, learned counsel for the appellants and Mr. Amuga, learned counsel for the 5th respondent, who was supporting the appeal.

Mr. Wafula, learned counsel holding brief for Mr. Osore of the 1st to 4th respondents informed the Court that the respondents would purely rely on their written submissions.

13. In their submissions, the appellants cudgelled the learned Judge for finding that the respondents had been initially employed by the 1st appellant before being taken over by the 2nd Appellant, even after the respondents admitted having been employed by the late Joseph Okoth Waudi. Learned counsel reiterated that there was no evidence whatsoever to support the respondents' claim that they were taken over by the second appellant as its employees. He posited that there being no proof that the appellants had employed the respondents at any one time, there was no employer/employee relationship between them and they could not be held liable for the unfair termination.

Further following the admission by the respondents that they were dismissed by Tony Kenga, then the person they needed to sue was Kenga pursuant to **Section 2** of the Employment Act and not the appellants. They urged us to allow this appeal and set aside the impugned

judgment.

14. Mr. Amuga reiterated the submissions made on behalf of the appellants. He cited the High Court decision in the case of **Rising Star Commodities Limited vs. Daniel Akwera** where the court held that the onus is on the employee to prove the fact of employment. He submitted that the respondents had failed to prove they were employees of the appellants and the case should therefore have been dismissed.

15. On their part, the respondents, through the submissions filed by Otieno Asewe and Company Advocates maintained that the learned Judge was right in holding that the 2nd appellant and the 1st appellant by virtue of being director of the 2nd appellant were the respondents' employer and they were consequently properly sued. On the issue of damages awarded, they stated that they had been unlawfully terminated as no proper reason had been given for their dismissal and that due process had not been followed. They urged us to dismiss the appeal.

16. We have re-evaluated the entire evidence adduced before the trial court as we are mandated to do pursuant to **Rule 29 (1) (a)** of the Rules of this Court.

As stated at the beginning of this judgment, at the core of this appeal is whether there existed an employee/employer relationship between the parties herein. That will be our first issue for determination.

17. In their amended claim, the 1st – 4th respondents stated that they were employed by Casablanca Restaurant Club, and Victor Waudi (1st appellant) before being transferred to the 2nd appellant. We pause here and ask, from the entire evidence in the trial Court, was there any evidence that the respondents were employed by 1st appellant? The answer is in the negative. First and foremost the learned Judge found, and correctly so that Casablanca Restaurant Club which had been sued as the first respondent was incapable of suing or being sued and its name was struck off the proceedings. That left Victor Waudi to shoulder the responsibility.

18. Did he, as found by the learned Judge employ the 4 respondents? Again the answer is NO. We say so because in their testimony on oath, the respondents said they were employed by the 1st appellant's father.

Indeed, they placed the 1st appellant in the picture only in 2010 when they claimed he was introduced to them by his late father. The 1st appellant was not their employer when they were employed. In a bid to attach liability to him, they said he was a director of the 2nd appellant and that the 2nd appellant took them over as its employees upon the demise of Joseph Waudi.

19. We have gone through and duly considered the evidence on record. We are not persuaded that there was sufficient evidence placed before the trial court to demonstrate firstly that the respondents' employment was taken over by the 2nd appellant; and secondly, that the 1st appellant was indeed a director of that company. We note that in their pleadings the respondents never stated that they were suing the 1st appellant in his capacity as director of the 2nd appellant. In **paragraph 2 (a)** of their amended memorandum of claim, they described the 1st appellant as proprietor/director/manager of Casablanca Restaurant Club. There was no link in the pleadings between the 1st appellant and 2nd appellant. The respondents changed course in their testimony in court.

20 As pronounced by this Court in **Galaxy Paints Company Ltd vs. Falcon Guards Ltd** (2000) eKLR.

> ***"It is trite law, and the provisions of O.XIV of the Civil Procedure Rules are clear, that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of O.XX rule 4 of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. In Gandy v. Caspair (1956) EACA 139 it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute as pleaded clearly amounts to an error on the face of the record."***

We hold that there was paucity of evidence before the trial court to support the learned Judge's conclusion that;-

> ***"there is no dispute that the claimants were initially employed by the 1st respondent before it was taken over by the 3rd respondent in 2009."***

Apparently, that finding was not a correct reflection of the proceedings before the court as the issue was hotly contested and there was therefore a major dispute on who the employer was and the issue, as pointed out earlier, had even been raised in the response to the claim, and it had not been resolved through the *viva voce* evidence of the parties. It was also a misdirection on the part of the learned Judge to find that 1st appellant was a director of 2nd appellant as there was no proper evidence placed before the court to that effect.

21. This Court reiterates it's holding in **Malelu Muthama vs. Kay Construction Company Limited** Nai Civil Appeal No. 60 of 2003 (unreported) that an employee must prove the fact of employment, where in particular employment has been denied by the alleged employer. We find that the 4 respondents failed to

prove that they were employees of the appellants. If they wanted to sue the correct person in absence of Joseph Okoth Waudi who had initially employed them, then they should have sued the administrators of the deceased's estate. The fact that the 1st appellant was on site and maybe supervising the operations of the business did not cloth him with the requisite *locus standi* to be sued on behalf of his late father.

22. We also note that the respondents gave the names of the managers who dismissed them. Under **Section 2** of the Employment Act 2007, they could have sued the managers in question and not the 1st appellant. There was even no evidence to show that it was 1st appellant who had directed the managers to sack the respondents because as correctly submitted by counsel for the appellants, such evidence remained hearsay evidence and was therefore inadmissible.

23. Whereas we sympathise with the four respondents for the fate that befell them after working for the 1st appellants' father for many years, unfortunately the law is not in their favour and our sympathy will not assist them in any way. Lastly, we would say that it was strange that the same Judge, faced by the same circumstances and same respondents and subject matter had earlier on arrived at a diametrically opposite conclusion in **Kazungu Kalama Nguma & Another vs. Victor Okoth Waudi** (2017) eKLR where he held:-

> ***"On a balance of probability, I agree with the evidence by the defence that the respondent never employed the claimants but they remained employees of the estate of the respondents' father. That without any evidence that the respondent was a manager or agent of the deceased's business, I am of the considered view that the respondent does not fit within the description of an employer under Section 2 of the Employment Act. Consequently, the answer to the first question for determination is that there was never any employment relationship between the respondent and the claimants herein."***

This was the correct position. We have said enough to demonstrate that this appeal is for allowing. We allow it and set aside the impugned judgment dated 28th April, 2017 in entirety. We also order that each party bears its own costs of this appeal and before the ELRC in view of the circumstances leading to the dismissal of the respondents' claim.

Dated and delivered at Mombasa this 12th day of July, 2018.

ALNASHIR VISRAM

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JUDGE OF APPEAL

W. KARANJA

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR