IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, WARSAME & MURGOR, JJ,A)

CIVIL APPEAL NO. 207 OF 2013

BETWEEN

KENYA MEDICAL RESEARCH INSTITUTE.....APPELLANT

AND

DAVY KIPROTICH KOECH.....RESPONDENT

(Appeal from the Ruling and order of the High Court of Kenya at Milimani Commercial Court (P. Kihara Kariuki, J.) delivered 15th July 2011 in

HCCC No. 382 of 2010)

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JUDGMENT OF THE COURT

This appeal arises out of a ruling of the High Court *(P. Kihara Kariuki, J.)* which declined to strike out ***the respondent's***, ***Davy Kiprotich Koech's*** suit, for want of jurisdiction which suit was filed in the High Court.

The appellant, the Kenya Medical Research Institute, a body corporate established under ***section 12*** of the ***Science and Technology Act, Cap 250*** was the respondent's employer. The respondent was the director of the appellant until 16th August 2007, when his employment was terminated. The respondent instituted proceedings on 4th June 2010 against the appellant in the commercial division of the High Court that being *HCCC No. 382 of 2010, Davey Kiprotich Koech vs Kenya Medical Research Institute*, where he alleged that he was wrongfully dismissed. As a consequence, he claimed damages of Kshs. 124,879,070, general damages for defamation and lost employment opportunities, cost of the suit and interest.

By a Chamber Summons dated 7th July 2010, the appellant, sought the following orders;

> *"1) That the Honourable Court strike out the Plaintiffs suit;*
>
> *2) That in the alternative the Plaintiff's suit be struck out for being an abuse of the court process;*
>
> *3) That the cost of the suit be borne by the plaintiff /respondent."*

The application was brought on the grounds that the matters pleaded involved an employment dispute, where the respondent was seeking damages against the respondent for wrongful dismissal; that the suit related to a claim for terminal dues, and the Commercial and Tax Division of the High Court has no jurisdiction to deal with the employment disputes which are matters within the jurisdiction of the Employment and Labour Relations Court. It was contended that the suit was brought in total disregard of the mandatory provisions of the law, and in particular ***section 12*** of the ***Labour Institutions Act 2007*** which specified that the dispute could only be adjudicated in the Industrial Court.

In determining the application, the High Court (P. Kihara Kariuki, J (as he then was) dismissed the application for reasons that the respondent had pleaded general damages for defamation arising from a tarnished name and reputation. The court took the view that under the Labour Institutions Act 2007 and the Employment Act 2007, the Industrial Court did not have jurisdiction to hear and determine defamation matters, and that having regard to the just, expeditious, proportionate and affordable resolution of disputes, it would be absurd to expect the respondent to file his complaint involving wrongful dismissal or unfair termination of employment in the Industrial Court and to pursue his

claim for damages for defamation in the High Court.

The appellant was aggrieved by the High Court's decision and has appealed to this Court on the grounds that the learned judge; failed to appreciate the interpretation and implication of ***section 12*** of the ***Labour Institutions Act***; and ***section 12*** of the ***Industrial Court Act***; misdirected himself on the jurisdiction of the Industrial Court as provided by the Labour Institutions Act, 2007 and the Employment Act, 2007; misinterpretation of ***section 22*** of ***Part 5*** of the ***Sixth Schedule of the Constitution***; in failing to appreciate the issues and the submissions that were before the court.

Both the appellant and the respondent filed written submissions. ***Mr. Rotich*** learned counsel for the appellant, holding brief for ***Mr. Munge*** highlighted the appellant's written submissions before us. It was counsel's case that the High Court did not have jurisdiction to determine the issue on the basis of ***section 12*** of the ***Industrial Act, Article 162 (2)*** of the Constitution and ***section 27*** of the ***Employment Act*****;** that the interpretation of ***section 22*** of the 6th Schedule of the Constitution provided that the matter shall be heard in the same court or in a corresponding court that the suit was filed, as it was filed on 4th June 2010 which was before the promulgation of the 2010 Constitution, and by this time the Industrial Court had the jurisdiction to entertain the dispute. In support of this contention, counsel cited ***Jane Wanjiku Maina vs Kenya Tea Development Authority [2009] eKLR*** and ***Narok County Government vs Trans Mara County Council [2000] 1EA 161*** where it was held that the Industrial Court had exclusive jurisdiction to hear employment disputes; that the suit was an employment dispute where defamation had been raised as an ancillary issue, and therefore the dispute was filed in the wrong court and ought to be struck out.

Despite having been served with the hearing notice on the 23rd May 2018 there was no appearance for the respondent. Nevertheless, when their written submissions filed on14th June 2017 are considered, the respondent's position is that, in as much as ***section 22 (3)*** of the ***Industrial Court Act 2011*** gives the court powers to award various reliefs, defamation was not one of the matters that the court was empowered to determine; that the time the suit was filed, the employer- employee relationship had come to an end and therefore the learned judge was right to find that it was absurd to expect the respondent to file two different suits, one for wrongful dismissal in the Industrial Court and the other one as a claim for defamation in the High Court.

We have considered the pleadings, the submissions of the parties and the law, and are of the view that the central issue for determination is whether the High Court or the Industrial Court had jurisdiction to entertain a suit, which was predominantly employment related, but which also contained a claim for defamation.

But before addressing the issue, we bear in mind the principles governing our mandate in matters of this nature. In the case of ***Samuel Kamau Macharia vs KCB & 2 others, Civil Application No. 2 of 2011*** the Supreme Court expressed itself as thus;

> ***"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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."***

We turn now to interrogate the jurisdiction of the two concerned courts. Beginning with the High Court under the retired Constitution, ***section 60 (1)*** specified that;

> ***"There shall be a High Court which shall be a superior court of record and which shall have unlimited jurisdiction in civil and criminal matters and such other jurisdiction and powers as may be conferred on it by this constitution or any other law…"***

Therefore, though it is provided that the High Court would have unlimited jurisdiction to hear all civil and criminal matters, the jurisdiction to hear employment disputes was not exclusive to the court.

Then following the enactment by Parliament of the repealed Labour Institutions Act 12 of 2007, which established labour institutions, and provided for their functions, powers and duties, and the repealed Employment Act 2007, a new court, that is, the Industrial Court was established with exclusive jurisdiction to hear and determine disputes between the employer and the employee.

Section 11 (1) of the ***Labour Institutions Act 2007*** established the Industrial Court and provided that;

> ***"There is established an Industrial Court with all the powers and rights set out in this Act or any other law for the furtherance, securing and maintenance of good industrial and labour relations and employment conditions in Kenya".***

The jurisdiction of the Industrial Court was set out in ***section 12 (1)*** of the same *Act* which stipulated that;

> ***"…the Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court, or in respect of any matter which may arise at common law between an employer and employee…"***

Section 15 went on to provide that;

> ***"if the Industrial Court finds that a dismissal is unfair, the Industrial Court may order the employer to:***

a) Reinstate the employee from any date but not earlier than the date of dismissal, or

b) Re-engage the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal, or

c) Pay compensation to the employee to maximum of twelve (12) months wages."

On its part ***section 47*** of the ***Employment Act 2007*** provided that, where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer, or to the Industrial Court on the same issue or in respect of any other infringement of his or her statutory rights.

In addition, ***section 87 (1)*** of that Act specified that;

"Subject to the provisions of this Act whenever—

(a) an employer or employee neglects or refuses to fulfill a contract of service; or

(b) any question, difference or dispute arises as to the rights or liabilities of either party; or

(c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court."

Also provided at sub- section (2) was the limitation that no court other than the Industrial Court shall determine any complaint or suit referred to in subsection (1).

Thereafter, following its promulgation, the Constitution 2010 established the specialized courts, that is, the employment and labour court and the environment and land court. In this regard, ***Article 162 (2)*** of the ***Constitution*** provided that;

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

(a) employment and labour relations

(b) the environment and the use and occupation of, and title to land."

And pursuant to ***Article 162 (2)*** of the Constitution, Parliament enacted the Industrial Court Act No. 20 of 2011, which repealed the Labour Institutions Act and the Employment Act, 2007, and replaced the Industrial Court as established under that Act with the Employment and Labour Relations Court (ELRC).

In so far as the ELRC's jurisdiction was concerned, ***section 4 (1)*** of the ***Industrial Court Act 2011*** stipulated that;

"In pursuance of Article 162 (2) (a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya

(2) The court shall be a superior court of record with the status of the High Court.

(3) The court shall have and shall exercise jurisdiction throughout Kenya".

Section 12 (1) went further to specify that;

"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 provision of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations including all the other matters specified in the Act."

It is clear from this chronology of enactments, that the position prevailing prior to the promulgation of the 2010 Constitution, was that the Industrial Court had exclusive jurisdiction to hear and determine all matters concerning employment disputes or that were employment related.

Going back to the instant case, the suit was filed on 4th June 2010 which was before the promulgation of the Constitution, but during the tenure of the Industrial Court as established under the Labour Institutions Act and the Employment Act 2007. This would have been the law applicable at the time. And as can be discerned from the Plaint, there is no question that the suit arose from an employment dispute between the parties. For instance paragraphs 8, 9 and 10 of the Plaint specified that;

"8. The Plaintiff had been in service with the defendant for thirty (30) years when his service was wrongly, unlawfully and

prematurely terminated.

9. At the time of the termination, the plaintiff was earning a consolidated salary together with benefits of Kshs. 622,290/=.

10. The plaintiff avers that the termination of his employment contract was unlawful and his claim against the defendant is for terminal dues and other damages for breach of contract and for unlawful dismissal".

Yet the respondent sought to file the suit in the High Court, instead of in the Industrial Court. But that said, there was an additional dimension to the suit which involved a claim for defamation that required to be taken into consideration. It is this aspect of the dispute that the learned judge concluded was a matter that only the High Court could determine, as this was an issue that went beyond the Industrial Court's remit.

The claim for defamation was expressed in the following terms;

"And the plaintiff claims for general damages for tarnished name and reputation in the manner that his termination was conducted by the defendant as he has not been able to get any other employment as he was labeled as a thief and a dishonest person".

A claim for defamation is a claim in tort or causing injury to an individual, and the remedy or relief would usually be in general damages. Before the establishment of the Industrial Court, this was a matter which would have wholly been determined by the High Court. But whether the Industrial Court, was sufficiently empowered to hear a claim for defamation was dependent on the extent of the Industrial court's jurisdiction as specified by the two Acts.

As seen above, ***sections 47*** and ***87 (1)*** of the ***Employment Act 2007*** were explicit that the court had jurisdiction to deal with any question, difference, or dispute as to the rights and liabilities of an employer or employee, as well as on matters touching on misconduct, neglect, ill treatment, or any injury to the person or property of either party or infringement of statutory rights. Considering that the respondent's claim was that his employer was alleged to have injured to his person by way of defamation, we find that the court had the requisite mandate with which to determine the dispute between the parties.

But the matter does not end there. In view of our finding above, did the court have the necessary powers to grant the reliefs sought? Our answer to this would be in the affirmative. We say this because ***section 12 (4)*** of the ***Labour Institutions Act, 2007*** stipulated that;

"In the discharge of its functions under this Act, the Industrial Court shall have the powers to grant injunctive relief, prohibition declaratory order, award of damages, specific performance or reinstatement of an employee".

Essentially, the above provisions endowed the court with sufficient powers to hear, determine and grant appropriate reliefs such as damages, injunctions, and specific performance, *inter alia,* to matters that were of an employment nature. In the case at hand, respondent has prayed for;

"b) General damages for defamation and lost employment opportunities."

Since the court was sufficiently empowered to award damages for a claim for defamation that was connected to the wrongful termination of employment, where it was alleged that the defamatory statements substantially and materially affected his employability, we have come to the inevitable conclusion that the High Court did not have jurisdiction to entertain the dispute, which jurisdiction lay exclusively with the Industrial Court.

Having so found, the appellant has urged us to strike out the suit for want of jurisdiction in the High Court. In reaching a determination on this issue given the circumstances of the case, the question that begs is whether this would be the most efficacious way to deal with a suit of this nature.

In the case of ***Kagenyi vs Musiramo & Another [1968] EA 43*** and a long line of cases after it, it was held that before a transfer can be effected, the court effecting the transfer must have the jurisdiction to order such transfer.

But in view of the overriding objectives of the courts as read together with ***Article 159 (2)*** of ***the Constitution*** which entreat them to perform their duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities, recent cases have adopted a different approach to dealing with cases concerning the courts of equal status, that is the High Court, the ELRC and the Environment and Land Court. In the case of ***Prof Daniel N. Mugendi vs Kenyatta University, Benson I. Wairegi, Eliud Mathiu & Prof Oliver M. Mugenda Civil Appeal No. 6 of 2012*** this Court rendered itself thus;

"Believing as we do that the approach taken by Majanja J. is the correct one, and in endeavoring to meet the ends of justice untrammeled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to Industrial and Labour Relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matter in that context and with regard to Article 165(5) (b). An in order to do justice, in the event where the High Court, the Industrial Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that Court for hearing and determination. These three Courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate form for each kind of claim. However, parties should not

file "mixed grill" causes in any court they fancy. This will only delay dispensation of justice".

As such, in the interest of justice, we would accept that this would be the correct approach to adopt in this case, and we would order that the suit be transferred to the Employment and Labour Relations Court for hearing and determination. In that event, we do not see that any prejudice would be visited on the appellant.

Accordingly, the appeal is dismissed and we do not strike out the suit for want of jurisdiction. Instead, we order that the High Court shall transfer the suit to the Employment and Labour Relations Court for hearing and determination. Since the suit is yet to be determined on its merits, we order each party to bear its own costs.

It is so ordered.

Dated and Delivered at Nairobi this 9th day of November, 2018.

P.N. WAKI

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JUDGE OF APPEAL

M. WARSAME

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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