IN THE COURT OF APPEAL

AT MOMBASA

CIVIL APPEAL NO. 70 OF 2015

BETWEEN

COMARCO PROPERTIES (EPZ) LIMITED……...APPELLANT

AND

TRANSPORT & ALLIED WORKERS UNION……..…… RESPONDENT

(Being an appeal from the judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 20th March, 2015

in

E.L.R.C.C. NO. 118 of 2012)

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JUDGMENT OF THE COURT

The appellant is a limited liability company engaged in transportation of drilling rigs and other construction equipment by land and sea. On the other hand, the respondent is a trade union representing the interest of employees engaged in motor and transport trades.

The dispute leading to this appeal relates to failure by the appellant to pay one of the respondent's alleged member, **Onesmus Njihia Mureithi**, "*the claimant*" terminal benefits and non-implementation of a commission contract between them. The claimant was initially employed by a company known as **Divecon** on 23rd February 1982, as contracts logistics manager with the commencement salary of Kshs.5000/- per month. Over the years the company changed names to Consolidated Marine Contractors, Kenya Marine Contractors (EPZ) and to the present appellant. Over the same period, the claimant, due to devotion and dedication to his duties, rose rapidly through the ranks and by December, 2006 when he voluntarily left the employment of the appellant, he was an executive director earning a monthly salary of Kshs.160,000/-. He left the appellant's employment subject however to payment of his terminal dues to take up consultancy services with appellant at the rate of 2% of the gross value of any contracts he would bring to the appellant. According to the respondent, pursuant to the said consultancy agreement, he secured for the appellant a contract to the tune of Kshs.213,594,123/70 but the appellant refused, failed and or neglected to pay him his 2% commission totaling Kshs.4,271,882/50.

Following this failure, the claimant went back to his employment records and realized that the appellant in fact owed him a substantial amount of money in terminal dues as hereunder:-

(i) One month's salary in lieu of notice 160,000.00

(ii) Service pay at 15 days for every completed year of service 3,680,000.00

(iii) Annual leave days earned but not taken 320,000.00

(iv) Leave arrears 100,330.00

In total the claimant demanded from the appellant a total sum of Kshs.8,532,212/50 on that account inclusive of the commission aforesaid in a claim lodged with the Employment and Labour Relations Court at Nairobi.

In its response to the claim, the appellant denied that it unilaterally terminated the claimant's employment. Rather, it averred that the claimant retired from its employment voluntarily upon which he was paid all his terminal dues and acknowledged receipt of the same by voluntarily signing a discharge voucher. The appellant further averred that it did not offer the claimant any consultancy work after retirement; that the claim was therefore spurious and fictitious; and that on retirement, the claimant was paid Kshs.616,348/- and Kshs.2,000,000/- separately in full and final settlement of his terminal dues. It was on this basis that the appellant asked for the dismissal of the claim with costs.

At the hearing, the claimant testified along the same lines as set out in the statement of claim. At the tail end of his testimony, however, the claimant applied for leave to file a supplementary memorandum of appeal so as to bring on board an e-mail through which his services were terminated. Leave was granted and on 6th December, 2011, the claimant filed the supplementary memorandum. When next the claim came up for further hearing on 2nd November, 2012, by the consent of the parties, it was transferred from the Employment and Labour Relations Court in Nairobi to the same court in Mombasa for hearing and final determination. The claim was then placed before **Radido, J**. on 3rd December, 2012 whereat parties agreed that the hearing commences *de novo*.

At the resumed hearing on 25th July, 2013, **Mr. Nasib Mokuwa**, union official appearing for the claimant informed the court that he was not calling any witnesses and that he was content with relying on the statement of claim as filed and thereafter making submissions.

In support of the appellant's response to the claim, the appellant called two witnesses, **James Amwayi** whose evidence was taken by Radido, J. and **Nuru Suleiman Hamed** whose evidence was recorded by **Rika, J.** in circumstances that are not easily discernable from the record. James Amwayi was the Managing Director of the appellant whereas Nuru Suleiman Hamed was his Executive Assistant.

James Amwayi testified to the effect that he knew the claimant in 2008 when he was working for Kenya Marine Contractors Ltd. However, the appellant was not its employer. That though the appellant was awarded a construction project in Lamu, the respondent was not involved at all in the process leading to the award of the said contract. In other words, the claimant did not participate at all in the delivery of the tender and could not therefore have influenced its award to the appellant nor did he participate in the financial bids. On the whole, he testified that, the claimant did not have any input in the tender process. Accordingly, he was not entitled to the commission that he was now demanding.

On 24th October, 2014, Rika, J. took over the cause in an unexplained circumstances and heard the evidence of Nuru Suleiman Hamed, who testified that he had worked with the claimant as the General Manager. On 31st December, 2008, the claimant left employment by mutual agreement. Indeed he retired and was paid Kshs.2,000,000/- as his retirement package. The money was paid to him in cash and he signed an acknowledgement and or discharge voucher. Accordingly, his claim had no basis since that was not a case of termination but retirement with full benefits.

With formal hearing concluded, the court directed that parties file and serve their respective written submissions. In a judgment rendered on 20th March, 2015 Rika, J. decreed that:-

(i) The claimant retired voluntarily from regular employment on 31st December, 2008.

(ii) In the circumstances the prayer for reinstatement was not available to him.

(iii) The claimant should however, be paid by the appellant service pay for a period of 22 years computed at Kshs.2,030,769/-.

(iv) The claimant should be paid by the appellant commission in accordance with the terms of retirement agreement computed at Kshs.2,135,941/-.

(iv) The total sum of Kshs.4,166,710/- should be paid to the claimant by the appellant through the respondent within thirty (30) days of the delivery of the award.

(v) There will be no order as to costs and interest.

Aggrieved by the decision, the appellant lodged the instant appeal on eight grounds summarized as follows: that the trial court erred in failing to appreciate the provisions of **Sections 38** and **40** of the Public Procurement and Disposal Act in awarding the respondent Kshs.2,135,941/- on account of procuring the tender; in holding that the claimant was unionsable and capable of being represented by the respondent when infact he held a position of Executive Director and was therefore an employer; by failing to hold that the appellant had been fully discharged from further claims when the claimant signed a discharge voucher on receipt of his terminal dues; by failing to hold that the commission agreement was between the claimant and Comarco Construction Ltd, an entirely different and distinct entity from the appellant; by failing to appreciate that the employer-employee relationship between the claimant and the appellant only arose on 1st July, 2006 and thus arrived at the wrong conclusion that the claimant was entitled to service pay for the period 1982 to 2004; by holding that the tender process preceded the commission agreement and thus arrived at the wrong conclusion that the claimant was entitled to a commission; by failing to appreciate that the respondent had no *locus standi* to institute and prosecute the claim on behalf of the claimant; and finally, by failings to properly evaluate the law and the evidence on record thereby arriving at an erroneous decision and awarding service pay for the period 1982 to 2004 and the commission.

When the appeal came before us for plenary hearing on 3rd December, 2015, parties agreed to cavass it by way of written submissions. Those submissions were subsequently filed and exchanged.

Highlighting the appellant's submissions, **Mr. Asige Kelvin** indicated that he had not filed any authorities as the case traversed virgin land and there were no known authorities. On the issue of privity of contract, counsel submitted that the contract between the claimant and the appellant was not one of employment and that though the decision of the High Court turned on the e-mail dated 18th November, 2008 between the appellant and the claimant, that e-mail was in respect of a separate entity other than the appellant. Counsel submitted that in the premises the trial court erred in coming to the conclusion that there was indeed a contract on the basis of that e-mail. To counsel, therefore there was no privity of contract and thus the court erred in awarding the damages.

Replying **Mr. Nasibu** submitted that though over the years the appellant had mutated into many companies, the claimant never broke his contract of service. To the respondent, the award was proper and the trial court simply struck a balance. The respondent also urged us in determining the appeal to have regard to the definition of contract of service under the Labour Relations Act, 2007. This was in response to the argument whether the respondent had *locus standi* to represent the claimant.

We have carefully read and considered the rival written submissions as well as the highlights. However, it appears to us that the determination of this appeal may not turn on its merits. We say so because as we read through the record as well as the judgment of the High Court, we came across a litany of procedural and jurisdictional irregularities that actually vitiate the eventual decision of the trial court.

What are these irregularities? First and foremost the claim was initially lodged in Nairobi and was subsequently transferred to Mombasa by consent of the parties. In Nairobi, the claimant's evidence was taken by **Mukunya, J.** At the tail end of his evidence, Mr. Nasibu applied to file a supplementary memorandum of claim to bring on record the respondent's reaction to the e-mail evidence. That application was allowed subject to the appellant being allowed to file and serve an answer. Ideally therefore the claimant had not concluded his testimony. Indeed Mukunya, J. re-scheduled the hearing to 4th July, 2012 at 2.30 specifically for continuation of the claimant's case.

When the claim came up for further hearing, it had been transferred to Mombasa as already stated. On 3rd December 2012, when the claim was placed before Radido, J. in Mombasa, he with the consent of the parties issued the following directions:-

> **" …this matter was part heard before Justice Mukunya who no longer is a Judge of the Industrial Court and it is therefore ordered that the matter starts afresh…."**

Again these directions were renewed by the Judge on 17th December, 2012 thus: *"…As directed during the last appearance on 3/12/2012 this matter will commence afresh…"*

Eventually when the hearing commenced on 25th July, 2013, Mr. Nasibu is on record as saying: *"I am not calling any witness. I will make submissions. Rely on statement of claim filed in Court on 4/4/2011…"* Immediately thereafter, Mr. Nasibu launched into his submissions. This is the first irregularity we are talking about. We are not aware of a trial procedure where a party is allowed to submit before the conclusion of the trial. A close scrutiny of the alleged submissions reveals no more than the evidence contained in the claimants witness statement filed in court. In essence therefore, Mr. Nasibu was giving evidence. That is irregularity number two. There are no reasons advanced as to why the claimant could not be called to testify and be subjected to cross-examination. After all he had done so before Mukunya, J. In our view, therefore the claimant closed his case without tendering any evidence. That being the case, on what basis did the trial court find in favour of the claimant?

The order of the court in Mombasa was that the case be heard *de novo*. To our understanding, the order meant that the case would start afresh meaning therefore that this Court will have no regard to what transpired before Mukunya, J. Yet, in the judgment of the trial court, the Judge borrowed heavily from the evidence tendered before Mukunya, J. That is procedural irregularity number 3.

It appears however, from **Rule 24** of the Industrial Court Rules that evidence in court may be given orally or if the Judge so orders, by affidavit or a written statement and submissions. From the foregoing, it is plain that the hearing of a claim must proceed by way of oral testimony unless the court hearing directs by an order that it be heard on the basis of the affidavits, written memoranda and submissions on record. From what is before us, we have not seen any order recorded to the effect by the Judge that the claim be canvassed by way of documents on record and thereafter submissions. Nor have we seen the order by the trial court dispensing with the oral hearing of the claim. This conclusion is buttressed by the fact that the appellant went out of its way and testified orally by calling witnesses. In the absence of such specific order, we doubt very much whether the trial court was right in relying on such evidence more so when the author of the statement did not take the witness stand and confirmed that, that was his statement and he stood by it, and he could, if need be cross –examined on it. Instead we have a situation where the statement is introduced by the respondent who proceeds to comment and submit on it long before the trial has even reached its halfway mark. Procedural irregularity number 4.

The record shows that the claim was being handled by Radido, J. Indeed, he took the evidence of James Amwayi for the appellant on 3rd March, 2014. However, when the claim next came up for further hearing on 24th October, 2014, Rika, J. took charge. The record does not show the circumstances under which Rika, J. took over the claim from his colleague. Of course, it is not unheard of for a Judge to take over a matter from another. The reason (s) may vary from the preceding Judge having passed on, left judicial service, becoming incapacitated or even having left the station on transfer and it is not practical to have him come back to conclude the part-heard case. However, the reason(s) must be self-evident on record.

Otherwise, it would be ridiculous and highly irregular for another Judge to take over a matter that has hitherto been handled by another and run away with it when the Judge previously hearing it is still available in the station to proceed with the case. Rika, J. may have taken over the claim in the circumstances which are perfectly legal or even procedural. However, the absence from the record of the circumstances under which he became seized of the claim, raises jurisdictional questions. That is problem number five.

We think that all these procedural and jurisdictional improprieties call for an order that the claim be heard afresh. We appreciate that these matters were never canvassed before us. However, since they touch on procedure and jurisdiction, we think that we can entertain and decide them *suo moto*.

Accordingly, we allow the appeal, set aside the judgment and decree of the trial court and in lieu thereof order that the claim be heard afresh before any other Judge of Employment and Labour Relations Court, Mombasa other than Rika, Radido and Mukunya, JJ. There shall be no order as to costs.

Made and dated at Mombasa this 22nd day of April, 2016.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

W. OUKO

JUDGE OF APPEAL

K. M'INOTI

JUDGE OF APPEAL

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

DEPUTY REGISTRAR