



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MWILU, J. MOHAMMED & OTIENO-ODEK JJ.A)

CIVIL APPEAL (APPLICATION) NO. 105 OF 2013

BETWEEN

MAUREEN ODEROAPPLICANT

AND

KENYA PIPELINE COMPANY LIMITED.....RESPONDENT

(An application to strike out the Record of Appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Mukunya, J.) dated 25th May 2012

in

IND. COURT CAUSE NO. 422 OF 2011)

RULING OF THE COURT

1. The dispute between the parties was heard by the Industrial Court of Kenya at Nairobi at the time when the said Industrial Court was a Tribunal established under the **Labour Institutions Act of 2007** and not the presently constituted **Employment and Labour Relations Court** established under **Article 162 (2)**

a. and **(3)** of the 2010 Constitution. By a Notice of Motion dated 26th June 2013, the applicant seeks an order to strike out the appellant’s record of appeal lodged in Court at Nairobi on 27th May 2013 in Civil Appeal No. 105 of 2013.

2. The grounds in support of the application as stated on the face of the Motion and in the supporting affidavit are *inter alia*:

“(a) *The award appealed from emanates from the Industrial Court as a tribunal established under the Labour Institutions Act No. 12 of 2007 and from which no appeal could lie to this Court.*

b. *The Record of Appeal was filed out of time without leave of this Court.*

c. *The Record of Appeal is incurably defective as it does not contain a certified copy of the*

decree as required under the rules of this Court.

d. The appeal is an abuse of the Court process as the applicant prior to filing the instant appeal had filed a Constitutional Petition being Industrial Court Petition No. 10 of 2012 (formerly High Court Petition No. 269 of 2012) seeking to nullify the award herein; the Constitutional Petition is yet to be heard and determined.”

3. The respondent did not file a replying affidavit in opposition to the instant application and opted to respond on points of law.
4. At the hearing of the application, learned counsel Mr. Geoffrey Orao Obura appeared for the applicant while learned counsel Mr. Kiche holding brief for Mr. John Ohaga appeared for the respondent.
5. Counsel for the applicant in reiterating the grounds in support of the application relied on the supporting affidavit dated 25th June 2013 deposed by the applicant; it was emphasized that this Court has no jurisdiction to entertain an appeal from an award/decision by the Industrial Court as previously established under the **Labour Institutions Act No. 12 of 2007**; that record of appeal does not contain a certified copy of the decree appealed against; that the record of appeal was filed out of time taking into account that the Notice of Appeal was filed on 8th June 2012 and the record filed on 27th May 2013 which was way beyond the 60 days from the date of filing the Notice of Appeal; and that no certificate of delay was filed with the record of appeal.
6. Counsel for the respondent urged this Court to dismiss the application submitting that the Record of Appeal was filed within time because a Supplementary Record of Appeal was filed on 11th September 2013 pursuant to **Rule 92** of the Rules of this Court and the said Supplementary Record cured any defects in the initial Record of Appeal; that **Rule 92** allowed the respondent to file the Supplementary Record of Appeal at any time; that the Supplementary Record of Appeal contains the certificate of delay and the certified copy of the decree appealed against.
7. As regards the jurisdiction of this Court to hear an appeal from the Industrial Court as established under the **Labour Institutions Act No.12 of 2007**, it was submitted that this Court had jurisdiction because the award the subject of the appeal was delivered on 25th May 2012 after the 2010 Constitution had been promulgated; that as of the date of the award i.e. 25th May 2010, the new Constitution had come into effect and this Court under **Article 164 (3)** thereof has jurisdiction to hear and determine appeals from the Employment and Labour Relations Court.
8. In response to submissions by the respondent, counsel for the applicant indicated that the Supplementary Record of Appeal was filed without leave of court because **Rule 88** permits the respondent to file a Supplementary Record without leave within 15 days of filing the Record of Appeal; that in the instant case, the respondent filed the Supplementary Record after 15 days and leave was required under **Rule 88** of the Rules of this Court; the Supplementary Record having been filed without leave was not properly before Court and it was incompetent and should also be struck out.
9. We have considered the instant application, the grounds in support thereof as well as submissions by counsel and authorities cited to us.
10. The critical issue for determination is whether this Court has jurisdiction to entertain an appeal from the Industrial Court as established under the **Labour Institutions Act No. 12 of 2007**. It is not disputed that the dispute between the parties was heard by the Industrial Court constituted under the **Labour Institutions Act**; it is also not in dispute that the award by the Industrial Court was made on 25th May 2012 after the new 2010 Constitution had been promulgated. Jurisdiction is everything and without it a court must lay down its tools. (See **Owners of the Motor Vessel “Lillian S’ -v- Caltex Oil (K) Limited [1989] KLR 1**).
11. In **The Director Kenya Medical Research Institute -v- Agnes Muthoni & 35 Others, Civil**

Appeal No. 15 of 2011, this Court had an opportunity to consider the competence of this Court to hear appeals emanating from decisions of the Industrial Court as established under the **Labour Institutions Act No. 12 of 2007**. In arriving at the decision that this Court had no jurisdiction to hear such appeals this Court stated:

“Section 3 of the Appellate Jurisdiction Act and Section 64 of the retired Constitution limit our appellate jurisdiction to appeals emanating from the High Court. Section 3 of the Interpretation and General Provisions Act (Cap 2) defines High Court to mean High Court established by the Constitution...We are therefore in agreement with the arguments of the preliminary objector that the definition of the High Court whose decisions are appealable to the Court of Appeal does not include the Industrial Court.”

12. Guided by the decision in **The Director Kenya Medical Research Institute - v- Agnes Muthoni & 35 Others** (supra); we stand by the same decision and hereby find and hold that this Court has no jurisdiction to entertain Civil Appeal No. 105 of 2013.

13. The appellant contended that the date upon which the Industrial Court award was made i.e. 25th May 2012 which was after the promulgation of the 2010 Constitution should be considered. Jurisdiction is not conferred upon a court by virtue of the date of the award or determination of the case - jurisdiction is conferred by law. Jurisdiction must exist *ab initio* at the time of hearing the case; jurisdiction is not retrospective to be conferred by the date of award or determination of the case. The trial court that heard and made the award and determination in this matter was the Industrial Court as established and constituted under the provisions of the **Labour Institutions Act of 2007**; the court that heard and made the determination of the award the subject of this appeal was not the Employment & Labour Relations Court as established and constituted under **Article 162 (2) (a) and (3)** of the 2010 Constitution.

14. Another jurisdictional issue canvassed in this application relates to the competence of the appeal as filed. Counsel for the applicant submitted that the appeal filed was incompetent because the record of appeal was filed out of time and no certificate of delay and certified copy of the decree appealed against was on record. Counsel for the respondent submitted that the Supplementary Record of Appeal filed in this matter cured the defects in the record because the certificate of delay and the certified copy of the decree are in the Supplementary Record. In **Kali Security Co. Ltd -v- Mureithi (2005) KLR 91**, this Court reiterated that **Rule 81 (1)** of the Court of Appeal Rules (**now 82**

(1) requires that an appeal should be lodged within sixty (60) days of the date when a notice of appeal was lodged and the only exception to that rule is where the period certified as having been necessary for preparation of the record is excluded from computation of time without the need to seek an order of the court. **Rule 81 (2)** and which is now **rule 82 (2)** must however be complied with for the certificate of delay to be acceptable.

15. In the instant case, it is not in dispute that the Supplementary Record of Appeal was filed more than fifteen (15) days after filing of the Record of Appeal and that leave to file the Supplementary Record was not obtained. **Rule 88** of the Rules of this Court stipulates that where any document is omitted from the record of appeal the appellant, may within fifteen (15) days of lodging the record, without leave include the document in a supplementary record of appeal and thereafter with leave of the deputy registrar on application. (emphasis ours).

16. Under the provisions of **Rule 88** the respondent herein, who is the appellant, was required to obtain leave to file the Supplementary Record of Appeal - leave was not obtained. We accordingly find that the Supplementary Record of Appeal that was filed on 11th September 2013 is improperly on record with the consequence that the record of appeal as lodged is defective. We are alive to the decision of this Court in **Odera t/a Odera & Associates -v- Machira t/a Machira & Co. Advocates (2000) KLR 254** wherein it was stated that if omission of a document from the record of appeal is not fatal, it would be quite harsh to strike out an appeal on the ground of omission unless the appellant, for whatever reasons, is not ready or is reluctant to regularize the defect by seeking leave of the court to put in a supplementary record of appeal. Despite the foregoing, in the instant case, a fundamental jurisdictional issue remains, *to wit*, that

this Court cannot hear an appeal from the Industrial Court as established under the **Labour Institutions Act No. 12 of 2007**.

17. Given our finding and determination on the fundamental jurisdictional question, it is our considered view that the Notice of Motion dated 26th June 2013 has merit and is hereby allowed. The final order of this Court is that the record of appeal lodged in this Court as Civil Appeal No. 105 of 2013 be and is hereby struck out for want of jurisdiction by this Court. Costs of this application are awarded to the applicant.

Dated and delivered at Nairobi this 31st day of July, 2015

P.M. MWILU

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JUDGE OF APPEAL

J. MOHAMMED

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR