



**Dunaiski v Kenya Airways PLC (Cause E845 of 2024)
[2025] KEELRC 1560 (KLR) (29 May 2025) (Ruling)**

Neutral citation: [2025] KEELRC 1560 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E845 OF 2024
CN BAARI, J
MAY 29, 2025**

BETWEEN

CAROLINE SOPHIA DUNAISKI CLAIMANT

AND

KENYA AIRWAYS PLC RESPONDENT

RULING

1. Before Court is the Respondent's Preliminary Objection dated 4th December, 2024, seeking the striking out of the Claimant's claim on the premise firstly, that this Court lacks jurisdiction to hear and determine the same in accordance with Article 162(a) of the Constitution and Section 12 (1)(a)-(j) of the Employment and Labour Relations Court Act, and secondly, that the claim seeks the recognition, adoption and enforcement of a foreign judgment with the applicable law being the Civil Procedure Act.
2. That consequently, the Claimant cannot invoke this Court's jurisdiction as it is not a dispute envisaged under Section 12(1) of the Employment and Labour Relations Court Act.
3. Parties urged the objection by way of written submissions, and submissions were received from both parties.

The Respondent's Submissions

4. It is the Respondent's submission that this Court lacks the jurisdiction to determine the Claim before it, and jurisdiction being everything per Nyarangi J in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, the Court must then down its tools.
5. It submits further that their Preliminary Objection does not raise any factual matters, rather, it turns on one singular issue - the jurisdiction of the Employment and Labour Relations Court ("ELRC"). It



sought to rely in the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA. 696 for the holding that: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

6. The Respondent submits that a cursory look at the claim, clearly shows that the Claimant seeks to recognize, adopt, and enforce a Foreign Judgement, which the Court does not have jurisdiction to do.
7. The Respondent submits that Article 162 (2) of the [Constitution](#) established the ELRC as a Superior Court with the status of a High Court to hear and determine employment and labour relations disputes, and that whereas the ELRC has the equal status of a High Court, it does not have the equal jurisdiction of the High Court. It submits further, that the ELRC is a specialized Court with a specified mandate as set out in the [ELRC Act](#) and for this reason, it lacks the jurisdiction to recognize, adopt, and enforce a Foreign Judgment.
8. The Respondent placed reliance in the Supreme Court’s decision in [Republic v. Karisa Chengo & 2 Others](#) Supreme Court Petition No. 5 of 2015; [2017] eKLR, where the Court clarified the jurisdiction of superior Courts as Courts of equal status, in the following words: -

“(52) In addition to the above, we note that under Article 162(3) of the [Constitution](#), Parliament enacted the [Environment and Land Court Act](#) and the [Employment and Labour Relations Act](#) and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the [Constitution](#) and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters presented to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

9. It is the Respondent’s submission that the claim has to be filed before the High Court because whereas the Foreign Judgment arises from an employment-related dispute, the recognition and enforcement are not inherently an employment and labour relations dispute. It had reliance in the sentiments of the Court in [National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others](#) (Civil Appeal 656 of 2022) [2023] KECA 80 (KLR), where the Court opined: -

“The intention of Parliament was clear both from the preamble [of the Act] and section 12(1)(a) (f). The [ELRC Act](#) was enacted to resolve employer-employee disputes as provided by Article 162(a) of the [Constitution](#). That was the purpose and context which could not be ignored in interpreting provisions of the [ELRC Act](#)... Where the statute creating a court conferred it with jurisdiction over a limited subject matter, it could only entertain any such claim that fell within the purview of the subject matter.”

10. It submits that the reason the High Court is the appropriate Court, is because of the provision of Section 3 of the [Judicature Act](#) Cap 8 Laws of Kenya, which demands that the jurisdiction of the High



Court is to be exercised in conformity with the Constitution and all other written laws and subject to certain qualifications, the substance of the common law of England. It had reliance in Raw Bank PLC v Yusuf Shaa Mohamed Omar & another [2020] KEHC 5281 (KLR), to buttress this position.

11. The Respondent further submits that the ELRC is a creature of statute and its jurisdiction is strictly limited to what is provided for under the Act, and that the legislature did not intend to confer the ELRC with this jurisdiction.
12. It submits that recognition and enforcement of a Foreign Judgment is premised on principles of international comity, reciprocity, and the sovereignty of states. That a sovereign state has no compulsory obligation under international law to recognize and enforce a Judgment from another jurisdiction and this obligation is based on reciprocal arrangements that are partly judicial and partly administrative. It submits further that such is a matter of foreign relations, which falls under the unlimited original jurisdiction of the High Court.
13. It is the Respondent's final submission that the ELRC does not have jurisdiction to recognize, adopt or enforce the Angolan Judgment by virtue of Section 12 of the ELRC Act.

The Claimant's Submissions

14. The Claimant submits that this Court has exclusive jurisdiction to determine the dispute or claim herein.
15. It is submitted for the Claimant, that the High Court lacks jurisdiction to determine employment and labour relations matters and therefore, the High Court cannot have jurisdiction to adjudicate matters relating to whether the foreign judgment in issue herein is valid or capable of adoption and enforcement in Kenya.
16. The Claimant submits that an Angolan judgment can only be enforced as a common law claim as was held by the Court of Appeal in the case of Jayesh Hasmukh Shah v Navin Haria & Another [2016] KLR, where the Court of Appeal held at paragraph 23 of the judgment that the provisions of Section 9 of the Civil Procedure Act apply mutatis mutandis with the common law principles in adoption and enforcement of a foreign judgment in Kenya from a non designated country.
17. The Claimant further submits that it follows that the issues and or questions arising from determination of whether the foreign judgment in issue is conclusive determination of the dispute between parties under Section 9 of the Civil Procedure Act are matters which arise from and relate to employer/employee relationship of the parties herein, and which ELRC has exclusive jurisdiction to determine.
18. The Claimant submits that enforcement of foreign judgment herein, can only be achieved under Section 9 of the Civil Procedure Act since there is no reciprocal agreement between Angola and Kenya. Further, Section 12(1) of the ELRC Act, confers this Court exclusive jurisdiction to proceed and determine the dispute herein, by application of Section 9 of the Civil Procedure Act.
19. The Claimant prays that the Preliminary Objection be dismissed with costs.

Determination

20. The singular issue for my determination is whether the Court has jurisdiction to hear and determine the Claimant's claim.



21. It is settled that a preliminary objection can only hold on points of law and not where facts have to be ascertained. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA. 696 the court held thus: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

22. The instant objection by the Respondent is on whether this Court has jurisdiction to hear and determine the Claimant’s suit. The Respondent’s argument is that by the express provisions of Article 162 of the *Constitution* and Section 12 of the *Employment and Labour Relations Court Act*, the jurisdiction of this court as stipulated therein, does not include the recognition, adoption and enforcement of a foreign judgment.

23. The Respondent’s contention is that the claim herein, ought to have been filed before the High Court because whereas the Foreign Judgment subject of the claim arises from an employment-related dispute, the recognition and enforcement are not inherently an employment and labour relations dispute.

24. The Claimant’s position is that enforcement of a foreign judgment can only be achieved under Section 9 of the *Civil Procedure Act* since there is no reciprocal agreement between Angola and Kenya. It is the Claimant’s further contention that Section 12(1) of the *ELRC Act*, confers this Court exclusive jurisdiction to proceed and determine the dispute herein, by application of Section 9 of the *Civil Procedure Act*.

25. Section 9 of the *Civil Procedure Act* states: -

“A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim, litigating under the same title, except—

- a. where it has not been pronounced by a court of competent jurisdiction;
- b. where it has not been given on the merits of the case;
- c. where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of Kenya in cases in which such law is applicable;
- d. where the proceedings in which the judgment was obtained are opposed to natural justice;
- e. where it has been obtained by fraud;
- f. where it sustains a claim founded on a breach of any law in force in Kenya.”

26. It is not disputed that there is no reciprocal agreement between Angola and Kenya. The only issue therefore, is whether this court has jurisdiction to recognize, adopt and enforce a foreign judgment. Nyarangi J in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, held that jurisdiction is everything, and without which a Court must down its tools.



27. Firstly, I do concur with the Respondent's submission that the objection raised herein, being on the jurisdiction of the Court, is without doubt a pure point of law and falls squarely within the threshold set in the *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (*supra*).
28. On the question of jurisdiction, the Supreme Court of Kenya in *Republic v. Karisa Chengo & 2 Others* Supreme Court Petition No. 5 of 2015; [2017] eKLR, clarified the jurisdiction of superior Courts as Courts of equal status, in the following words: -
- “(52) In addition to the above, we note that under Article 162(3) of the *Constitution*, Parliament enacted the *Environment and Land Court Act* and the *Employment and Labour Relations Act* and respectively outlined the separate jurisdictions of the ELC and the ELRC as stated above. From a reading of the *Constitution* and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters presented to the ELC and ELRC (emphasis own), it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”
29. The Respondent admits that the foreign judgment arises from an employment dispute, and its only reservation is that this court cannot enforce the said judgment for the singular reason that it is a foreign decision.
30. It is not disputed that Article 162 (2) of the *Constitution* established the ELRC as a Superior Court with the status of the High Court to hear and determine employment and labour relations disputes. In *Jayesh Hasmukh Shah v Navin Haria & Another* [2016] KLR, the Court of Appeal held that the provisions of Section 9 of the *Civil Procedure Act* apply mutatis mutandis with the common law principles in adoption and enforcement of a foreign judgment in Kenya from a none designated country.
31. In the case of *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* [2024] KESC 3 (KLR) the Supreme Court held that there was nothing in the *Constitution*, the *ELRC Act*, or indeed the decision in the *Karisa Chengo case* to suggest that in exercising its jurisdiction over disputes emanating from employment and labour relations, the ELRC was precluded from determining the constitutional validity of a statute. That was especially so if the statute in question lay at the center of the dispute. What it could not do, was to sit as if it were the High Court under Article 165 of the *Constitution* and declare a statute unconstitutional in circumstances where the dispute in question had nothing or little to do with employment and labour relations within the context of the *ELRC Act*. (Emphasis own).
32. By dint of the foregoing, and for reason that the judgment that is sought to be adopted and enforced under the claim arises from an employment dispute, it follows that the claim squarely falls within the jurisdiction of the Employment and Labour Relations Court espoused under Article 162(2)(a) of the *Constitution* and Section 12 (1)(a)-(j) of the *Employment and Labour Relations Court Act*.
33. I thus conclude by holding that this Court is clothed with jurisdiction to hear and determine the suit herein, and the Respondent's Objection lacks merit and is for dismissal.



34. It is dismissed with costs in the cause.

35. It is so ordered.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
29TH DAY OF MAY, 2025.**

C. N. BAARI

JUDGE

Appearance:

Mr. Kinyanjui h/b for Mr. Litoro for the Claimant

Ms. Ogonyo h/b for Mr. Adan for the Respondent

Ms. Esther S-CA.

