



Kigotho v Acme Wanji Investment Limited (Employment and Labour Relations Appeal E054 of 2023) [2024] KEELRC 13618 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13618 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E054 OF 2023**

**JW KELI, J
DECEMBER 18, 2024**

BETWEEN

ALICE WANJIKU KIGOTHO APPELLANT

AND

ACME WANJI INVESTMENT LIMITED RESPONDENT

(Being an appeal from the Ruling and Order of the Honorable C.K Cheptoo PM delivered on the 17th March 2023 in Milimani Commercial Courts CMCELRC No. E932 of 2021)

JUDGMENT

1. The appellant being dissatisfied with the Ruling and Order of the Honorable C.K. Cheptoo PM delivered in Nairobi on the 17th of March 2023 in Milimani Commercial Courts CMCELRC No. E932 filed a memorandum of appeal dated 13th April 2023 seeking for the following reliefs:-
 - a. The decision by the subordinate court allowing the Respondent's Notice of Preliminary Objection dated 2nd August 2022 be set aside and substituted with an order dismissing the Respondent's Notice of Preliminary Objection dated 2nd August 2022.
 - b. The Appellant's Claim against the Respondent be reinstated with an order that it proceeds on its merits before another Magistrate.
 - c. The Respondent pay the costs of the appeal to the Appellant.

In the Alternative

- a. The decision by the subordinate court striking out the Appellant's Claim against the Respondent be set aside and substituted with an order dismissing the Respondent's Notice of Preliminary objection dated 2nd August 2022.



- b. The Appellant's Claim against the Respondent be reinstated and transferred before the Magistrate Court at Mavoko and/or Nairobi before another Magistrate for hearing and final determination on its merits.
- c. The Respondent pay costs of the Appeal to the Appellant.

Grounds of the Appeal

2. The Learned Magistrate misdirected herself in matters of Law by allowing a Notice of Preliminary Objection based on Laws not Applicable before the Employment and Labour Relations Court, the resultant effect that the whole Ruling was erroneous.
3. The Learned Magistrate's misdirected herself in Law by striking out the Claim yet she had Jurisdiction to hear and determine the matter, the resultant effect that the whole ruling was erroneous.
4. ALL in all, the Learned Magistrate misdirected herself in both matters of Law and fact so as to occasion a miscarriage of Justice.

Background to the Appeal

5. The appellant filed an employment dispute before the Trial Magistrates Court at Milimani Commercial Courts. The Respondent raised a preliminary objection dated 2nd August 2022 raising the following points: -
 - a. This Honourable Court lacks jurisdiction to entertain and determine the claim as filed.
 - b. The entire claim had been brought in total desecration and or violation of section 15(c) and 19 of the Civil Procedure Act has ousted the jurisdiction of the court to hear the matter (page 57 of the record was the notice of preliminary objection).
6. The application was canvassed by way of written submissions. Having considered the Trial Magistrate Court held that it was not disputed that the contract and the place of business of the respondent was Syokimau in Machakos County. The Court held that under the Gazette Notice of 10th June 2018 giving it jurisdiction over employment disputes the court was to hear and determine employment and labour relations matters within their respective areas of jurisdiction. The Trial Magistrate Court held that section 15 of the Civil Procedure Act was applicable allowing the Preliminary Objection. It was the appellant's case that the Civil Procedure Act was not applicable but the Court Rules according to the authority on Prisca Kipngetich v Generation Career Readiness Social Initiative Limited (2021)e KLR where Justice Rika held:- "12. Parties must avoid citing the Civil Procedure Act on all procedural matters before the E&LRC. These are different jurisdictions, as established in Supreme Court of Kenya decision, Republic v. Karisa Chengo & 2 Others [2017] e-KLR.
13. The Civil Procedure Act applies to proceedings of the E&LRC only as a may be specifically allowed, under the E&LRC [Procedure] Rules 2016, such as applies in Rule 32 [2], which states, "Rules on execution of an order or decree, shall be enforceable in accordance with the Civil Procedure Rules."

Decision

6. Whereas the ELRC (Procedural) 2016, Rules were silent on place of suing. In the event of lacuna in the ELRC procedural rules the Civil Procedure Act and Rules would apply on procedural cases as held in TNT Express Worldwide (Kenya) Limited v Timothy Graeme Steel [2022] KECA 881 (KLR) where the Court of Appeal held:- "However, in the case of Dock Workers Union Kenya vs Kenya Ports Authority (Civil Appeal No. 112 of 2019) [2021] KECA 87 (KLR) on an issue concerning res judicata



on which the Employment and Labour Relations' Court rules are silent, this Court did not hesitate to adopt the provisions of section 7 of the Civil Procedure Act to uphold a preliminary objection.

29. In effect, the inference that can be drawn from the above cases is that courts have not shied away from applying relevant provisions of the Civil Procedure Act and rules, where necessary, to employment disputes, which is in line with their duty to ensure that the ends of justice is served, and to prevent the making of orders in vain. So that, where it is established that the ELRC rules and regulations have come up short of provisions that would aid in the making of such orders, nothing precludes the ELRC from relying on available Civil Procedure provisions to address the extant gaps. Furthermore, since section 12 (3) (iii) of the Employment Act specifies that, where appropriate, the court can assess the case and make such orders as it deems fit, and rule 17 of the Employment and Labour Relations Court (Procedure) Rules empowers the court with jurisdiction to address applications and issue interlocutory orders, it goes without saying that these provisions, when coupled with relevant provisions of the Civil Procedure rules, grant the court the necessary leeway to make orders that would ensure that the ends of justice are served.”
7. Applying the foregoing decision that Court holds that the territorial jurisdiction of the Trial Magistrate was as per the Gazette Notice, being the Magistrate's area of jurisdiction. The cases cited by the appellant to effect that this is a special court does not apply to magistrate courts which only exercise jurisdiction as delegated vide the Gazette Notice of 2018 with specific instruction they are to handle such matters as within their areas of jurisdiction.
8. The 2024 procedural Rules of the Court have now addressed the place of suing in Rule 6 as follows:-
“(1) Proceedings before the Court shall be instituted at the Court's registry or sub-registry with respect to the county where—
- (a) the claimant, petitioner or applicant, at the time of commencement of the proceedings, actually and voluntarily resides or carries on business or personally works for gain; Or
 - (b) the cause of action, wholly or in part, arises”
9. In the upshot the appeal is dismissed with costs to the Respondent. The Ruling and Order of the Honorable C.K. Cheptoo PM delivered on the 17th March 2023 in Milimani Commercial Courts CMCELRC No. E932 of 2021 is upheld.

Further Orders

10. The court finds the new Rule 6 (ELRC Procedural 2024 Rules) is similar to the provisions of section 15 of the Civil Procedure Act. The said Rule 6 further provides: - “(2) The Court may, on its own motion or upon application, for recorded reasons, transfer any proceeding to the most convenient court station for hearing and determination.’ The respondent submits that there was no case of transfer before the Trial Magistrate Court and hence ought not be submitted on at appeal stage. The appellant submits that the act of striking out the case for want of territorial jurisdiction was drastic as the court could have exercised administrative action and transferred the case. The court is mindful of limited judicial time to consider further applications in relation to the reinstatement and transfer of the suit. The appellant had alternative prayer as follows: - “The Appellant's Claim against the Respondent



be reinstated and transferred before the Magistrate Court at Mavoko and/or Nairobi before another Magistrate for hearing and final determination on its merits.”

11. The Court exercising its powers under Rule 6(2) of the Employment and Labour Relations Court (Procedure) Rules 2024 on its own motion reinstates the claim in Milimani Commercial Courts MCELRC Cause No. E932 of 2021 between the parties and Orders transfer of the same to Mavoko Magistrate Court for hearing and determination as the court with territorial jurisdiction.
12. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18th DAY OF DECEMBER, 2024.

**JEMIMAH KELLI,
JUDGE.**

IN THE PRESENCE OF:

Court Assistant: Caleb

Appellant : - Oketch

Respondent: Wesanza

