



REPUBLIC OF KENYA



**Mtimaukanena v Bharti Airtel International Ltd (Cause  
E264 of 2021) [2023] KEELRC 4 (KLR) (18 January 2023) (Ruling)**

Neutral citation: [2023] KEELRC 4 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E264 OF 2021  
JK GAKERI, J  
JANUARY 18, 2023**

**BETWEEN**

**JOHN MTIMAUKANENA ..... CLAIMANT**

**AND**

**BHARTI AIRTEL INTERNATIONAL LTD ..... RESPONDENT**

**RULING**

1. In the Application dated 21<sup>st</sup> December, 2022, the Applicant sought Orders That:-
  1. The Honourable court be pleased to grant leave to the Respondent/Applicant to lodge an appeal against the decision delivered on 20<sup>th</sup> September, 2022.
  2. The Honourable court be pleased to order a stay of proceedings pending the hearing and determination of the Application.
  3. The Honourable court be pleased to order a stay of proceedings pending the hearing and determination of the appeal in the Court of Appeal.
  4. The costs of this application be in the cause.
2. The Application filed under certificate of urgency was scheduled for hearing on 18<sup>th</sup> January, 2023 and counsel for both parties made their respective submissions.
3. The Applicant submitted that its application was based on directions given by the court on 20<sup>th</sup> September, 2022, that leave to appeal be sought.
4. Needless to emphasize, the right to appeal against judgements, orders, awards and decrees of this court is prescribed by the law and no leave was required in the first instance.



5. The provisions of section 17(1) of the *Employment and Labour Relations Court Act*, 2011 are categorical that;

Appeals from the court shall lie to the Court of Appeal against any judgement, award, order or decree issued by the court in accordance with article 164(3) of *the Constitution*.

6. In other words, Orders, Judgements and Rulings of this court are appealable as of right at the Court of Appeal and no leave of this court is necessary. It is patently clear to the court that the directions issued on 20<sup>th</sup> September, 2022 were issued in error as the law did not provide for leave to appeal a decision of this court.
7. This position was amplified by counsel for the Respondent who submitted that the court had no jurisdiction to grant the orders sought being the trial court.
8. Guided by the relevant Article of *the Constitution* of Kenya, 2010 and the provisions of section 12 and 17 of the *Employment and Labour Relations Court*, 2011, it is evident that the court has no jurisdiction to grant the leave sought. It is trite that Jurisdiction is everything as aptly captured by Nyarangi J.A in the celebrated decision of the Court of Appeal in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] where the learned judge stated as follows;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction . . . Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing . . .”

9. On the effect of lack of jurisdiction, in *Joseph Muthee Kamau & another V David Mwangi Gichure & another* (2013) eKLR, cited with approval in Phoenix of *E.A Assurance Co. Ltd V S.M. Thiga t/a Newspaper Services* (2019) eKLR, the Court of Appeal stated as follows;

“When a suit has been filed in a court without jurisdiction, it is a nullity. May cases have established that; the most famous being Kagenyi V Musirambo (1968) EA 43 . . . We hold that jurisdiction cannot be conferred at the time of delivery of judgement. Jurisdiction does not operate retroactively. Jurisdiction must exist at the time of filing suit or latest at the commencement of hearing.”

The court is guided accordingly.

10. Although counsels occasionally lodge applications before the trial court, for extension of time to file an appeal or stay pending appeal to the Court of Appeal, the more appropriate forum to make these applications is in the court’s view the court before which the intended appeal will be prosecuted. The appeal court has a better panoramic view of the appeal than the trial court. In the circumstances, the application for stay of proceedings pending the hearing and determination of the appeal is disallowed.
11. In the end, having found that the Applicant has a statutorily guaranteed right to appeal the ruling delivered on September 20, 2022 at the Court of Appeal and this court has no jurisdiction to grant the leave sought by the applicant, the court hereby downs its tools as required of it by law.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 18TH DAY OF JANUARY 2023**

**DR. JACOB GAKERI**



**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

**DRAFT**

