



**Akrim v Mobile Consultations Africa Ltd (Cause E055 of 2022)
[2023] KEELRC 425 (KLR) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 425 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E055 OF 2022
AN MWAURE, J
FEBRUARY 17, 2023**

BETWEEN

HANANE AKRIM APPLICANT

AND

MOBILE CONSULTATIONS AFRICA LTD RESPONDENT

RULING

1. The applicant brought an application under the notice of motion dated June 30, 2022 seeking the following prayers.
 1. That this honourable court be pleased to strike out paragraphs 7 and 20(d) of the memorandum of claim together with prayers b(iv) and c) on the memorandum of claim for want of jurisdiction.
 2. That this honourable court be pleased to strike out paragraph 13 of the memorandum of claim and paragraph 5 of the claimant's witness statement for being libelous, disparaging of a party that is not party to the suit without evidential support whatsoever and for being scandalous, vexatious and an abuse of the process of the honourable court.

Applicant's Case

2. The application deponent is supported by the supporting affidavit of Jason Carmichaer who is the chief executive officer of the respondent.
3. The deponent avers that this court does not have jurisdiction to deal with matters of occupation and rent payment for business premises.
4. He states that this court also does not have jurisdiction to deal with disputes for shares and directorship or other company law issues.



5. He says that the claimant has made disparaging remarks and defamatory remarks against the defendant which remarks he says are irrelevant and vexatious.
6. He says that paragraphs 13 of the memorandum of claim and 5 of the witness statement are irrelevant and refer to extraneous matters.
7. He says the said defamatory statements are meant to annoy and irritate a man and a father who is a role model.

Respondent's Case

8. The claimant/respondent filed a replying affidavit dated July 26, 2022. He says that the use of his premises as working and storage space was related to his employment and hence extending the court's jurisdiction pursuant to section 12(1) (a) of Employment and Labour Relations Act.
9. He says the issue of the shares he holds in the company is not in dispute as the respondent confirmed it by his email of January 1, 2022. He says the respondent/applicant's advocate reached out to his advocate concerning preparation of the vesting agreement for his shares. He says he has not asked this court to determine the matter of his shares and only brought it up to show how their relationship developed from being a consultant to an employee.
10. He says that he is of the view that this application is brought up to block his right to justice and to delay the suit.
11. He further says that failure to have his case heard to its logical conclusion will amount to breach for his constitutional right that guarantees a right to fair hearing to all.
12. He prays that the applicant's application be dismissed and case be heard on merits.

Respondent/Applicants Submissions

13. The respondents/applicant raises the issues for determination as follows:
 - a. Does the court have jurisdiction to deal with issues raised in paragraph 7 20(d) and prayer b (iv) of the memorandum of claim.
 - b. Are paragraphs 13 of memorandum of claim and paragraph 5 of the claimant witnesses statement scandalous and vexatious and an abuse of this court process.
 - c. Should the orders sought be granted.
 - d. Does the court have jurisdiction to handle issues raised in paragraph 7 and 20(d) and prayer b (iv) of memorandum of claim.

They rely on case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited & 2 Others* (2012) eKLR where Supreme Court held:

“A court's jurisdiction flows from either the constitution or legislation or both. Thus a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

14. In his submissions respondent/applicant says the employment and labour relations court derives this jurisdiction from section 12 of employment and labour relations court act.



15. He says that matters of tenancy can only be handled by environment and land act and/or business premises rent tribunal act.
16. He further says issues to deal with shares comes as a commercial dispute and should be referred to the High Court.
17. Finally as pertains to the charge that the claimant/ respondent's pleadings are scandalous the respondent/applicant relies on case of Mpaka Road Development Co Ltd vs Abdul Gafur Kana t/a Anil Kapuri Pan Coffee house (2001) eKLR where court held that:

” I would hold that a matter would only be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleadings which is sought to be impugned. Such would be the case where an importation is made on the character of a party which the character is not in issue.
18. The respondent/applicant submits that the paragraph sought to be struck out is an importation to the character of him Mr Jason and the character of him Jason is not in issue.
19. On the issue of whether the claimant/respondent is entitled to the reliefs sought the respondent/applicant submits that the court has powers to strike out the pleadings in whole or in part and costs should be awarded as the suit was necessitated by claimant's improper pleadings.

Claimant/Respondent submissions.

20. The claimant/respondent submits that this honourable court's jurisdiction is governed by section 12 of the Employment and Labour Relations Court Act). He submits that the same says court will have jurisdiction to handle

”..... disputes relating to or arising out of employment between an employer and an employee”
21. He says the paragraphs disputed arise from the employment relationship as the claimant's premises were used as storage space by the respondent and this arrangement arose from the employment relationship. He says the respondent/applicant would not have been housed by the claimant/respondent if they did not have that employment relationship.
22. The claimant/respondent relied on the case of United States International University (USIU) vs The Attorney General (Nairobi) Petition no 170 of (2012) eKLR where court held

“labour and employment rights are a part of bill of rights and are protected under article 41 which is within the province of the industrial court....”
23. The claimant/respondent further submitted that as pertains to shareholding and co-founder title these are not in dispute as the respondent/applicant communicated to the claimant that he could retain co-founder title and shareholding.
24. As to the prayer to strike out paragraph 13 of the memorandum of claim and paragraph 5 of the claimant's witness statement the claimant/respondent wishes to refer to the case of Kenya Power Lighting Company Ltd vs balozi Kenga (2019) eKLR where court said:

“The elements under order 2 rule 15(1) of Civil Procedure Rules were also canvassed in the case of Mpaka Road Development vs Kama 2004 1 EA 161 where court held:



“A matter would only be scandalous frivolous and vexatious if it would not be admissible in evidence to show the truth of any allegation in the pleadings which ought to be impugned. A scandalous and or frivolous pleading is *ipsa facto* vexatious.”

25. The matters entered in paragraph 13 according to the claimant/applicant are part of those leading to his unlawful termination.
26. Claimant/applicant further submits that according to section 55 of [evidence act](#) that states:

“In civil cases the fact that the character of any person concerned is such as to render probable or improbable any conduct imputed to him is inadmissible except so far as such character appears from facts otherwise admissible.” The matters raised are therefore admissible.
27. He also says in civil cases the fact of a character of a person is admissible if it affects the amount of damages.
28. Claimant says the character of the Chief Executive Officer is applicable as the employer being a corporation used him to carry out the illegal termination of the claimant/respondent.
29. So the claimant/respondent urges the court to uphold the claimant’s submissions and/or strike out the respondents/ applicant with costs.

Determination.

30. The applicant is seeking to have some certain paragraphs of the memorandum of claim and in particular paragraphs 7 and 20(d) and prayers b (iv) and (c) struck off as the court has no jurisdiction to deal with the same.
 - (a) The main issues for determination is whether the court has jurisdiction to deal with the issues raised in the aforementioned paragraphs.
 - (b) Also the other issue is whether the matters raised in paragraphs 13 of the memorandum of claim and paragraph 5 of claimant’s witness statement are an abuse of court process for being scandalous and vexatious.
 - (c) Is the applicant entitled to the reliefs sought.
31. The court has considered carefully the averments in the application dated June 30, 2022 alongside the supportive affidavit, the claimants/respondent replying affidavit and the rival submissions of the respective parties.
32. The parties in their submissions interestingly refer to section 12 of the employment and labour relations act as far as jurisdiction is concerned. The claimant inter partes section 12(1) to refer to all disputes relating to or arising from employment between an employer and an employee.
33. The court must point out that it were more prudent and better use of time of the parties and indeed the court if they allowed the case to proceed to full hearing and raise these issues at the hearing with the relevant testament of the parties and the support documents. Only then would the court have had the benefit of deciphering if the rent money claimed was a separate arrangement or was tied up with the employment.
34. As the evidence now is there is no clear relationship that the tenancy was directly related to the employment. After all various people always enter into tenancy relationships without any other strings attached like of employment.



35. The claimant/respondent has not demonstrated the tenancy was related directly or otherwise to the employment. Now that there is a law known as *Employment and Labour Relations Court Act* that gives clear proviso as to the perimeters of the jurisdiction of this court, the court finds the matters of tenancy payment is not part of that jurisdiction.
36. The law is very strict as far as jurisdiction of a court goes. On the centrality of jurisdiction the Court of appeal had this to say in the case of *Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others* (2013) eKLR “so central and determinative is the jurisdiction that it is at once fundamental and over anchoring as far as judicial proceedings is concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be an issue a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cul-de-sac. Courts like ventures must not sit in vain.”
37. It is trite law that jurisdiction is everything in a case and if the court has no jurisdiction then it must immediately drop that case.
38. The interpretation of the claimant/respondent of section 12(a) that employment relationships include disputes relating or arising out of employment between an employer and an employee does not add up as this tenancy relationship has not been established was connected or arose or was even related to the employment of the respective parties.
39. The issue No 2 is whether paragraph 13 of the memorandum of claim and paragraph 5 of the witness statement is an abuse of court process for being vexatious and scandalous.
40. As earlier observed this is a case the applicants rushed to court much to the detriment of delaying the hearing of the main suit. All the issues he is raising would have been adequately raised in the main suit.
41. Having said as much concerns paragraph 13 of the memorandum of claim and paragraph 5 of the claimant’s witness statement the court is convinced there will be no prejudice caused if full evidence is adduced and the case can be determined in its entirety. The court does not find there is enough evidence adduced from the applicant and the submissions to find the said contention is an abuse of the court process. The court will make its final determination on the submissions pertaining thereto at the conclusion of the suit. It is premature to rule on that at this particular point.
42. As for the issue of the shareholding and co-owing, that particular matter is not raised in the claim and the court will not address it. In fact the claimant himself has admitted he is not raising the issue of shareholding in the suit as is well handled between the parties.
43. Flowing from the foregoing the court:-
 - a. concedes the matter pertaining to rent in arrears claimed In paragraph 7 of the memorandum of claim paragraph 20(d) and prayers b(iv) the court lacks jurisdiction to handle the same and so the aforesaid paragraphs are struck out from the said memorandum of claim. Also prayers (c) as relates to shareholding is also stuck off as is not in dispute even as the applicant has admitted.
44. The court does not find any merit in prayer 2 of the claim and so is not granted.
45. Costs will be in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 17TH DAY OF FEBRUARY 2023.



ANNA NGIBUINI MWAURE

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 15th March 2020 and subsequent directions of 21st 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

