



REPUBLIC OF KENYA



Sambali v Butali Sugar Mills Limited & another (Employment and Labour Relations Appeal 16 of 2023) [2023] KEELRC 1694 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1694 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS APPEAL 16 OF 2023**

**JW KELI, J
JULY 13, 2023**

BETWEEN

EZEKIEL MBOLOMU SAMBALI APPELLANT

AND

BUTALI SUGAR MILLS LIMITED 1ST RESPONDENT

FRODAK KENYA LIMITED 2ND RESPONDENT

(Appeal against the Ruling of the Hon. Josephine Maragia (SRM) in Kakamega Chief Magistrate ELR in CMCC NO 48 OF 2020 between the parties delivered on the 27th June, 2022)

JUDGMENT

1. The Appellant aggrieved by the Ruling and order of Honorable Josephine Maragia (SRM) delivered on the June 27, 2022 in Kakamega CMELR NO 55 of 2020 between the parties brought the instant Appeal vide Memorandum of Appeal dated August 30, 2022 and the record of appeal received in court on the March 15, 2023 seeking orders to set aside the Magistrate' ruling delivered on the June 27, 2022 and all consequential orders and in the alternative to find that:- the lower court at Kakamega has jurisdiction to hear the matter in Kakamega MELR CAUSE NO 48 of 2020 and that the preliminary objection dated May 5, 2022 in the primary suit was not merited and proceed to dismiss the same and for the respondents to pay costs of the appeal.
2. The Appeal was premised on the following grounds: -
 - i. The learned Magistrate erred in law and fact by finding that the subordinate court did not have territorial jurisdiction
 - ii. The learned trial Magistrate erred in law and fact by failing to consider the submissions of the claimants based on the relevant territories as envisaged in the Constitution of Kenya.



- iii. The learned Magistrate erred in law and fact in disregarding section 11, 14 and 15 of the *Civil Procedure Act*
- iv. The learned Magistrate erred in law and fact by striking out the entire suit based on the wrong assumption that the subordinate court lacked territorial jurisdiction
- v. The learned Magistrate erred in law and fact by issuing orders that cost be awarded to the respondents.

Background to the appeal

3. The claimant filed a suit at lower court in Kakamega CMERC CASE NO 48 OF 2020 against the Respondents dated December 6, 2019 and amended on the August 25, 2021 seeking judgment against the respondents for the following reliefs:
 - a. May salary
 - b. One-month salary in lieu of notice
 - c. Prorate leave
 - d. Underpayment of wages
 - e. Public holidays
 - f. Overtime for extra hours worked
 - g. Rest days
 - h. 12 months compensation salary
 - i. Cost of the suit
 - j. Certificate of service
 - k. House allowance (page 3-5 of the record of appeal where the amounts sought was also detailed)
4. The Respondents entered appearance and filed responses. (pages 15-37) The 2nd respondent addition filed notice of preliminary objection stating that the court lacked territorial jurisdiction based on the provisions of section 12 of the *Civil Procedure Act*.

Preliminary

5. The Court gave directions with consent of the parties represented by same advocates for the judgment in this appeal to be the test case to apply in Kakamega ELRCA nos 9,10,11, 14 and 15 and for the appeal to be canvassed by way of written submissions.
6. The Appellant's written submissions drawn by V.A. Shibanda & Company Advocates were dated April 11, 2023 and received in court on the April 20, 2023.
7. The 1st respondent's written submissions drawn by Okong'o Wandago & Company Advocates were dated May 11, 2023 and received in court on the May 15, 2023.
8. The 2nd respondent's written submissions drawn by Mbeka & Associates were dated May 12, 2023 and received in court on the May 15, 2023.



Determination

Issues for determination.

9. The Appellant in their written submissions identified the following issues for determination: -
 - a. Whether the trial court erred in law in holding that it had no jurisdiction to entertain the suit.
 - b. Who shall bear the costs of the appeal.
10. The 1st respondent addressed the merits of the appeal.
11. The 2nd respondent addressed the following issues: -
 - a. whether the trial court had jurisdiction to hear and determine the suit
 - b. whether the court can order transfer of the primary suit filed in a court without jurisdiction to a court with competent jurisdiction
 - c. Which party should bear costs of the appeal.
12. The Court having considered the grounds of the appeal was of the considered opinion that the issues for determination in the appeal was whether the trial court erred in law in holding that it had no jurisdiction to entertain the suit.

Jurisdiction of the court at appeal

13. The principles which guide this court in an appeal from a trial by the magistrate court are now well settled. In *Selle And Another V Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

' An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.'

Whether the trial court erred in law in holding that it had no jurisdiction to entertain the suit.

The appellant's submissions

14. The appellant relied on section 11 of the *Civil Procedure Act* which provides of territorial jurisdiction as follows:- 'Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts:



Provided that—

- (i) If a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and
 - ii. Nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same county.’ That these provisions give a party liberty to institute suit in any court situate in a county where there exists more than one court in the county.
15. The Appellant further relied on the provisions of section 14 and 15 of the *Civil Procedure Act* to submit that the defendants operating within Kakamega county the Kakamega law courts had jurisdiction to determine the suit.
 16. The appellant further relied on the decision in *Charles Ndungu Kabando v Clementine Nyawiara Kuria & another 2021 e KLR* where the Judge held that it took judicial notice that both Nyahururu law courts and Nanyuki Laws courts were located within the boundaries of Laikipia County and there were no directions by the High Court or the ELC on distribution of business between the two courts and hence the two courts had concurrent jurisdiction and a party may elect to file suit in either of the courts for property situate within Laikipia county. In that case the judge held the trial court erred in declining to entertain the appellant’s suit on account of territorial jurisdiction.

1st Respondents submissions

17. The 1st respondent submits that jurisdiction of the court is on three areas, subject matter, pecuniary and territorial and relied on the decision of the Supreme court in *National Rainbow Coalition Kenya (NARC Kenya) v Independent Electoral & Boundaries Commission; Tharaka Nithi County Assembly & 5 others (Interested Party) (Petition 1 of 2021) [2022] KESC 6 (KLR) (February 17, 2022) (Judgment)*, ‘3. Jurisdiction was everything and without it, a court had no power to make one more step. In addition, where the *Constitution* exhaustively provided for the jurisdiction of a court, the court had to operate within those limits. It could not expand its jurisdiction through judicial craft or innovation.’ It also relied on decision of Nyarangi JA in *Owners of Motor Vessel ‘Lilian S’ v Caltex (Kenya) Limited (1989) KLR*
18. The 1st respondent submits that section 14 and 15 of the *Civil Procedure Act* mandate a litigant to file their suit in the court within whose local limits the defendant resides or carries on business or is gainfully employed. To buttress these submissions it relied on the decision of Mbaru J in *Ruth Muthoni Mwangi v Kenya Meat Commission [2020] eKLR* where the judge held:- ‘Vide Legal Notice No 6024 of June 10, 2018 the Chief Justice appointed Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine employment and labour relations cases within their respective areas of jurisdiction. This was to ensure access to justice and the filing of suit within the geographical coverage of each magistrate’s court. Despite these practice directions, the applicant filed ELR Cause No 6 of 2020 at Machakos Chief Magistrates Court instead of Mavoko Law Courts where the cause of action arose. There are preliminary objections filed before Machakos Magistrates Court challenging the geographical jurisdiction of the court. The applicant cannot circumvent such procedure by filing the instant application seeking to have the matter transferred to Mavoko Law Court upon the advice of staff at the Registry as to do so would be subverting the rule of law. Mr Philip Wambugu in his Supporting Affidavit dated October 19, 2020



avers at paragraph 6 that; We have been advised at the registry that we can have the file transferred to the correct court by an order of this court.’

19. The 1st respondent submits the contract of employment with the claimants was executed at Webuye and his work station was at Webuye not entire county. That the court with territorial jurisdiction was Butali law courts which had close proximity with where the appellant resides and the respondents’ principal area of business. That territorial jurisdiction was not a matter of discretion of the court as held by Justice Nyakundi in *Korea Nyamai v Neema Parcels Limited* (2021)e KLR .

2nd Respondent’s submissions

20. The 2nd respondent synopsis of the applicable law agreed with the 1st respondent and I find it of no value to replicate the same. It was further the case of the 2nd respondent that section 12 of the *Civil Procedure Act* provides for case to be institute within local limits of defendant. Section 12 provides: ‘Subject to the pecuniary or other limitations prescribed by any law, suits— (a) for the recovery of immovable property, with or without rent or profits; (b) for the partition of immovable property; (c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immovable property; (d) for the determination of any other right to or interest in immovable property; (e) for compensation for wrong to immovable property; (f) for the recovery of movable property actually under distraint or attachment, where the property is situate in Kenya, shall be instituted in the court within the local limits of whose jurisdiction the property is situate: Provided that a suit to obtain relief respecting, or compensation for wrong to, immovable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the court within the local limits of whose jurisdiction the property is situate, or in the court within the local limits of whose jurisdiction the defendant actually and voluntarily resides or carries on business, or personally works for gain.’
21. That further Section 15 of the *Civil Procedure Act* provides for the suit to be instituted where the defendant resides or cause of action arose to wit :- ‘Subject to the limitations aforesaid, every suit shall be instituted in a court within the local limits of whose jurisdiction— (a) the defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain; or (b) any of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the court is given, or the defendants who do not reside or carry on business, or personally work for gain, as aforesaid acquiesce in such institution; or (c) the cause of action, wholly or in part, arise.’ That both respondents carry out their business at Butali and that the suit should have been filed at Butali Law Courts.
22. The 2nd respondent further submits that it was not true that section 11 and 12 of the *Civil Procedure Act* gave liberty to the party to file suit in any court situate within the county, as the suit should be in lowest court with competent jurisdiction, that is, both pecuniary and territorial jurisdiction.

Decision

23. The relevant procedural law on territorial jurisdiction is as provided for under section 11 to 15 of the *Civil Procedure Act*. Section 11 provides for court in which suit is to be instituted as follows: ‘Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same county competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in anyone of such subordinate courts: Provided that— (i) if a suit is instituted in a court other than a court of the lowest grade competent



- to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same county.’
24. The court finds that Section 12 and 13 are about immovable property like land and consequently would not be applicable in employment claims.
 25. Sections 14 and 15 are applicable as they provide for suit to be instituted within the local limits of the defendant’s place of business. Section 14 relied on by the respondents in opposition to the appeal states:- ‘Where a suit is for compensation for wrong done to the person or to movable property, if the wrong was done within the local limits of the jurisdiction of one court and the defendant resides or carries on business, or personally works for gain, within the local limits of the jurisdiction of another court, the suit may be instituted at the option of the plaintiff in either of those courts. Illustration.— (a) A residing in Mombasa beats B in Nairobi. B may sue A either in Mombasa or Nairobi. Illustration.—(b) A residing in Mombasa publishes at Nairobi statements defamatory of B. B may sue A either in Mombasa or Nairobi.’
 26. This court further upholds its ruling of December 2, 2022 in *Isaiah Chikamai v Frodak Kenya Limited and Butali Sugar Mills Ltd* that :- ‘The court finds that Under section 11 of the *Civil Procedure Act*, a suit may be instituted at lowest grade subordinate court in the County to try the matter and may also be moved within the County.’
 27. From the pleadings, the court noted under the 2nd respondent reply to the amended claim and stated that the alleged strike was allegedly reported to Kakamega county labour office which held conciliation between the parties. This gives credence to the fact that the parties operate within limits of Kakamega law court and hence the trial court at Kakamega county had jurisdiction to handle the primary suit as filed. I further find that the parties are at liberty to apply and move the case within any of the courts within the county and in that regard I uphold the decision in *Charles Ndungu Kahando v Clementine Nyawiara Kuria & another* 2021 e KLR where the court held that it took judicial notice that both Nyahururu law courts and Nanyuki laws courts were located within the boundaries of Laikipia County and there were no directions by the High Court or the ELC on distribution of business between the two courts and hence the two courts had concurrent jurisdiction and a party may elect to file suit in either of the two courts for property situate within Laikipia county. In that case the Judge held the trial court erred in declining to entertain the appellant’s suit on account of territorial jurisdiction.
 28. I find the decision by Justice Nyakundi cited by the 1st Respondent is in agreement that the territorial jurisdiction of the magistrates is limited to the county boundaries. The Judge in *Korea Nyamai v Neema Parcels Limited* [2021] eKLR held:- ‘In particular, adopting a view popular with the current jurisprudential question on personal jurisdiction of magistrates being of universal character and not limited to the local limits/county or sub county. With this trajectory under the provisions of the magistrates court act as read with section 15 of the *Civil Procedure Act* there is no dispute that the only divisibility in the ranking of the magistrates is at the scale of pecuniary jurisdiction. It therefore behoves the Court in the legislative scheme that emerges from a combined reading of sections 11, 12, 13, 14 and 15 to give effect to the competence on personam and subject matter jurisdiction. Implicit in these emphasis are cumulative components of reasonableness of access to justice in Article 48 and the due process clauses under Article 50 of the *Constitution*. The Civil Court is primarily and expressly required under the provisions of section 15 to protect the Defendant against the burdens of being sued and litigating in distant or inconvenience forums, in my view giving credence to this provision on territorial jurisdiction. It also acts to ensure that counties through their respective courts do not reach out beyond



the limits imposed by their counties as core equal sovereign in our system of government. So, territorial jurisdiction need not be confused with personam jurisdiction over things or cause of action. Justice is idea of giving each person his or her own fair due process as a matter of constitutional right. The system must imbue in those who have reason to seek justice in our various Courts a sense of the fairness of the system of laws, processes and procedure underpinned primarily on access to justice. Jurisdiction being the authority in which judges and magistrates take cognizance of the cause of action which normally constitutes a subject matter ordinarily falls within the local limits of that Court. In my considered view jurisdiction as generally legislated by parliament and understood in our system of Court is a combined effect over the parties' territorial jurisdiction, the nature of the claim and its relationship to pecuniary measure. The *Civil Procedure Act* subject to the interpretation on territorial jurisdiction gives no room for a plaintiff or a suit to be filed against the defendant by any original process in any county, or sub-county than that whereof he or she is a resident or carries business at the time of service of summons for the claim. '

29. I read the decision by my sister Justice Mbaru relied on by the respondents in *Ruth Muthoni Mwangi v Kenya Meat Commission* [2020] eKLR where the judge held:- 'Vide Legal Notice No 6024 of June 10, 2018 the Chief Justice appointed Magistrates of the rank of Senior Resident Magistrates and above as Special Magistrates designated to hear and determine employment and labour relations cases within their respective areas of jurisdiction. This was to ensure access to justice and the filing of suit within the geographical coverage of each magistrate's court. Despite these practice directions, the applicant filed ELR Cause No 6 of 2020 at Machakos Chief Magistrates Court instead of Mavoko Law Courts where the cause of action arose. There are preliminary objections filed before Machakos Magistrates Court challenging the geographical jurisdiction of the court. The applicant cannot circumvent such procedure by filing the instant application seeking to have the matter transferred to Mavoko Law Court upon the advice of staff at the Registry as to do so would be subverting the rule of law. Mr Philip Wambugu in his Supporting Affidavit dated October 19, 2020 avers at paragraph 6 that;

'We have been advised at the registry that we can have the file transferred to the correct court by an order of this court.' The court finds that there was no final decision of Justice Mbaru but obiter remarks on the issue of territorial jurisdiction as there was doubt if there was a proper suit before Machakos court with pending preliminary objection under section 90 of the *Employment Act* and the Judge returned the matter determination of those objections.'

30. The Magistrates have been conferred limited jurisdiction in employment claims by the Chief Justice vide legal notice no 6024 of June 10, 2018 which reads:- 'GAZETTE NOTICE NO. 6024

THE *Employment And Labour Relations Court Act*

(No 20 of 2011)

Appointment Of Magistrates' Courts To Hear Matters Relating To Employment And Labour Relations

In ExercisE of the powers conferred by section 29 (3) and (4) (b) of the *Employment and Labour Relations Court Act*, 2011, and in consultation with the Principal Judge of the Court, the Chief Justice appoints all Magistrates of the rank of the *Senior Resident Magistrates and above* as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective areas of jurisdiction:

1. Dispute arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007) where employees gross monthly pay does not exceed Kshs 80,000.00 as



commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.

2. Matters relating to the following specific areas- (i) Offences under the *Work Injury Benefits Act*, 2007. (ii) Offences under the *Employment Act*, 2007. (iii) Offences under the *Labour Institutions Act*, 2007. (iv) Offences under *Occupational Safety and Health Act*, 2007; and (v) Offences under the *Labour Relations Act*, 2007.

The conferment under Gazette Notice No 9243 is revoked.

Dated the June 10, 2018.

David K Maraga,

Chief Justice/President, Supreme Court of Kenya.’(reproduced in verbatim)

31. The territorial jurisdiction of magistrates under the said Legal Notice 6024 of June 10, 2018 is as follows: - ‘the Chief Justice appoints all Magistrates of the rank of the *Senior Resident Magistrates and above* as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective areas of jurisdiction:’
32. Section 14 of the *Civil Procedure Act* illustrates territorial jurisdiction follows:- ‘Illustration.—(a) A residing in Mombasa beats B in Nairobi. B may sue A either in Mombasa or Nairobi.
Illustration.—(b) A residing in Mombasa publishes at Nairobi statements defamatory of B. B may sue A either in Mombasa or Nairobi.’ The court holds that Nairobi and Mombasa are counties which fall within the meaning of section 11(supra). It is thus the opinion of the court that the magistrate court in deciding on territorial jurisdiction under the legal notice no 6024 of June 10, 2018 should be guided by section 11 of the *Civil Procedure Act* in claims of employment.
33. It was the opinion of this court that section 11(i) addressed the challenge which may have faced the trial magistrate in fairness of distribution of workload within the county. In the upshot the court holds that the Legal Notice by the Chief Justice of June 10, 2018 was subject to the provisions of section 11 of the *Civil Procedure Act* and the jurisdiction alluded to was the jurisdiction as defined under the Act.
34. In the upshot the court holds that the learned Magistrate erred in law in holding she lacked jurisdiction to handle the dispute within her territorial jurisdiction of Kakamega county as there was no pleading of limitation to right of access to justice by any of the parties who had participated in the conciliation of the dispute at Kakamega County labor offices before the suit was filed. It is the opinion of the court the spirit of article 159 of the *Constitution* which provides of how judicial power is to be exercised is to allow parties to have their day in court unless the jurisdiction of the court is non-existent. The parties are properly at Kakamega magistrate court’s and the court has demonstrated they even had conciliation done at the Kakamega County Ministry of labour office. The arguments of local limits at Butali hence held no much weight but that does not limit the parties’ right of making application to transfer the suit within the county if they so wish.
35. The court holds the appeal to be merited and enters judgment for the appellant as follows:-
 - a. The appeal is allowed.
 - b. The Hon Magistrate in Kakamega Chief Magistrate ELR in CMCC NO 48 OF 2020 has jurisdiction to hear and determine the suit.
 - c. The ruling and order of Hon Josephine Maragia (SRM) in Kakamega Chief Magistrate ELR in CMCC NO 48 OF 2020 between the parties delivered on the June 27, 2022 is set aside and



ruling entered that the preliminary objection dated May 5, 2022 is dismissed with costs on the cause.

36. This being the test case the decision will then apply to determine appeals in Kakamega ELRCA nos 9,11, 14 and 15 respectively.
37. On costs in the appeal in view of the appeal being on interpretation of the law and not merits of the case I order each party to bear own costs in the appeal.
38. It is so ordered.
39. Right of appeal in 30 days.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 13TH JULY 2023.

JEMIMAH KELI,

JUDGE.

In The Presence Of: -

Court Assistant :

For Appellant :Shlbanda

For 1st Respondent:- Twena

For 1st Respondent:- Mbaka

