



Mbithi v Chairman, Board of Management Tala High School (Civil Appeal E024 of 2022) [2023] KEELRC 2911 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2911 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E024 OF 2022**

L NDOLO, J

NOVEMBER 16, 2023

BETWEEN

MICHAEL NGUTA MBITHI APPELLANT

AND

**CHAIRMAN, BOARD OF MANAGEMENT TALA HIGH
SCHOOL RESPONDENT**

*(Appeal from the ruling of Hon Martha Opanga, SRM delivered
on 25th January 2022 in Kangundo PMELRC No E005 of 2021)*

JUDGMENT

1. This appeal arises from the ruling of Hon Martha Opanga, SRM dated 25th January 2022, upholding a Preliminary Objection raised by the Respondent and thereby dismissing the Appellant's claim.
2. In its notice of Preliminary Objection as amended on 2nd September 2021, the Respondent listed four grounds of objection to the Appellant's claim.
3. In her ruling, the learned trial Magistrate drew the following questions for determination:
 - a. Whether the court has jurisdiction to hear claims in respect of employment and labour relations;
 - b. Whether the Appellant's claim is time barred;
 - c. Whether the Respondent has been properly sued.
4. The learned trial Magistrate found in favour of the Appellant on question (b). She however found that she had no jurisdiction to hear and determine the claim, ostensibly because she had not been gazetted. She further found that the Appellant had sued the wrong party.



5. In his Memorandum of Appeal dated 23rd February 2022, the Appellant raises the following grounds of appeal:
- a. The Honourable Magistrate erred in law by pronouncing herself on the *Industrial Court Act*, 2011 which has since been repealed by the *Employment and Labour Relations Court Act*, 2011;
 - b. The learned Magistrate erred in fact and law by holding that she had no jurisdiction to hear and determine employment and labour disputes contrary to Gazette Notice No. 6024 of 2018, which permitted courts of the status of Senior Resident Magistrates and above to hear and determine employment disputes;
 - c. The Honourable Magistrate erred in law and fact in dismissing the Appellant's suit, without hearing it on merit, contrary to the provisions of Article 159(2) of the *Constitution* and Rule 24 of the *Employment and Labour Relations Court (Procedure) Rules* which underscore that courts are enjoined to hear matters on merit rather than on procedural technicalities;
 - d. The learned Magistrate erred in law and fact in finding that the Chairman of the Board of Management had been wrongly sued as this was a technicality which could have been solved by a simple amendment of the claim, which the Appellant was willing and had undertaken to do.
6. For coherence, I will deal with this appeal under the two heads upon which the trial court dismissed the Appellant's claim; being, lack of jurisdiction and misjoinder of party.
7. Regarding the issue of jurisdiction, the learned trial Magistrate relied on Section 9(b) of the [Magistrate's Court Act](#), which provides as follows:
- A magistrate's court shall:-
- in the exercise of the jurisdiction conferred upon it under section 29 of the *Industrial Court Act*, 2011 (No. 20 of 2011) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to employment and labour relations.
8. She further cited Section 29 of the [Industrial Court Act](#) 2011 stating:
1. The Court shall ensure reasonable, equitable and progressive access to the judicial services in all counties.
 2. For purposes of subsection (1), the Chief Justice may designate a Judge in a County as a Judge for the purposes of this Act.
 3. The chief Justice may, by notice in the Gazette, appoint certain Magistrates to preside over cases involving employment and labour relations in respect of any area of the country.
9. The parties expended a lot of time on arguments as to whether the Industrial Court Act was repealed or merely amended upon the enactment of the [Employment and Labour Relations Court Act](#). I think however, that this appeal turns on the question whether Hon Martha Opanga, SRM is a gazetted Special Magistrate to hear and determine employment matters such as the one filed by the Appellant.
10. In pursuing his appeal, the Appellant relied on Gazette Notice No 6024 of 10th June 2018, which merits reproduction:

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 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. Disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act, 2007*) where the employee's gross monthly pay does not exceed KSh. 80,000 as commenced and continued in accordance with the *Employment and Labour Relations Court (Procedure) Rules, 2016*.

2. ...

The conferment under Gazette Notice No. 9243 is revoked.

Dated the 10th June 2018.

David K. Maraga

Chief Justice/President, Supreme Court of Kenya.

11. By her designation as Senior Resident Magistrate, the learned trial Magistrate was covered by the foregoing Gazette Notice. There was therefore no reason for her to decline to assume jurisdiction in the Appellant's case.
12. Regarding the issue of misjoinder of party, this Court (variously constituted) has held that the mere fact that an employee has misnamed the employer cannot defeat an otherwise valid claim.
13. In *Kenya Hotels and Allied Workers Union v Diani Sea Resort t/a Carslake Nominee Limited* [2015] eKLR Rika J stated the following:

“Employees cannot be closed out from pursuing their Claims on the ground that they have given the Court the wrong description, of the business and legal structures which constitute their Employers. Employees hardly know what these capacities are, and what the Employers' business and legal structures are.....Employees would be hampered in correcting employment wrongs, if they are expected to sift through these multiple layers before filing their claims.”
14. In its decision in *James Kala Ngolya v Registered Trustees of Nairobi Club* [2022] eKLR this Court held that an employee cannot lose a claim against an employer simply because the employer has not been properly described.
15. On the whole, this appeal has merit and is allowed.
16. The ruling by Hon Martha Opanga, SRM delivered on 25th January 2022 is set aside and the Appellant's claim remitted for hearing on merit before another Magistrate of the rank named in Gazette Notice No 6024 of 10th June 2018, other than Hon Opanga.
17. The costs of the appeal will abide with the outcome of the trial in the lower court.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF NOVEMBER 2023

LINNET NDOLO



JUDGE

Appearance:

Mr. Nyabena for the Appellant

Mr. Watuka for the Respondent

