



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 83 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

JACKLINE OICHOE.....CLAIMANT

VERSUS

JILAG LIMITED.....RESPONDENT

RULING

1. Before me for determination is the Respondent's Preliminary Objection dated 16th December 2021.

2. The Respondent prays for orders that:

a. THAT this honourable Court lacks jurisdiction to determine and grant reliefs sought by the Claimant in the memorandum of claim dated 30th November 2017.

b. THAT to hear the matter would go contrary to the Gazette Notice No. 6024 (Vol CXX No. 74) dated 22nd June 2018.

3. On the 18th January 2022 Counsel for the Respondent and Claimant made oral submissions in support of and against the preliminary objection respectively.

Respondent's Submissions

4. The Respondent's Counsel submitted that the Court lacked jurisdiction to hear and determine the suit before it and as such it should be struck out. Counsel submitted that vide Gazette Notice 6024 published on 22nd June 2018, the Chief Justice exercise of powers under section 29(3) and (4) of the Employment and Labour Relations Court Act, 2011 where he appointed certain magistrates to hear and determine cases relating to employment and labour relations.

5. The Respondent submitted that by the Gazette Notice the Chief Justice conferred upon the magistrates jurisdiction to hear and determine disputes in employment and labour where the gross monthly salary of an employee exceed Kshs.80,000/-.

6. The Respondent further submitted that from the Memorandum of Claim dated 30th November 2017, the Claimant was earning a salary of Kshs.13,000/- per month, a fact further confirmed by paragraphs 17 and 21 of the Memorandum of Claim.

7. The Court was invited to consider the decision in **Juliana Katini Mdari v Mastermind Tobacco Kenya Limited [2020] eKLR**, specifically paragraph 30, 31 and 32 of the judgment.

8. Counsel submitted the pursuant to the Gazette Notice dated 22nd June 2018, all claims where the monthly salary of the employee was below Kshs.80,000/- would be heard by the Magistrates Courts. That in the instant case, the facts were clear that the Claimant's case fell way below the threshold of Kshs.80,000/-. That the Employment and Labour Relations Court could only sit on appeal in such matters but not as a trial court.

9. Counsel submitted that the court lacks jurisdiction and the claim should be struck out.

Claimant's Submissions

10. The Claimant's Counsel in opposition to the preliminary objection submitted that the claim is dated 30th November 2017 and was filed on 18th January 2017 before Gazette Notice No. 6024 dated 10th June 2018 and published on 22nd June 2018.

11. The Claimant submitted that the suit was filed in the proper court which had and has jurisdiction to hear and determine it.

12. Pressing the issue further, the Claimant submits that the applicable law was the Employment and Labour Relations Court Act, 2011 whose Section 12(1) gave the Court jurisdiction to hear and determine the suit.

13. It was Counsel's view that the preliminary objection should be dismissed and the suit proceeds to hearing and determination.

Analysis and determination

14. I have considered the preliminary objection before me, submissions by both parties and the relevant law. Since the preliminary objection raises the issue of jurisdiction, which is a question of law, the test in **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] E.A. 696** is satisfied. The sole issue for determination is whether this Court has jurisdiction to hear and determine the claim before it.

15. Since jurisdiction is a threshold issue, courts are constrained to make a determination on it as early as possible since it is dispositive in nature. Needless to emphasize the essence of jurisdiction in the determination of a suit cannot be gainsaid. The celebrated words of Nyarangi JA in **The Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** are worth capturing in this ruling. The Judge stated that –

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

16. Article 162(2)(a) of the Constitution of Kenya 2010 provides that Parliament shall establish courts with status of the High Court to hear and determine disputes relating to employment and labour relations and further Article 162(3) states that Parliament shall determine the jurisdiction and functions of the courts contemplated in Clause 2 of Article 162.

17. It is not in dispute that Parliament enacted the Employment and Labour Relations Court Act, 2011 in exercise of the powers conferred by Article 162(2)(a) of the Constitution. The objective of the Act states as follows: **An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes**

18. It is clear that Parliament established a Court to hear and determine disputes relating to employment and labour matters.

19. Section 12(1)(a) of the Employment and Labour Relations Act, 2011 provides that –

1. The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

a. disputes relating to or arising out of employment between an employer and an employee;

20. By dint of Article 162(2)(a) of the Constitution of Kenya 2010, the Employment and Labour Relations Court has original jurisdiction to hear and determine over all employment and labour relations matters as confirmed by Section 12(1) above.

21. On the 22nd June 2018, the Chief Justice vide Gazette Notice 6024 in the quest to reduce backlog at the Employment and Labour Relations Court and in exercise of powers of an employee under Section 29(3) of the Employment and Labour Relations Court Act, conferred jurisdiction on Magistrates of the rank of Senior Resident Magistrate and above to hear and determine disputes arising from contracts of employment where the employee's gross monthly salary did not exceed Kshs.80,000/-.

22. Contrary to the submissions by the Respondent's Counsel, it is the Court's view that while the magistrates have jurisdiction to handle employment matters where the gross salary of an employee does not exceed Kshs.80,000/- by virtue of the gazette notice, it did not take away the jurisdiction conferred on the Employment and Labour Relations Court by the Constitution of Kenya 2010 and the Employment and Labour Relations Court Act, 2011.

23. Further, the Gazette Notice No. 6024 of 22nd June 2018 is undoubtedly subsidiary or delegated legislation which is subservient to Parliament made law (Acts of Parliament). A Gazette Notice cannot purport to amend an Act of Parliament and must not be inconsistent with the provisions of the Act.

24. On the issue of retrospective application of the Gazette Notice, although Section 28 of the Interpretation and General Provisions Act provide that subsidiary legislation may be made to operate retrospectively, to any date, not earlier than the commencement of the Act of Parliament under which it is made, Gazette Notice No. 6024 of 22nd June 2018 did not purport to act retrospectively as submitted by the Respondent's Counsel. The contention that Section 29(3) of the Employment and Labour Relations Court Act existed before the Gazette and by implication that the law was already in place is unsustainable because powers conferred on the Chief Justice had not been exercised and the Claimant could not have filed the claim in a Magistrates Court before that date.

25. It is the finding of the Court that Gazette Notice No. 6024 of 22nd June 2018 had no retrospective application. It would appear to follow that since the Memorandum of Claim here was filed on 18th January 2017 more than one (1) year before the Gazette Notice in question was published, this Court was the proper forum to hear and determine the claim.

26. For the above reasons, it is the finding of this Court that it has jurisdiction to hear and determine the matter before it. The Preliminary Objection dated 16th December 2021 is dismissed with no orders as to costs. The matter shall be fixed for hearing.

27. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 7TH DAY OF FEBRUARY, 2022

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 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 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