



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO.57 OF 2021

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

SDV TRANSAMI (K) LIMITED.....APPELLANT

VERSUS

STEVE ANDRADE.....RESPONDENT

JUDGEMENT

1. The applicant SDV Transami (K) Ltd being dissatisfied with the ruling of Hon. Principal Magistrate Mrs. R. A. Oganyo dated 28.02.2011 in **Milimani Chief Magistrate's Court Civil Suit No. 7974 of 2009**, filed a Memorandum of Appeal dated 3rd March 2011 appealing against the said decision on the grounds:

- (i) That the Honourable Learned Magistrate erred in law and in fact in holding that the Court had jurisdiction to hear and determine the matter between the parties herein.
- (ii) That the Honourable Learned Magistrate erred in law and in fact in failing to appreciate that the main dispute herein stems from the contract of service or employment between the parties.
- (iii) That the Honourable Learned Magistrate erred in law and in fact in holding that the main prayer is for a liquidated sum of Kshs.800,000/= in respect of terminal benefits and that the prayer for general damages for breach of contract of service and/or employment is ancillary to the one of liquidated sum.
- (iv) That the Honourable Learned Magistrate erred in law and in fact in failing to appreciate the merits of the application dated 23rd April, 2010 and filed on 11th June, 2010.
- (v) That the Honourable Learned Magistrate erred in law and in fact by holding that the supporting affidavit to the Appellant's application was defective for failure to mention the place where the same was sworn in the jurat thus illegal and proceeded to strike it off.
- (vi) That the Honourable Learned Magistrate erred in law and in fact in failing to appreciate the appropriate provisions of the Interpretation and General Provisions Act regarding deviation from form in documents which do not affect the substance of the document.
- (vii) That the Honourable Learned Magistrate erred in law and in fact in failing to appreciate that the omission to mention the place in the jurat is not a deviation in substance but and in its form which is not prejudicial to the opposite side.
- (viii) That the Honourable Learned Magistrate erred in law and in fact in failing to appreciate the submissions and authorities filed by the Appellant's Counsel in support of the application seeking to strike out the suit.

2. The background of the case is that Respondent herein instituted a suit in the Chief Magistrate's Court in the aforementioned civil suit seeking against the Appellant, Kshs.800,000/= and general damages for breach of contract for alleged unlawful termination of his services.

3. In response, the Appellant herein filed a Defence thereto challenging the trial court's jurisdiction to hear and determine the matter and thereafter filed a Chamber Summons Application dated 23.04.2010 to have the suit struck out for want of jurisdiction.

4. The Respondent in turn filed a Preliminary Objection and Grounds of Opposition dated 12.07.2010 for the Appellant's supporting affidavit be struck out for being defective because it did not indicate in the jurat, the place where the affidavit was sworn. On 28.02.2010 the Court delivered its ruling on both applications where it upheld the Respondent's P.O and dismissed the Appellant's application.

5. The Appellant prays that the Appeal herein be allowed and that the Ruling and Orders of the Learned Magistrate of 28.02.2011 be set aside and in place thereof the Application dated 23.04.2010 be allowed. Further, the Respondent's aforementioned suit in the trial Court be struck out with costs and that the costs of this appeal to be borne by the Respondent. It also prays for the Court to grant such other and further orders as it may deem fit in the circumstances.

The matter was disposed by way of written submissions.

APPELLANT'S SUBMISSIONS

6. The Appellant submits that jurisdiction is everything and without it the Court has no power to make one more step as is held in the case of **MOTOR VESSEL M/V LILLIANS VS CALTEX OIL (KENYA) LTD 1989 KLR**.

7. This suit was filed in the trial court on 18.11.2009 which was before the promulgation of the Kenyan 2010 Constitution but during the tenure of the Industrial Court as established under the Labour Institutions Act No. 12 of 2007 and the Employment Act 2007.

8. That the position prevailing prior to the promulgation of the 2010 Constitution was that the Industrial Court had exclusive jurisdiction to hear and determine all matters concerning employment disputes or those employment related cases (**section 12(1) of the Labour Institutions Act; and Section 87 (1&2) of the Employment Act 2007**). It submits that the trial court however erred in law in the interpretation of section 87(2) of the Employment Act that 'the complaint' to a Labour Officer meant or gave the trial Court jurisdiction to deal with the employment dispute. That the trial Court erred in equating a Labour Officer to a Chief Magistrate, which was clearly not the intention of the Act and that by doing so the Court gave itself jurisdiction which it did not have.

9. The Appellant cites the case of **ROB DE JONG & ANOTHER V CHARLES MURELTHI WACHIRA [2012] EKLK** wherein the Court held that as the law gives exclusive jurisdiction to the Industrial Court to hear and determine all industrial related matters, the Magistrate Court does not have any jurisdiction to entertain industrial disputes in any way. The said Court went on to allow the appeal and ordered that all proceedings thereat before the Magistrate Court was a nullity for want of jurisdiction.

10. It further relies on the case of **SAMUEL KAMAU MACHARIA & ANOTHER VS KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR** wherein the Supreme Court of Kenya held that:

"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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings."

11. The Appellant further submits that the trial Court erred in striking out the Appellant's Replying Affidavit. It relies on the case of **MICROSOFT CORPORATION V MITSUMI COMPUTER GARAGE LTD & ANOTHER [2001] EKLK** wherein the Court held that: "The parties cannot waive irregularities in the form of a jurat but where the place of swearing is omitted, the Court may possibly assume that the place was within the area in which the notary before whom it was taken was certified to have jurisdiction, and the irregularity, may be overlooked...".

12. In **STEPHEN BERNARD ODUOR V AFRO FREIGHT FORWARDERS [2002] EKLK**, the Court held that Order XVIII rule 7 provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any irregularity in the form thereof. It is the Appellant's submission that striking out of pleadings or parts of pleadings is a draconian and extreme measure which the Court will only deploy as a last resort. Further, striking out of pleadings is only utilized where the pleadings or parts of pleadings are so hopeless that nothing can be done to redeem them as was held in **D.T. DOBIE & COMPANY (KENYA) LIMITED V JOSEPH MBARIA MUCHINA & ANOTHER [1980] EKLK**. That this was an instance that the trial Court fell short of the commandment that courts should not be beholden to technicalities at the expense of substantive justice and that therefore the decision to strike out the Appellant's Chamber Summons was extreme.

DETERMINATION

13. I have considered the pleadings including the Appellants Memorandum of Appeal and the grounds of opposition as well as the Appellants submissions. The Respondent did not file any submissions however.

14. Without sounding like a broken bell the court cannot emphasize enough the core of jurisdiction in a suit. There are numerous authorities to the effect that a court cannot take one more step in a matter if the court has no jurisdiction. Case of **MOTOR VESSEL M/V LILLIANS VS CALTEX OIL (KENYA) LIMITED 1989 KLR**".....a court of law downs its tools in respect of the matter before it the moment it holds opinion that it is without jurisdiction".

15. The case whose subject matter this appeal is pegged on was filed in the Chief Magistrate's Court on 1st November, 2009.

The case involved an employer and an employee and the claim was for Kshs.800,000/= for unlawful termination.

16. The Respondent challenged the court's jurisdiction in its defence but the trial magistrate ruled that the matter could be heard in either court.

17. Yet in the case of **ROB DE JONG & ANOTHER VS CHARLES MURIITHI WACHIRA (2012) eKLR** the court held that the law gives exclusive jurisdiction to Industrial Court to hear and determine all industrial related matters. The court went further to rule that a magistrate court did not have jurisdiction to entertain in any way industrial disputes.

18. Similarly Labour Institution Act Section 12(1) provide that Industrial Court shall have exclusive jurisdiction to hear and determine and grant any appropriate relief in relation to an application or claim or infringement of any of the provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court.

Section 87 of the Employment Act 2007 also provide as follows;

Subject to the provisions of this Act whenever-

- (a) An employer or employee neglects or refuses to fulfill a contract of service; or
- (b) Any question, difference or dispute arises as to the rights or liabilities of either party ; or
- (c) Touching any misconduct, neglect or ill treatment of either party or an injury to the person or property of either party, under any contract of service,

the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Industrial Court.

- (2) No court other than the Industrial Court shall determine any complaint or suit referred to in sub section (1).

20. The above was the applicable law then and the Respondent admitted he was employed as a transport manager by the appellant at a salary of Kshs.400,000/= per month.

21. This is equivalent to Section 12 of the Employment and Labour Relations court Act which provide 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
- (b) disputes between an employer and a trade union;
- (c) disputes between an employers' organisation **and a trade union's organization;**
- (d) disputes between trade unions;
- (e) disputes between employer organisations;
- (f) disputes between an employers' organisation **and a trade union;**
- (g) disputes between an employer's organisation or
a federation and a member thereof;
- (h) disputes concerning the registration and election of trade union officials; and
- (i) disputes relating to the registration and enforcement of collective agreements.

22. In view of the foregoing, I find the trial magistrate erred in law and in fact in holding that the Chief Magistrates Court had jurisdiction to hear and determine the matter between the parties in her ruling dated 28th February, 2010.

23. The court also finds that the trial learned magistrate erred law and fact in striking out the supporting affidavit filed by the Applicant for failure to indicate the place where it was deponed contrary to Section 5 of Oaths and statutory Declaration Act.

In support of the above in the case of **MISCROSOFT CORPORATION VS MITSUMI COMPUTER GARAGE LIMITED AND ANOTHER (2001) eKLR** the court held that

“the parties cannot waive irregularities in the form of a jurat, but where the place of swearing is omitted, this court may possibly assume that

the place was within the area in which the jurat before whom it was taken was certified to have jurisdiction and the irregularly may be overlooked.....”

24. In **STEPHEN BERNARD ODUOR CASE VS AFRO FREIGHT FORWARDERS (2002) eKLR** the court held.....

“.....it would therefore appear that this court will in exercise of its discretion accept an affidavit in evidence or proceeding notwithstanding some irregularities on the face of the same provided such irregularity is not fundamental.

Applying these principles to the facts of this case, I find the irregularity on the relevant verifying affidavit does not go to its root and should not have been stricken off.

25. In view of the foregoing striking out of pleadings is an extreme measure and as held in case of **D.T. DOBIE & COMPANY (KENYA) LIMITED VERSUS JOSEPH MBARIA MUCHINA AND ANOTHER (1980) eKLR** is only utilized where the said pleadings are hopeless beyond redemption.

26. The learned trial magistrate should have considered the place where the commissioner attested the affidavit having indicated that the same was Nairobi.

The omission of the jurat or place of deponing the affidavit is not so fundamental as to justify striking out entire pleadings.

So in conclusion the court finds that in summary the honourable learned magistrate erred in law and in fact in the following:-

1. In holding that the court had jurisdiction to hear and to determine the matter between the parties.
2. In failing to appreciate that the main dispute herein stems from the contract of service or employment between the parties.
3. In holding that the main prayer is for a liquidated sum of Kshs.800,000/= in respect of terminal benefits and that the prayer for general damages for breach of contract of service and/or employment in ancillary to the one of liquidated sum.
4. In failing to appreciate the merits of the application dated 23rd April, 2010 and filed on 11th June, 2010.
5. By holding that the supporting affidavit to the Appellant’s application was defective for failure to mention the place where the same was sworn in the jurat thus illegal and proceeded to strike out.
6. In failing to appreciate the appropriate provisions of the interpretation and General Provisions Act regarding deviation from form in documents which do not affect the substance of the document.
7. In failing to appreciate that the omission to mention the place in the jurat is not a deviation in substance but and in its form which is not prejudicial to the opposite side.

DECISION

- (a) In conclusion therefore the court holds that the Appeal herein dated 3rd March, 2011 is allowed.
- (b) The Ruling and Orders of the Learned Magistrate of 28th February, 2011 be set aside in the place thereof the Application dated 23rd April, 2010 be allowed.
- (c) The Respondent’s suit in the Chief Magistrate’s Court at Milimani be struck out with costs.
- (d) Each party to bear its own costs having considered the initial relationship pertaining between the parties.
- (e) Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 5TH DAY OF APRIL, 2022.

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 **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.

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

ANNA NGIBUINI MWAURE

JUDGE