



**Kiteke v Unigroup Transporters (Appeal 64 of 2021)
[2022] KEELRC 1768 (KLR) (28 July 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1768 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 64 OF 2021**

**AK NZEI, J
JULY 28, 2022**

BETWEEN

JOSEPH KINYAE KITEKE APPELLANT

AND

UNIGROUP TRANSPORTERS RESPONDENT

*(Being an appeal from the whole of the Ruling delivered on 26th August
2021 by Hon. M. L. Nabibya – PM in ELRC -CMCC NO. 458 of 2019)*

JUDGMENT

1. The background of the appeal herein is rather interesting, and I will first set it out before addressing the issues involved:-
 - a. the appellant was the plaintiff in Mombasa CMCC No 2462 of 2018 whereby he sued the respondent *vide* a plaint dated December 4, 2018 and filed in court on December 6, 2018, seeking to be paid damages arising from work injuries sustained by himself in the course of his employment by the respondent on October 2, 2015, allegedly due to negligence on the part of the respondent, its authorized servants and/or agents.
 - b. the respondent was said to have filed a memorandum of appearance and a statement of reply on December 19, 2018, which were allegedly served on the appellant's (plaintiff's) counsel, but were never placed on the court's record.
 - c. hearing of the suit proceeded *ex-parte* on January 19, 2021 when the appellant's case was heard and closed, as the respondent (defendant) and/or its counsel did not attend court, though said to have been aware of the said hearing date. The respondent's case was thereupon closed as well.



- d. the respondent filed an application on January 19, 2021 seeking to set aside the *ex parte* proceedings. The trial court found no merit in the said application and it dismissed the same *vide* a ruling dated March 18, 2021.
 - e. aggrieved by the said ruling, the respondent appealed against the same *vide* Mombasa ELRC Appeal No 21 of 2021, which it subsequently withdrew.
 - f. subsequent to the said withdrawal, the respondent filed an application dated June 3, 2021 in the trial court, seeking review, variation or setting aside of the said court's ruling dated March 18, 2021, the subject matter in the withdrawn appeal. The trial court allowed the application *vide* a ruling dated August 26, 2021.
2. The appellant appealed to this court *vide* the appeal herein, and set forth the following grounds of appeal:-
 - a. the learned magistrate erred in law and fact in dismissing the application dated June 30, 2021 (sic).
 - b. the learned magistrate erred in law and fact in not considering the fact that the application was for review of orders that the respondent had earlier sought in the High Court through an appeal and were denied.
 - c. the learned magistrate erred in failing to consider the documentary evidence and submissions presented by the appellant in considering the application in question.
 - d. the learned magistrate erred in law and fact in ruling that the appellant had failed to file response to the application after setting the same (down) for ruling on August 26, 2021 on being satisfied with compliance by both parties.
 - e. the ruling was against the weight of the need to dispense justice with fairness and thus bad in law.
 3. I will address all the grounds of appeal together, and start by pointing out that the appeal herein stemmed from a suit that was incompetent and invalid at its inception, and one that never was.
 4. I say so because the lower court suit (Mombasa CMCCC No 246 of 2018) is/was a work injury claim. I have already stated this fact in paragraph 1 herein. the Appellant pleaded as follows in paragraphs 3, 4, 5, 6 and 7 of his plaint dated December 4, 2018:-
 - “ 3. at all times relevant to this suit, the plaintiff was an employer of the defendant, having been employed on April 16, 2013 as a mechanic.
 4. the plaintiff avers that it was an express and/or implied duty of the defendant to take all reasonable precautions for the safety of the plaintiff and not to expose him to a risk of danger or injury which he knew or ought to have known and to provide and maintain adequate and suitable plant and appliances to provide a safe and proper system of working.
 5. the plaintiff avers that on October 2, 2015, he was in the course of his employment and in obedience of instructions from the defendant, working as mechanic when one of his colleagues by the name Otieno asked him to check the release bearing to enable the said Otieno to fit the gear box when it failed and fell on the plaintiff, covering his whole body.



6. the plaintiff avers that the said accident and consequential injuries to him were occasioned by the negligence, recklessness and/or carelessness and/or breach of employment safety by the defendant its authorized agents and/or servants.....
 7. in consequence of the foregoing the plaintiff sustained injuries and has suffered loss and damage for which he holds the defendant liable....”
5. Section 16 of the *Work Injury Benefits Act* (Cap 236 Laws of Kenya) whose, date of commencement is December 20, 2007, provides:-
- “no action shall lie by any employee or any dependant of an employee for the recovery of damages in respect of any occupational accident or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”
6. The Court of Appeal in Civil Appeal No 133 Of 2011 – *Attorney General v Law Society of Kenya & Another* eKLR upheld the constitutionality of section 4,16,21(1), 23,35(1) (3), 52(1) (2) and 58 of the aforesaid Act. The Court of Appeal’s decision was upheld by the Supreme Court of Kenya in the case of *Law Society of Kenya v Attorney General & Another* [2019] eKLR.
7. It follows that the suit filed by the appellant in the lower court in 2015 was filed in a court without jurisdiction. The trial court lacked jurisdiction to in any way entertain or hear and/or determine the suit or any application thereon. It matters not whether or not the parties herein had submitted to the trial court’s jurisdiction.
8. As stated by the Supreme Court of Kenya in the case of *Samuel Kamau Macharia v KCB and 2 Others* [2012] eKLR,
- “A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
9. Although none of the parties herein raised the issue of jurisdiction, either in this court or in the court below, this court cannot ignore an issue as pivotal as jurisdiction, as jurisdiction is the engine that powers and moves the wheels of justice. Without jurisdiction a court of law cannot move. In the case of *Owners of Motor Vessel “Lilian S” -vs- Caltex Oil (K) Limited* [1989] KLR1, the Court of Appeal (Nyarangi, JA, as he then was) stated as follows:-
- “... I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court ceased of the matter is then obligated to decide the issues straight away on the material before it. 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 the 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.”
10. The question that arises is whether this court, while sitting as an appellate court, can take up the issue of jurisdiction when none of the parties to the appeal has raised the same, either on appeal or in the



trial court. In the case of *Kenya Ports Authority v Modern Handling EA Limited* [2017] eKLR, the Court of Appeal stated as follows:-

“we have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time in any manner, even for the first time on appeal, or even *viva voce*, and indeed even by the court itself, provided that where the court raises it “*suo moto*”, parties are to be accorded an opportunity to be heard.”

11. In the present interlocutory appeal, both parties have filed submissions on the appeal pursuant to the court’s directions in that regard. I have read and considered the filed submissions. As already stated, none of the parties has addressed the court on the issue of jurisdiction. Jurisdiction is a matter of law and the court cannot close its mind to that fact. I find and hold that this court has no jurisdiction to hear and to determine the appeal herein. The appeal arises from a ruling of the trial court which was made without jurisdiction. I decline jurisdiction over the appeal, which is, in any case, invalid.
12. This court’s jurisdiction over occupational accidents and liability in relation thereto and compensation thereon can only be invoked after the Director of Occupational Safety and Health Services has determined the issues of liability and compensation. Sections 26 and 52(2) of the *Work Injury Benefits Act* are called in aid.
13. In sum, the appeal herein is incompetent and is hereby struck off with no orders as to costs. Although the appeal herein is an interlocutory appeal, this court’s finding on lack of jurisdiction on the part of the trial court automatically seals the fate of the suit pending in the trial court.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

..... for Appellant

..... for Respondent

