



REPUBLIC OF KENYA



KENYA LAW
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**Waikwa v Absa Bank Kenya Plc (Cause E022 of 2021)
[2022] KEELRC 3955 (KLR) (16 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 3955 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E022 OF 2021
DKN MARETE, J
SEPTEMBER 16, 2022**

BETWEEN

JANE WARIMA WAIKWA CLAIMANT

AND

ABSA BANK KENYA PLC RESPONDENT

RULING

1. This is an application by way of a Preliminary Objection dated July 24, 2021. It comes out as follows;

Take notice that the Claimant shall raise a Preliminary Objection against the Respondent's Counter Claim contained in paragraph 19, 20, 21, 22, 23, 24, 25 and 26 of the Statement of Response and Counterclaim dated May 27, 2021 on ground that the Honourable court lacks jurisdiction to hear and determine the Counterclaim as framed and for that reason, the said paragraphs should be struck out from the Statement of Response and the Counterclaim dismissed forthwith with costs.
2. The claimant in her written submissions dated September 21, 2021 comes out as follows;
3. Paragraph 26 of the Counter claim provides that, the Respondent has a right pursuant to the principle of sanctity of contract to have the outstanding loan owed to it by the claimant paid at commercial rates and that the loan be converted to attract commercial interest rates based on the terms of the claimant's employment contract and loan policy, of the Respondent which is a commercial bank.
4. Reliefs sought on the counterclaim are that judgment be entered for the Respondent for:-
 - a. The total amount of Kshs.1,307,843/= plus interests, as against the claimant.
 - b. Interest on (a) above at commercial rates with effect from the date of the claimant's termination to the date of judgment in this matter.



- c. Costs and interests thereon at court rates.
 - d. Any such further relief as may be appropriate in the circumstances.
3. The claimant/Respondent herein cites and relied on the authority of *Mukhisa Biscuits Manufacturing Company Ltd Vs West End Distributors Limited (1969) EA 696*.
4. It is her case that the preliminary objection is on a pure point of law and touches on the provisions of *the Constitution* and statute creating this court and also conferring it with jurisdiction to hear and determine matters before it. This is as follows;
- 7. Clause 2 provides that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:
 - a. Employment and labour relations and
 - b. The environment and use and occupation of and title to, land”
 - c. Clause 3 states that, parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
 - 7. The *Industrial Court Act* No.20 of 2011 at Part III provides for the jurisdiction of Employment and Labour relations court. Section 12 of the Act, provides that 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 and arising out of employment between an employee and employer.
 - b. Disputes between an employer and a trade union.
 - c. Disputes between an employer organisation and a trade union organisation
 - d. Disputes between trade unions
 - e. Disputes between employer organization and a trade union.
 - f. Disputes between an employer’s organisation or a federation and a member thereof.
 - g. Dispute concerning the registration and election of trade union officials and
 - h. Disputes relating to the registration and enforcement of collective agreements.
5. The Objector further seeks to rely on the authority of the *Owners of the Motor vessel “Lilian vs Caltex Oil (K) Ltd (1988) eKLR*, it was held that;

“...it has been reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right 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 proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.....”



15. In the case of *Abdulmasjid Mohammed Adam vs Nimish Shab T/A Flora Printers* (2017) eKLR, the court held thus;

“However, what does the expression “down tools mean” to me the learned judge, R.O Kwach, to be precise, meant and can only be taken to have meant that once jurisdiction is established to be lacking, the court cannot purport to deal with the matter further. It cannot be taken to mean that I just down my tools, the pen and fold the file and infinitum. That could result in a large number of files that are just folded, never to be touched because the court has downed words of the Court of Appeal, I choose prudence over imprudence and order that, the appeal be and is hereby transferred to the Environment and Land Court, Mombasa for hearing and determination.”

6. The Respondent in opposition to the preliminary objection submits that this is not in tandem with the requirements of the authority of *Mukbisa Biscuits Manufacturing Company Ltd Vs West End Distributors Limited* (1969) EA 696.
7. She further seeks to rely on the authority of *AKN v JNM* (2014) eKLR.
8. The Respondent in a nutshell submit that the Preliminary objection would require further interrogation and enquiry to verify. It therefore is not feasible on sustainable as it is set out. The court would require evidence of the nature of relationship of the parties and or how the sum in the counter claim came about.

Further,

7. On the issue of the jurisdiction of this court, we submit that this court draws its jurisdiction from Article 162 (2) of *the Constitution* of Kenya, 2010 and Section 12(1)(a) of the *Employment and Labour Relations Court’s Act* No.20 of 2011 which provides that “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.
9. The Respondent further says the following authorities in opposition to the preliminary objection;
8. We submit that the jurisdiction of this court is pegged on an employer/employee relationship as espoused by Section 12 of the *Employment and Labour Relations Act*, 2014. It cannot be disputed that the dispute before court arises out of a contract of service (appropriate term in modern employment law is contract of employment).
12. In the case of *Kenya County Government Workers’ Union versus National Social Security Board of Trustees and 5 others* 2015 eKLR, the court held thus;

“.....*the constitution* did not define the extent to which the Employment and Labour Relations Court, as a court having the same status of the High Court should deal with matters that come before it which do not wholly relate to Employment and Labour Relations. However, under Article 159 (2) (e) both the High Court and the



Employment and Labour Relations court are enjoined to protect and promote the principles of *the Constitution*.”

Again;

16. In the case of *Kenya Tea Development Agency Holdings Limited v Lee Kimathi & 2 others* (2021) eKLR the court held thus;

“However, as pleaded in the suit, the claim herein is anchored on execution in ELRC Cause No.658 of 2011 which is an employment matter. Section 13 of the Employment and Labour Relations Court Act specifically provides that this court has jurisdiction to enforce its judgments, awards, orders and decrees, but the rules to apply in execution are those in the *Civil Procedure Act*. This of necessity means that any claims arising out of its execution powers under the Act must be determined by the same court. The enactors of the law would have intended that where a suit is filed exclusively on disputes arising out of the jurisdiction of this court the same should be filed in another court just because the suit does not relate to employment and labour relations matters directly.

10. The preliminary objection fails. This is because it does not meet the threshold for preliminary objections as enunciated in the celebrated authority of *Giella vs Cassman Brown and Co. Ltd (1973) EA 358*. It would call for further interrogation and evidence to sustain the objection.
11. The preliminary objection is dismissed with orders that each party bears their costs to the application.

DATED AND DELIVERED AT NYERI THIS 16TH DAY OF SEPTEMBER 2022.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Abwour instructed by Abwour & Co.Advocates for the Claimant/Objector.
2. Mr. Achiando instructed by Okweth Ochiando & Co.Advocates for the Respondent.

