REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 30 OF 2020

BETWEEN

BENTA ACHIENG ODINYO.....APPELLANT

-AND-

UNIVERSITY OF NAIROBI.....RESPONDENT

(Being an appeal from the Ruling and Order of the Honourable P.Muholi Senior Resident Magistrate made on 30.4.2020 in Nairobi CMEL No. 1584 of 2019)

JUDGMENT

1. On 4.12.2019 the Appellant filed a Statement of Claim in the Chief Magistrate Court being CMEL Cause No. 1584 of 2019 in which she averred that the respondent had erroneously computed and paid to her kshs 415,601 as gratuity which was below her entitlement under the Collective Bargaining Agreement (CBA) negotiated between her trade union and the respondent. She contended that under the CBA provided for payment of gratuity calculated at the rate of 31% of her last yearly basic pay for the years worked and consequently she prayed for judgment in the sum of Kshs.1,494, 276.76 for her 28 years' service.

2. The Respondent filed defence denying the claim by the claimant and averred that all his gratuities were settled in accordance with the CBA. It contended that the CBA provided for gratuity at the rate of 28 days per year of service until 1.7.2015 when the CBA providing for gratuity at the rate 31% of the basic pay became effective. In addition the respondent filed application dated7.11.2019 seeking to consolidate the suit with other related suits.

3. In the meanwhile the respondent filed a Notice of Preliminary Objection dated19.11.2019 urging for striking out of the suit on grounds that the Subordinate Court lacked jurisdiction to determine the suit by virtue of section 12(1) and (5) of the Employment and Labour Relations Court Act and Gazette Notice No. 6024 of 10th June 2018 since it involved interpretation and enforcement of a CBA which is an exclusive jurisdiction of this Court.

4. However, the claimant maintained that the trial court had the jurisdiction to determine the claim for gratuity by enforcing clause 40 of the CBA by assessing the correct amount of gratuity payable. She relied on section 2, 59(3), 62(1) and 73(3) of the Labour Relations Act and section 26(1) of the Employment Act.

5. The objection was disposed of by written submissions and after consideration of the same, the trial court rendered the impugned ruling on 30.4.2020 whereby he struck out the suit with costs and directed that the ruling shall apply to 5 other matters, namely, Cmel 1583 of 2019, 1586 of 2019, 1686 of 2019, 1687 of 2019 and 1622 of 2019.

6. Aggrieved by the said Ruling, the Appellant filed the instant Appeal on 26.3.2020 raising the following grounds:

a. The Learned Magistrate erred in law and fact by upholding the Preliminary Objection dated 19.11.2019 which was without merit.

b. The Learned Magistrate erred in holding that the issues raised but the preliminary Objection were pure points of law.

c. The Learned Magistrate erred in law and fact by failing to consider the Appellant's submissions.

d. The learned Magistrate erred in law and fact by allowing the Respondent's Preliminary Objection and thus dealing a blow to the Appellant's right to access to justice.

7. The Appeal was canvassed by written submissions.

Appellant's submissions

8. The Appellant submitted that the trial Court ran into error when he applied his ruling on the Preliminary Objection to five other matters before a formal consolidation was done and thereby condemned the respective claimants unheard.

9. She argued that the Preliminary Objection was not a pure point of law and relied on **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) E.A. 696** which laid down the parameters of a preliminary objection. She further relied on **Muhu Holdings Limited v James Muhu Kangari [2017] eKLR** where the Court held that a preliminary objection cannot be raised if any fact has to be ascertained in evidence.

10. She argued that the Preliminary Objection required the Court has to examine documents and actively participate in examining the facts to ascertain issue raised. She further argued that the court went on to consider the issue of registration of the CBA, which issue had not been raised or pleaded by either party, and thereby became a party to the claim, formulated its own issue and proceeded to argue and determine the same.

11. She submitted that Gazette Notice No. 6024 excludes trade disputes under the Labour Relations Act but empowers magistrates to deal with disputes arising from contracts of employment where an employee's pay does not exceed Kshs. 80,000. She argued that the claim was not commenced by a trade union and neither was the court told that the dispute had been reported to the Cabinet Secretary. She further submitted that the trial court erred by failing to consider her submissions and appreciate that she was an individual suing alone, and that she had no relations with the Claimants in the other causes that were bundled in the impugned Ruling.

12. She argued that section 59 (3) of the Labour Relations Act provides that the terms agreed in collective agreements shall be incorporated into the contract of employment of every employee covered by the agreement. She further argued that section 59 (2) of the Act provides that a collective agreement continues to bind employers and employees who are parties to it.

13. She submitted that the she is not an authorised representative of an employer, group of employers, employers' organisation or trade union and as such she is incapable of referring a trade dispute to the ELRC as envisaged by law.

14. She submitted that the respondent's failure to pay correct gratuity as provided in the CBA was the reason for complaint and it was a breach of an employee's term of employment which is an offence by the employer under the Labour Relations Act.

15. It was her submission that the trial court while looking at the CBA annexed to the claim, was being called upon to examine it merely as an exhibit in support of the Appellant's case and uphold the implementation of the prescribed minimum standards in line with section 26 (1) of the Employment Act and section 15 (6) of the Employment and Labour Relations Court Act.

16. She submitted that in order for a case to be classified as a trade dispute which is out of the jurisdiction of the magistrates court, the matter ought to have been referred to conciliation as contemplated under sections 62 (1) and 73 (1) of the Labour Relations Act. She referred to **Janet Muriungi v Chief Offer Department of Education [2018] eKLR**.

17. Finally, she submitted that this matter calls for trial to ascertain whether she was paid her gratuity in full. She urged the Court to allow the appeal, dismiss the preliminary objection dated 19.11.2019 with costs and order that the main suit be heard promptly on its merit before another court.

Respondent's submissions

18. The Respondent supported the decision to strike out the Appellant's suit and relied on section 162 (2) (a) of the Constitution and Section 12 (1) and (5) of the Employment and Labour Relations Court Act to submit that the Employment and Labour Relations Court (ELRC) has original jurisdiction to entertain all employment and labour relations matters and magistrate court can only come in to the extent of delegation.

19. It maintained that the issue raised by the Appellant fell within the excluded maters under paragraph 1 of the Gazette Notice no. 6024 of 10th June 2018 since it related to interpretation and enforcement of a CBA which is within the exclusive jurisdiction of the ELRC.

20. It submitted that section 59 (5) of the Labour Relations Act is couched in mandatory terms, that registration, interpretation, enforcement and implementation of a CBA is a preserve of the ELRC. According to it, the trial Court was being called upon to interpret and enforce Clause 40 of the Collective Bargaining Agreement which in all considerations was outside its jurisdiction.

21. It relied on the decision of the Court of Appeal in **Kenya Tea Growers Association v Kenya Plantation and Agricultural Workers Union [2018] eKLR** where the Court cited the decision in **Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & 3 Others [2015] eKLR** that a collective bargaining is neither compulsory nor automatic and that collective bargaining is a platform upon which trade unions can build to provide advantageous terms and conditions to their members.

22. It argued that the issue before the Court was whether the Court could interpret the contract as operating retrospectively or taking effect from the date of signing of the agreement or on such a date as the parties agree.

23. It submitted that a body or person can only act to the extent of the powers donated. He relied on section 12 (1) of the Employment and Labour Relations Court and the decision in **Pastoli v Kabale District Local Government & Others (2008) 2EA** as cited in **Republic v Secretary of Firearms Licensing Board & 2 Others Ex-parte Senator Johnson Muthama [2018] eKLR.**

24. He further relied on **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR** cited by the Court of Appeal in **Capital Markets Authority v Jeremiah Gitau Kiereini & another [2014] eKLR** that a court's jurisdiction flows from either the Constitution or legislation or both and that it cannot arrogate itself jurisdiction exceeding that conferred upon it by law.

25. It relied on the **Mukisa Biscuit case** to submit that its preliminary objection raised pure points of law because the issue of whether the Court has jurisdiction to determine the matter met the threshold set out in that precedent.

26. It submitted that the argument that the appellant and the Claimants in the other suits were condemned unheard is neither here nor there and is only meant to misled the Court. It submitted that it had only made applications to have the matters consolidated but the matters were never consolidated.

27. It contended that a perusal of the record reveals that it was mutually agreed by consent of the parties that the Ruling in CMEL No. 1584 of 2019 would apply to the 5 other matters. It argued that Order 38 Rule 1 of the Civil Procedure Rules allows for consolidation of suits.

28. It relied on the Supreme Court's finding in **Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR** that the essence of consolidation is to facilitate expeditious disposal of disputes and to provide a fair framework for impartial dispensation of justice to the parties.

29. It submitted that the Claimants in the consolidated matters were its employees at various times and the interpretation of Clause 40 would have substantially affected all other causes and the amount that was being individually claimed.

30. It argued that notwithstanding the fact that the trial court lacked jurisdiction in respect of interpreting and enforcing the CBA, the matter was prematurely before the trial court since the dispute had not been submitted to the Cabinet Secretary for conciliation thus the Court was incapable of granting the orders sought.

31. It argued that the exhaustion doctrine was emphasised by the Court in **Republic v PMS Innovateus Limited v another ex-parte PZ Cussons Limited [2019] eKLR** where the Court cited the Court of Appeal in **Speaker of National Assembly v James Njenga Karume [1992] eKLR** that where a clear procedure for redress is prescribed by the Constitution or an Act of Parliament procedure should be strictly followed.

32. It maintained that the only issue for determination by the trial Court was whether it had jurisdiction to interpret and enforce Clause 40 of the CBA. It contended that under section 2 of the Labour Relations Act, a trade dispute does not necessarily have to be between an employer and a trade union and that a dispute between an employer and an employee also forms part of a trade dispute.

33. It submitted that the Claimants were duly paid their gratuity as per the terms of the CBA and the only contention was the manner in which the calculations were done.

34. Finally, it submitted that this appeal is abstract, merely academic and that there was no error committed by the trial court to warrant this Honourable Court to interfere with, set aside and/or otherwise quash the Ruling if the Court dated 30.4.2020.

Issues for determination

35. Upon considering the record of appeal and the rival submissions filed by both parties, it is my view that this appeal turns on the following issues:

a. Whether the Preliminary Objection raised pure points of law

b. Whether the Learned Magistrate erred in law and fact by upholding the preliminary objection.

c. Whether the Learned Magistrate erred in law and fact by applying his Ruling the 5 other suits.

36. This being a first appeal, my duty is well cut out, namely, to review and re-evaluate the evidence and draw my own conclusions to test whether the decision reached by the trial court should stand. The said mandate has been restated by the Court of Appeal in numerous decisions including ***Kenya Ports Authority vs Kuston (Kenya) Limited (2009) 2 EA 212*** where it held inter alia that:

> ***"On a first appeal from the High Court, the court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."***

Whether the Preliminary Objection raised pure points of law

37. The Appellant submitted that the Preliminary Objection was not a proper preliminary objection since it failed, to raise a pure point of law. In her view the preliminary objection raised issues of fact that required evidence to establish. However, the respondent maintained that the Preliminary Objection was proper and grounded in law since it raised the issue of the Court's jurisdiction to interpret and enforce a CBA.

38. I have carefully considered the Notice of the Preliminary Objection and the rival submissions made by parties including the judicial precedents cited. In the **Mukisa Biscuit Case** the Court of Appeal held:

"So far as I am aware, a preliminary objection consists of a point of aw which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..."

39. The Preliminary Objection herein related to the jurisdiction of the trial court to hear and determine the suit since it involved interpretation and enforcement of a CBA, and a pending application for consolidation with other suits. In my view a Preliminary Objection contesting jurisdiction of the Magistrates' Court to determine issues relating to a CBA, pursuant to Gazette Notice No. 6024 dated 10.6.2018, did not require any examination of the evidence to establish. As held in the **Mukisa Biscuit case**, the objection raised by the respondent was a pure point of law and it was appropriate to raise it at the earliest opportunity as held in the ***The Owners Of The Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd (1989) KLR 1.***

40. As regards the issue of the pending application for consolidation of the appellant's suit and other matters I believe that was not the basis for striking out the suit because the Notice of the Preliminary Objection did not indicated that. In fact it was clear that the pending application was used as a basis for asking the court to stand over the suit generally.

Whether the Learned Magistrate erred in law and fact by upholding the preliminary objection.

41. The Learned Magistrate in his Ruling held thus:

"From the provisions above the Claimants herein seek enforcement of clause 40 of the collective agreement between the respondent University of Nairobi and a Trade Union. This is a dispute that ought to be taken to the Employment and Labour Court whether the said agreement was registered or not…From the above reasoning to which court is guided the court must first establish why it was not registered, then secondly this court is not in a position to enforce a clause contained in an agreement as per Gazette notice and Section 12."

42. In arriving at the foregoing decision the trial court considered the various provisions of the Labour relations Act, ELRC Act and the gazette notice no. 6024 of 10th June, 2018 which was published by the Chief Justice. The gazette notice provides as follows:

"***IN EXERCISE of the powers conferred by section29 (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 Magistrate and above as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective area of jurisdiction:***

1. Disputes arising from contracts of employment (excluding trade disputes under the Labour Relations Act 2007) where the employees gross monthly pay does not exceed kshs.80,000 as commenced and continued in accordance with the Employ and Labour Relations Court (Procedure) Rules, 2016.

2. …"

43. My understanding of the foregoing gazette notice is that a Senior Resident Magistrate Court has been conferred with jurisdiction to hear and determine all employment and labour relations disputes arising from contracts of employment but not disputes under the Labour Relations Act 2007. Section 59 (3) of the Labour Relations Act provides that:

"(3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement."

44. Again section 26 of the Employment provides as follows:

"(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment, award or order of Industrial Court are more favourable to an employee than the terms provided in this part and Part VI, then such favourable terms and conditions of service shall apply."

45. Following from the foregoing provisions it is clear that a contract of service can be contained in a mosaic of documents including letters, Memos, HR manuals, CBA, statutes, subsidiary legislations, the Constitution or even a decree, award or order of this Court. It means that once the terms of the engagement are set out, whether by the employer unilaterally or mutually between the employer and individual employee or through collective negotiation by a trade union, they become a right to the individual employee under his or her individual contract of employment.

46. In view of the foregoing, it is my holding that a Clause 40 of the CBA herein was incorporated into the appellant's contract of employment after the CBA was registered by this court, effective from the date agreed between the trade union and the employer. Consequently, he was entitled to payment of gratuity under Clause 40 of the CBA as of right and if the employer breached the terms set out thereunder, the appellant was free to enforce the terms thereunder as if it was an individual contract before this court or the subordinate court depending on the pecuniary criteria set out by the Gazette Notice No. 6024 of 10.6.2018.

47. In this case, the appellant went to the Subordinate court because his gross monthly pay was below kshs.80, 000. I must agree that going by the said gazette notice and Section 87 (3) of the Employment Act, the appellate was right to file the suit there and the trial court had jurisdiction to hear and determine the suit because it involved enforcement of a term of contract of employment between the appellant and the respondent. Section 87 (1) and (2) of the Employment Act provides that no other court except this Court shall determine claims for breach of employment contract or injury arising from a contract of service but subsection (3) provides that:

> ***"This section shall not apply in a suit where the dispute over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute."***

48. In this case, the dispute before the trial court was fairly simple and straight forward. The appellant merely asked the court to determine his rightful gratuity based on clause 40 of the CBA which was now a right under her contract of employment by dint of section 59 (3) of the Labour Relations Act. The Respondent also understood the dispute before the trial as the computation of the appellant's gratuity based on Clause 40 of the CBA and submitted as much. Also in this appeal, the respondent has appreciated the said dispute in its submissions in paragraph 38 (j). However, despite the aforesaid clear case of breach of an employment contract, the trial court observed that:

> ***"From the provisions above the Claimants herein seek enforcement of clause 40 of the collective agreement between the respondent University of Nairobi and a Trade Union. This is a dispute that ought to be taken to the Employment and Labour Court whether the said agreement was registered or not."***

49. With due respect to the learned trial Magistrate, I find that he misunderstood the dispute before him and proceeded to consider extraneous matters as the reason for declining jurisdiction, thus:

> ***"From the above reasoning to which court is guided the court must first establish why it (CBA) was not registered, then secondly this court is not in a position to enforce a clause contained in an agreement as per Gazette notice and Section 12."*** *[emphasis added]*

50. The foregoing conclusion was obviously erroneous both in law and fact. Whereas the learned magistrate rightfully stated that he could not deal with a dispute involving registration of a CBA, he erred in finding that the court was required first to inquire into whether the CBA before it had been registered or not. The issue before the Court was the computation of her gratuities under clause 40 of the CBA and no party ever raised the issue of registration of the CBA. As correctly submitted by the Appellant, the trial Court was only being called upon to merely examine the CBA as an exhibit in support of her claim.

51. The distinction between this case and a trade dispute is that it is an individual claim founded on breach of employment contract under the Employment Act while trade dispute is collective grievance between a Trade Union and an Employer or between an Employers' Organisation and a Union regarding the terms of a CBA under the Labour Relations Act which exclusively falls within the jurisdiction of the ELRC.

52. I gather support from the **Kenya Tea Growers Association Case** where the Court of Appeal held that:

> ***"It follows therefore that the ELRC at this stage is tasked with the responsibility of determining the trade dispute between the parties which in our view, includes the disagreement with regard to the terms of the CBA or what the parties refer to as the economic dispute between them."***[Emphasis Mine]

53. Having found that the dispute before the trial court was not between parties to the CBA, that is, the respondent and the appellant's trade union, but a clear case of computation of the Appellant's gratuity under his contract of employment contained in the subject CBA, I reiterate that the trial court had jurisdiction to determine the suit by disnt of the said gazette Notice.

Whether the Learned Magistrate erred in law and fact by applying the impugned ruling to 5 other matters.

54. The trial magistrate held that the order was to apply to the cases mentioned in his Ruling. These matters were listed in his Ruling as CMEL 1687 of 2019, CMEL 1686 of 2019, CMEL 1622 of 2019, CMEL 1586 of 2019 and CMEL 1583 of 2019.

55. In its Preliminary Objection, the Respondent indicated that it had made an application to consolidate the matter with 10 other similar matters. In its submission herein, the Respondent stated that it had made applications to have the matters consolidated but they were never consolidated. It nonetheless, contended that the parties had consented that the Ruling in CMEL No. 1584 of 2019 would apply to the 5 other matters.

56. I have perused the typed proceeding provided by the trial court and found no indication that the parties consented to have the ruling by the trial court apply to the other 5 matters. Rule 23 of the **The Employment And Labour Relations Court (Procedure) Rules, 2016** provides:

> ***"The Court may consolidate suits if it appears that in any number of suits—***
>
> ***(a) some common question of fact or law arises; or***
>
> ***(b) it is practical and appropriate to proceed with the issues raised in the suits simultaneously."***

57. Whereas the Court has discretion to consolidate the suit before it, this cannot not be done without addressing the application for consolidation of the suits, and establishing the relevant threshold required for consolidation. Notably, the effect of the Ruling is that all the suits referred to in the Ruling were struck out without giving all Claimants a chance to respond to the Preliminary Objection.

58. The Court of Appeal in **National Union of Water and Sewarage Employees & 3 others v Nairobi Water and Sewarage Company Limited [2018] eKLR** held:

> ***"Also at the learned Judge's disposal was Rule 23 of the Industrial Court (procedure) Rules 2010 pursuant to which the learned Judge made the impugned order…***
>
> ***The learned Judge should have set out and interrogated the issues in controversy in each of the matters intended to be consolidated, identified their commonality, either in law or on facts and then give reasons as to why in his view a consolidation order was the most ideal in the circumstances ..."***

59. Consequently, I find that the trial court erred in law by applying the impugned ruling on the said other 5 suits herein and thereby striking them out without giving the respective Claimants a chance to ventilate their position on the Preliminary Objection.

60. In conclusion, I allow the appeal in the following terms:

(a) The decision by the subordinate court striking out the appellant's suit against the respondent is set aside and substituted with an order dismissing the respondent's Notice of Preliminary objection dated 19th November, 2019.

(b) The appellant's suit against the respondent is reinstated with an order that it proceeds on its merits before another Magistrate.

(c) This judgment applies to other 5 matters referred to in the impugned Ruling.

(d) The respondent will pay costs of the appeal to the appellant.

DATED AND DELIVERED IN NAIROBI THIS 6TH DAY OF MAY, 2021.

ONESMUS N. MAKAU

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 April 2020, this judgment has been delivered to the parties online via Google Teams with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE