



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**APPEAL NO.45 OF 2017**

**EGERTON UNIVERSITY.....APPELLANT**

**VERSUS**

**JOHN MARANI.....RESPONDENT**

**JUDGEMENT**

1. The Appellant herein being dissatisfied with the judgment of Hon. J. Mwaniki delivered on 25<sup>th</sup> March, 2014 in Nakuru Chief Magistrates Court Civil Case Number 1321 of 2007 preferred this Appeal by way of Memorandum of Appeal dated 14<sup>th</sup> April, 2014 and filed through the firm of Sheth & Wathigo Advocates. It comes out as follows;

**1) That The Learned Magistrate erred in law and in fact in failing to appreciate the disparate nature of the claim as advanced in the plaint and the counter claim and that while he had jurisdiction to deal with the course of action in the plaint, he clearly did not have the jurisdiction to entertain the counterclaim and should have struck the same out.**

**2) The learned magistrate erred in law and fact in finding the counter claim proved n particulars that were neither pleaded and or in respect of which no credible evidence was adduced.**

**3) The learned magistrate erred in law and in fact in failing to appreciate the legal regime under which the defendant's claims for benefits are processed and ended up wrongly imposing the burden thereof on the plaintiff especially when the issue was never pleaded and proved by the defendant.**

**4) The learned trial magistrate erred in law and in fact in ignoring the submission and laughing off sound and serious legal contentions of the plaintiff thereby denying himself of invaluable assistance offered thereby reaching unsound decisions on the counterclaim.**

**5) The judgment of the trial Court is unreasonable and contrary to law and facts of the case presented before that trial court.**

It prays for Orders That;

**a) The judgment and decree of the honourable Court dated 25<sup>th</sup> March, 2014 on counter-claim be reviewed and or set aside and in its place substituted judgment and decree that is reasonable and derivative of proper evaluation of evidence on record dismissing or striking out counter-claim in the subject matter.**

**b) The Respondent be ordered to bear the costs of this Appeal.**

**Brief facts**

2. The Appellant/ Plaintiff in the lower court matter filed its suit being case number Nakuru CMCC No. 1321 of 2007 seeking to recover Kshs. 393, 130/- which had been paid irregularly into the Respondents account. That the respondent filed his statement of defence on 2<sup>nd</sup> November, 2007 denying all the averment in the plaint and later amended on 26<sup>th</sup> February, 2011 to include a Counter-claim which sought for terminal benefits for unfair termination having been terminated from employment on 16<sup>th</sup> October,2006. The matter proceeding for hearing and judgment was delivered to wit; the Plaintiff case had entirely succeeded while the defendants counter-claim had partly succeeded in the sum of Kshs 586,770 which was set off with the plaintiffs claim and the plaintiff ordered to pay the remainder of Kshs. 193,640/-. The Appellant herein being dissatisfied with the judgment on the counterclaim preferred this Appeal.

3. This appeal proceeded by way of written submissions with the Appellant filing on 15<sup>th</sup> July, 2020 while the Respondent filed on 19<sup>th</sup> May, 2021.

#### **Appellant's submissions.**

4. The Appellant submitted that the trial court lacked jurisdiction to entertain the counterclaim on the basis that the counterclaim which was filed on 26<sup>th</sup> February, 2011 was filed in the Chief magistrates' court which lacked jurisdiction to entertain employment matters in light of Article 162(2) of the Constitution of Kenya 2010 which came to force prior to the institution of counterclaim by the Respondent.

5. The Appellant submitted that Jurisdiction is everything as held in locus classicus case of **Owners of Motor vessels 'Lillian S'-v- Caltex Oil Kenya Limited [1989] KLR 1** and without it the Learned magistrate ought to have down its tools and truck off the counter claim for want of jurisdiction.

6. It was further submitted that the respondent failed to adduce any evidence to support his counterclaim further that the Court used unsubstantiated figures in calculating the Respondents terminal benefits which figures were never pleaded by the Respondent as such the trial court assumed figures in arriving at its findings when the burden of adducing evidence lied with the Respondent as envisage under section 107 to 109 of the Evidence Act.

7. With regard to Ground number 5, it was submitted that the Respondent was allegedly dismissed from employment on 16<sup>th</sup> October, 2006 and the counterclaim filed on 26<sup>th</sup> March, 2011 more than Four (4) years since the course of Action arose, therefore, the claim was time-barred as provided for under section 90 of the Employment Act which trial court needed to have declined to consider the counterclaim on that basis.

8. He concluded by urging this Court to reevaluate the facts of this case and allow the Appeal as prayed.

#### **Respondent's Submissions**

9. The respondent on the other hand submitted that the he filed his defence on 2<sup>nd</sup> November, 2007 and subsequently sought leave of Court vide his application dated 20<sup>th</sup> November, 2010 to amend his defence to include the Counter-claim which application was not opposed by the Appellant herein therefore the trial Court allowed him to file the counter-claim on 15<sup>th</sup> February, 2011. He argued that Article 262 of the Constitution of Kenya 2010 established transitional provisions to be set under the sixth schedule, and under section 22 of part 5, it was envisioned that all matter that followed a certain procedure before promulgation of the Constitution ought to follow the said procedure to its conclusion notwithstanding the introduction of a new law. He relied on the case of **Philip Muiruri -v- Gatemu Housing Co. Ltd [2019] eKLR**.

10. It was submitted that the respondent institute his counter-claim against the Respondent for unfair termination which the trial Court rightfully found partially in his favour and explained clearly how he came up with the figures owed to each party, therefore the allegation that the trial court used imaginary figures to calculate the terminal dues of the respondent is baseless.

11. On the issue of jurisdiction, it was submitted that the trial Court was empowered under Article 262, Sixth schedule, section 22 of part 5 to complete the hearing of the suit having been instituted in 2007 before promulgation of the Kenya Constitution 2010.

12. It is the Respondent submissions that the Appellant fired him on 16<sup>th</sup> October, 2006 and he immediately lodged an appeal with the respondent who affirmed the dismissal on 18<sup>th</sup> December, 2008 through its deputy registrar's office therefore the claim was timely instituted in light of the said response of the appeal.

13. Accordingly, it was submitted that the trial court was seized of jurisdiction to entertain the suit before it and urged this Court to dismiss the Appeal herein.

14. I have examined the submissions and averments of the parties herein. From the plaint filed in the lower court, the plaintiff sought to be paid 393,130/= by the respondent which amount was an overpayment of salary on illegal allowance. I will look at this as a remuneration received by an employee from his employer.

15. The defendant on the other hand at the lower court filed his defence denying the plaint but also put in a counter claim alleging unlawful termination and seeking to be paid his terminal benefits.

16. It is also imperative to note that this claim was initially filed on 3/10/2007 before the CM's court Nakuru. During the hearing of this case, the parties herein gave evidence. The respondent also led his evidence and submitted that he was unfairly dismissed even before his appeal from dismissal was heard based on the evidence, the learned magistrate proceeded.

17. I note that indeed the respondent in his counter claim made a case for wrongful termination which was concluded by the lower court.

18. After the counter claim was filed, the respondent responded to the same. The submission by the appellants herein is that the learned magistrate proceeded to award the respondent on a counter claim not pleaded and where particulars were unknown.

19. The appellants also submit that the learned magistrate had no jurisdiction to handle this matter. The issue for this court to determine herein are two fold.

1. Whether the learned magistrate had jurisdiction to handle the counter claim.

2. Whether the counter claim was proved.

#### ISSUE NO. 1

20. On 1<sup>st</sup> issue, it is clear that at the time this cause was filed on 3<sup>rd</sup> October 2007, the court that had no jurisdiction to handle employment related matters as the Industrial Court of Kenya then established under Trade Dispute Act Cap 234 which established the Industrial Court of Kenya had jurisdiction to handle disputes between employers and employees.

21. The dispute in court that was filed by the appellant emanated from a dispute between an employer and an employee where the respondent was accused of receiving money from his employer illegally.

22. This was definitely not considered as a criminal case and the respondent and his colleagues were never charged for any criminal misconduct.

23. The appellant subjected themselves to the jurisdiction of the Hon. Magistrate and obtained Judgment for what they sought whereas aware that this was a matter to be filed before the Industrial Court of Kenya (Tribunal).

24. Having subjected themselves to the CM's Court, the appellants are in my view estopped from pleading lack of jurisdiction from the same court from handling the counter claim inter related with the employment relationship between the respondent and the appellant.

25. It is my finding that the learned magistrate had jurisdiction to handle the counter claim as it emanated from the relationship between the appellant and respondent and which the same court had handled in favour of the appellants on their claim.

#### ISSUE NO.2

26. On issue No.2, the appellants argued that the counter claim was not established and no evidence adduced.

27. From the record, after the appellants were served with the counter claim the respondents responded to the same and indicated that the plaintiff had been lawfully terminated. They had indicated they would raise a preliminary objection on a point of law which the Hon. Magistrate considered in his Judgement.

28. During the hearing the respondent gave him evidence and indicated that he had been dismissed without due process and sought to be paid his terminal dues.

29. In his Judgment, the learned magistrate found for the respondent and awarded him his terminal benefits of kshs.586,770/= to be effected from the 393,130/= awarded to the appellant.

30. In my view the learned magistrate considered the submissions before him in computing the said dues.

31. There was evidence submitted by the respondent on his termination and he was indeed entitled to his terminal dues.

32. There was no error in my view committed by the trial magistrate and I therefore find the appeal has no merit.

33. I dismiss this appeal with costs to the respondent.

Dated and delivered in open Court this **8<sup>TH</sup> day of JULY, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Mureithi holding brief for Kisila for appellant – present

Respondents – absent

Court Assistants – Fred and Wanyoike