



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISC. APP. NO. 71 OF 2019

APOLLO KINGORI WANDERICLAIMANT

VERSUS

ATTORNEY GENERAL1ST RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF FINANCE2ND RESPONDENT

RULING

1. The Applicant brought the Notice of Motion herein seeking the following orders against the respondents:-

(a) That the application be certified as urgent and service be dispensed with in the first instance.

(b) An order of MANDAMUS be and is hereby issued directing the Attorney General and the Principal Secretary Ministry of Finance to pay the applicant Kshs. 689,735/- as the decretal sum plus Kshs. 279,824.54/- as interest on the principal sum, plus costs and interest at court rates from the date of the decree till date of payment in full.

(c) An order directing The Attorney General and the Principal Secretary Ministry of Finance to pay the applicant Kshs. 86,975/- as costs plus interest thereon of the suit for **CMCC. NO. 7977 of 2013, Apollo Kingori Wanderi vs Attorney General and County commissioner of Kiambu.**

(d) Costs of and incidental to this application be provided for.

(e) Such further other reliefs that the Honourable Court may deem just and expedient to grant.

2. The application is brought under Article 47 (1) of the Constitution and section 11(2) of the Fair Administrative Actions Act. The aim of the application is to enforce the judgment and decree of the Senior Resident Magistrate, Milimani Commercial Courts.

3. The respondents have objected to the suit through the notice of Preliminary Objection dated 1.8.2019 and prayed for the Notice of Motion to be dismissed with costs on the following ground ;-

(a) That the court has no jurisdiction to deal with this matter since it is not an employment dispute within the descriptions provided in section 12 of the Employment and Labour Relations Court Act 2014.

(b) That moreover the applicant was on a tender contract with the Government hence not an employee as provided for in section 2 in the Employment and Labour Relations Act of 2012.

(c) That the applicant did not seek leave of court to file the Judicial Review matter seeking mandamus contrary to Order 53 Rule (1) of the Civil Procedure Rules 2010.

(d) That the application is misconceived and misplaced therefore an abuse of the court process.

4. On 9.10.2019 the parties agreed to dispose of the Preliminary Objection by written submissions within 14 days each. No submissions were filed by either party to dispose the preliminary objection. Instead the applicant filed another application dated 7.11.2019 for transfer of the suit to the High Court and thereafter filed submission on 1.1.2020 not to oppose the preliminary objection but to dispose his application for transfer of the suit.

5. I have carefully considered the preliminary objection and the application for transfer of the suit. The issues for determination are:

- (a) Whether the court lacks jurisdiction to entertain the suit.
- (b) Whether the suit is incompetent.
- (c) Whether the suit should be transferred to the High Court

Jurisdiction

6. The exhibits annexed to the supporting affidavit leaves no doubt that the dispute herein concerns unpaid charges for repair of the respondent's motor vehicle by the applicant. The dispute is therefore not related to a contract of service but a contract for services by an independent contractor. I therefore agree with the respondents that the court lacks jurisdiction to determine the same by dint of section 12 of the Employment and Labour Relations Act as read with Article 162 (2) (a) and 165 (5) of the constitution which limits the jurisdiction of this court to a dispute related to contract of service and labour relations only.

Incompetent Application

7. In addition to the foregoing, I have found that the suit before the court is neither a Judiciary Review application brought under order 53 of the Civil Procedure Rules nor a constitutional petition and as such I am of the view that it is an incompetent suit.

8. In **Proto Energy Limited v Hashi Energy Limited [2019] eKLR** the Court held:

“The Constitution of Kenya [Protection of Rights and Fundamental Freedoms] Practice Rules 2013 otherwise known as the “Mutunga Rules” 2013, stipulate that any suit brought for the enforcement of Constitutional rights must be commenced by way of a Petition as provided for by Section 10(1) of said Rules... A Notice of Motion is not legally recognized as an originating process... A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.”

9. In view of the foregoing matters, I down my tools for lack of jurisdiction and strike out the suit with costs. The applicant is however at liberty to file his suit before a competent court.

Dated, signed and delivered in open court at Nairobi this 21st February, 2020.

ONESMUS N. MAKAU

JUDGE