



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 26 OF 2018

(Before D. K. N. Marete)

CAREN CHEPCHUMBA LIMO (Suing as Personal Representative of the Estate

of STEPHEN NALIANYA NDIWA (DECEASED) CLAIMANT

VERSUS

JEMI FREIGHTS LIMITED 1ST RESPONDENT

NATIONAL INDUSTRIAL CREDIT BANK LIMITED 2ND RESPONDENT

RULING

This is an application by way of a preliminary objection dated 25th April, 2018 and comes out as follows;

TAKE NOTICE THAT THE 1ST RESPONDENT herein shall raise a preliminary objection on points of law and apply that the entire suit herein be struck out with costs to the Respondent on the ground that:

- 1. The Honourable court lacks jurisdiction to entertain the suit herein.*
- 2. The entire suit is misconceived, incompetent, fatally defective and does not lie.*

The application came for hearing on 31st May.2018 when the parties agreed on a disposal by way of written submission.

It is the respondent/applicant's case that the suit, seeking special and general damages on grounds that the deceased was under the 1st respondents employment and at the time of the accident was driving motor vehicle KCC 948S is not related to S 12 (1) of the Employment Act, 2007 and therefore this court lacks jurisdiction to entertain the suit.

The applicant seeks to rely on the authority of section 15(c) of the Civil Procedure Act, Chapter 21, Laws of Kenya provides as follows;

“...every suit shall be instituted in a court within the local limits of whose jurisdiction:-

- a) the cause of action, wholly or in part, arises.*

It is their submission that this court lacks jurisdiction to hear and determine the suit as the cause of action arises within the jurisdiction of a court other than the Employment and Labour Relations Court.

The respondent/applicant's further submission is that where a court lacks inherent jurisdiction, it cannot purport to confer this to itself and neither of the parties by consent do this. Lack of jurisdiction is fatal and cannot be regarded as a mere technicality. On this, they sought to rely on the authority of **Desai vs. Warsama (1967) E.A** at page 353 where the court observed as follows;

It is well established law that a judgment of a court without jurisdiction is a nullity and 9 Halsbury 351 sets out the proposition briefly thus;

“Where the court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to a nothing.”

Again, the court at page 354 observed thus;

Lack of jurisdiction goes far beyond any “error, omission, or irregularity”, nor can it be regarded as a mere technicality.

The objectors/applicants further sought to rely on the authority of **Allarkhia vs. Aga Khan (1968) E.A** where the court at page 617 observed thus:

Where the judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by mutual consent, convert into a proper judicial process, although they may constitute the judge their arbiter, and be bound by his decision on the merits when these are submitted to him.

It is their ultimate submission that jurisdiction in this cause lies with the lower court and not here as referenced.

The claimant/respondent submits a case of jurisdiction of this court. This is as follows;

*...the respondent herein subjected their thoughts narrowly into the belief that the definition of the word **DISPUTE** as laid down in section 12 (1) of the Employment and Labour Relations Court Act to only disagreements by the parties to the suit and as a result missed out on the thought that the employer who does not compensate a employee who has been injured or has passed on as a result of an accident while conducting their work within the scope of their employment is a dispute of its own kind.*

This court is a creature of the Constitution. Article 162 (2) (a) of this Constitution establishes this as a court with the status of the High Court to hear and determine disputes relating to employment and labour relations. Sub Article 3 empowers parliament to determine the jurisdiction and functions of courts contemplated under Article 2 (above.) Pursuant to this, parliament enacted the Employment and Labour Relations Court Act, 2014 whose preamble is as follows;

An Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and labour relations and for connected purposes

The intent of the court is clearly set out here. Section 12 of the Act is her statutory mouth piece on the jurisdiction of this court.

The Employment and Labour Relations Court is essentially created to hear and determine disputes *relating* to employment and labour relations. If this was minded by the litigating community, the numerous issues of jurisdiction would

not arise. This is because the constitution and consequently parliament through legislation has clearly set out the criterion for jurisdiction: *disputes relating to employment and labour relations.*

This issue was ably and elaborately elucidated in the authority of **Seven Seas Technologies Limited v Eric Chege [2014] eKLR** where Nzioki Wa Makau, J. observed as follows;

The Industrial Court is a superior court and has the same status as the High Court. It is among equals when it stands with the Environment & Land Court and the High Court with all its divisions. It is imbued with all the powers of the High Court. The High Court has extensive jurisdiction in matters except those that fall under Article 162, there is a constitutional imperative thrust upon this Court to deal with all aspects of disputes that relate to labour and employment matters wherever they arise within Kenya. To hold otherwise would be anathemic to the principles set out in Article 159(2) of the Constitution if I ordered that the Applications for transfer of suits relative to labour issues be heard by the High Court. Article 162(2) shuts the door on the High Court as far as labour and employment matters go. Why would the High Court entertain such an application while this Court is seized of all matters under Article 162(2) shuts the door on the High Court as far as labour and employment matters go. Why would the High Court entertain such an application while this Court is seized of all matters under Article 162(2)” Can a court split a cause of action into various parts depending on what portions the Claimant or Respondent is challenging” Would a dispute relating to an employees housing and the employers buildings and land be referred to the Environment & Land Court if the employee and employer are tussling over termination of employment and the unpaid rent, illegal occupation by the staff member and the like” Or would such a suit be transferred to the Commercial division” I think not. There has to be a purposive interpretation of the Constitution. I am not persuaded that the Industrial Court cannot determine whether a suit relating to employment matters can be transferred to it or not. Similarly, where an issue of employment rights under Article 41, for example, arises, I cannot refer parties to the High Court to determine the constitutional question before returning to this Court for determination of the labour dispute...

Again, in the authority of **Abdikadir Suleiman v County Government of Isiolo and Another [2015] eKLR** Ongaya, J. observed as follows;

“As stated by the court earlier in this judgement, the original and unlimited jurisdiction to make a finding on legitimacy or lawfulness of decisions in disputes between employers and employees rests with this court as vested with the appropriate jurisdiction under Articles 159(1), 162 (2) (a) as read with Article 165 (5) and (6) of the Constitution; Articles 221 and 258(1) of the Constitution, and the provisions of the Employment and Labour Relations Act, 2011. The court holds that the jurisdiction spreads to all issues in the employment relationship and related matters including the enforcement of the fundamental rights and freedoms under Article 22 of the Constitution and enforcement of the Constitution under Article 258 as far as the issues in dispute are, evolve, revolve or relate to employment and labour relations. The court holds that the compass or golden test for the court’s jurisdiction is

the subject matter in the dispute namely disputes relating to employment and labour relations as provided for Article 162 (2) (a) of the Constitution and as amplified in the Employment and Labour Relations Act, 2011 and not the remedies sought or the procedure of moving the court of the situ of the applicable law of any other extraneous considerations as may be advanced by or for a litigant.”

Lastly, in the authority of **Professor Elijah Biama v University of Eldoret and 2 Others [2014]eKLR** Ongaya, J. amplified this as follows;

“..The court holds that venture to distinguish the manner a litigant approaches or ought to approach the court merely on the basis of the remedy or the situ (prescription of the right or fundamental freedom as embedded in

the Constitution or legislation or other formal source) of the right or

fundamental freedom in issue is long dead under the former constitutional dispensation as the new constitutional order prescribes and favours universal approach towards the realization of the rights and fundamental rights irrespective their primary formal situ. In the opinion of the court, future

*measures of aligning court procedures to the new constitutional order will entail universal procedure for realization and enforcement of the rights and freedoms irrespective the formal source or residence of the right or fundamental freedom because the Constitution incorporates all parts of the Bill of Rights. If every dispute that comes to court entails enforcement of some legitimate right or fundamental freedom which the Constitution has incorporated in the constitutional Bill of Rights, then, in the court’s opinion, time for a universal procedure by which parties should move the court has come and it would be pursuit in vanity to look for and attempt to sieve rights and fundamental freedoms that tare expressly provided for in the Bill of Rights as was the case in the days of **Harrikson v Attorney-General of Trinidad and Tobacco (1980) AC 265**. For the time being that the universal procedure is not in place, it is the opinion of the court that litigants will not be faulted for the option they shall adopt of the myriad procedural options that continue to peep their souls from the former constitutional dispensation to the new constitutional orders.”*

We need not belabor this. This court is not required to dissect claims made before it with a view to dispersing the separate units to their seemingly respective jurisdictions. This would be fool handy and doubtlessly create extensive confusion in dispute resolution mechanisms touching on the court. It is with this in mind that the drafters of the Constitution determined this issue with the terminology: *relating to employment and labour relations*. This squares the entire issue on jurisdiction in the circumstances.

This preliminary objection must die by the sword. Why? It is intended to fatally injure the claim. With a finding that it is entirely misplaced, we relegate to the dustbins of jurisprudence. There, ... let it lie.

I am therefore inclined to dismiss the preliminary objection with costs to the claimant/respondent.

Delivered, dated and signed this 12th day of June 2018.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Mugumya holding brief for Sang instructed by Sang & Sang Advocates for the claimant/respondent.
2. Mr. Mutea holding brief for Miss Ngugi instructed by Masire & Mogusu Advocates for the respondent/objector.