



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

ELDORET

CAUSE NO.216 OF 2017

Consolidated with

CAUSE NO.217 OF 2017

FESTUS SHIKULI SHIVONJE.....CLAIMANT

AND

JOSEPH IKOBWA KAITANOCLAIMANT

VERSUS

WESTERN STEEL MILLS LIMITED.....RESPONDENT

RULING

The respondent, Western Steel Mills Limited filed Notice of Preliminary Objection on the 23rd November, 2017 on the grounds that;

Pursuant to section 12 of the Employment and Labour Relations Court Act, this court lacks jurisdiction to adjudicate between the claimant and the respondent since the respondent is/was not an employer of the claimant.

Both parties filed written submissions.

The respondent as the applicant submits that the claimants do not fit the description of an employee with the respondent as stipulated under section 2 of the Employment Act. The claimants entered into a contract with *Jokali Handling Services* and not the respondent and this entity gave the claimants notice to terminate employment. The statement of accounts the claimants have from National Social Security Fund states that the employer was/is *Jokali Handling Services* and not the respondent. This then removes the respondent from an employment relationship with the claimant and wrongly sued as a respondent.

The respondent relied on the case of **David Randu versus Malindi Water and Sewerage Company Limited [2013] eKLR** where the court relied on the provisions of section 2 of the Employment Act, 2007 and held where there is no employer and employee relationship between parties the court lack jurisdiction to determine the dispute. In the case of **George Onyango Ochieng versus Chemelil Sugar Company Limited [2014] eKLR** the court held that the court's jurisdiction is well listed to matters relating to employment and labour relations and where an employer and employee relationship does not exist, the court has no jurisdiction.

The claimant in reply submits that the objections raised by the respondent do not address matters of law and relates to facts which must be addressed by the call of evidence. Preliminary objection should meet principles set out in the case of **Mukisa Biscuit Co. Ltd versus West End Distributors Ltd [1969] EA** in that;

- a. *A preliminary objection raises a point of law.*
- b. *A preliminary objection is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained.*
- c. *It cannot be raised if what is sought is the exercise of judicial discretion.*

That in this case, the respondent has failed to address which questions of law if argued have the import of finality without the set out facts ad

discretion is not to be applied. The objection herein are meant as a delay tactic so that the dispute is not heard expeditiously and that as held in the case of **Alex Aluchili Miloko versus Nakumatt Holdings, Cause No.253 of 2014 (ELRC Nakuru)** that;

The fact that the respondent has not failed to file a response to state its version only makes it more difficult to accept that the preliminary objection is a true preliminary objection arising out of the claimant’s pleadings.

Section 12 of the Employment and Labour Relations Court Act, 2011 has defined some of the relationship where they exists grants this court jurisdiction to hear and determine a dispute therefrom. In the case of an employer and employee and where there is a dispute with regard to employment and labour relations, there is direct conferment of jurisdiction.

The challenge here is that the respondent and the claimants have no employer and employee relationship and such employment of the claimant was with the entity of *Jokali Handling Services* and therefore the court lacks the requisite jurisdiction to hear and determine the matter herein. As submitted by the claimant, in the case of **Mukhisa Biscuits Manufacturing Co. Ltd versus West end Distributors Ltd (1969) E.A.** and where the court defined a preliminary objection as follows;

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

The respondent in this case has applied the provisions of section 2 of the Employment Act, 2007 in setting out the definition of who an employee is for the purposes of the relationship set out under section 12 of the Employment and Labour Relationship Act, 2011 and that the claimant were not the employees of the respondent to justify the fining of the claim against the respondent.

In the Memorandum of Claim filed on 31st July, 2017 the claimants’ case is that they were orally employed by the respondent company as Ingot Processors from 14th January, 2016. That on 30th May, 2017 the employment was terminated orally and without justifiable cause. The claimants are seeking terminal dues and compensation for unfair termination of employment.

There is no defence save for the Notice of Preliminary Objections.

The respondent assertions that the claimants were employees of *Jokali Handling Services* are not supported by any material evidence. There averments in submissions that the claimants had NSSF records setting out that they were employed by *Jokali Handling Services* is also left bare. The source of this information with regard to the employment of the claimants by another party other than the respondents as set out in the Memorandum of Claim is not established. It is not lost to the court that section 10 of the Employment Act, 2007 read together with section 74 requires an employer to keep work records for each employee. Where the respondent has information or records that the claimants were not in their employment as pleaded and were the employees on a third party, for the purpose of the objections filed and for the court to be well seized on the matters herein, reason demanded that a defence be filed setting out such facts and details as to address factual matters within objections in the nature of which should be purely on matters of law is to go outside the requisite threshold.

The findings by the court in **Alex Aluchili Miloko versus Nakumatt Holdings, Cause No.253 of 2014 (ELRC Nakuru)** are herein relevant to cite in that, without the respondent filing a defence, the court is denied of useful material record the basis of which should have allowed a wider purview to the matters set out herein in the objections by the respondent.

Accordingly, the objections fail the threshold of setting out matters of law as the averments in the Claim requires call of evidence. Objections by the respondent are hereby dismissed with costs to the claimants.

Delivered in open court at Eldoret this 29th day of June, 2018

M. MBARU

JUDGE

In the presence of:

Court Assistants: Martin and Robert

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