



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1865 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th January, 2017)

JOHN OUMA MIDEGE.....CLAIMANT

VERSUS

KENGEN COMPANY LIMITED.....RESPONDENT

RULING

1. Before the Court is a Notice of Preliminary Objection dated 22nd April 2013 where the Applicant seeks orders:

1. **That the Claimant's suit against the Respondent herein is misconceived, incompetent and fatally defective and does not lie.**

2. **That the Honorable Court lacks jurisdiction to entertain the suit herein.**

2. Both parties have filed submissions.

3. The Respondent/Applicant submits that the Honorable Court lacks jurisdiction as the cause of action arises from Road Traffic Accident which occurred on the 9th of January 2010, and the Plaintiff is seeking recovery of damages from the said accident. They rely on the matter of **Motor Vessel Lillian "S" vs. Caltex Oil Kenya Ltd (1989) KLR** where the Court of Appeal states that:

"Without Jurisdiction a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for continuation of proceedings before it. A Court of law downs it's told in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

4. The same position was emphasized by the Supreme Court in **Samuel Kamau Macharia vs. KCB & 2 Others in Civil Application No 2 of 2011** where the Court stated that:

"A Courts' jurisdiction flows from either the Constitution or legislation or both. Thus a Court can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

5. They submit that the jurisdiction of the Court is clearly established under Section 12 of the Industrial

Court Act Number 20 of 2011 and the claim here does not fall within those provisions. They submit that the Claimant is in the wrong forum and ought to file the suit in the Civil Courts to appropriately seek for orders.

6. The Claimants have filed submissions dated 21st March 2016. In them they submit that it was in the course of his employment that the Claimant got injured at an accident. After reporting the same to the Director of Occupational Safety and Health Service, pursuant to Section 22 of the Work Injury Benefits Act Cap 236, the Claimant was taken for medical examination for the purpose of ascertaining his injuries and amount of compensation required. This was assessed to be at Kshs. 3,395,261.2 and the Director lodged the claim and demanded for payment.

7. They submit that the Claimant has been waiting for almost four years for the payment causing him great injustice.

8. They submit that the Respondent did not object and proceeded to pay the Claimant a sum of Kshs.780,264.00 leaving a balance of Kshs.2,614,997.2 refusing to pay the rest.

9. They submit that the jurisdiction conferred by Section 12 of the Employment and Labour Relations Court Act Cap 234 includes jurisdiction to hear and determine disputes relating to or arising out of employment between an employee and an employer. The Court has power pursuant to Section 12(3) (v) to make any orders as to awards of compensation in any circumstances contemplated under any written law.

10. They cite the cases of **Wilberforce Kilibwa vs. Mumias Sugar Co. Ltd [2013] eKLR, Julius Chacha Mwita vs. Kenya Airways Limited & Another [2013] eKLR** as being some of the cases that this Honorable Court has heard and determined claims emanating from Work Injury Benefits Act.

11. They submit that the Court has jurisdiction, and that the Court should dismiss the Preliminary Objection with costs.

12. The jurisdiction of the Employment & Labour Relations Court flows from Article 162(2) of the Constitution of Kenya 2010 which states that the Court envisaged is to deal with employment and labour relationship matters.

13. The Court's jurisdiction is thereafter set out under Section 12(1) of Employment & Labour Relations Court Act 2014 which states as follows:

“ (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including:-

a. disputes relating to or arising out of employment between an employer and an employee;

b. disputes between an employer and a trade union;

c. disputes between an employers' organisation and a trade unions organisation;

d. disputes between trade unions;

e. disputes between employer organizations;

f. disputes between an employers' organisation and a trade union;

g. disputes between a trade union and a member thereof;

h. disputes between an employer's organisation or a federation and a member thereof;

i. disputes concerning the registration and election of trade union officials; and

j. disputes relating to the registration and enforcement of collective agreements.

14. Of course the Court has jurisdiction to deal with all matters to deal with Employment and Labour Relations including issues that arise out of injury at work.

15. However, on 5.8.2011 vide Kenya Gazette Notice No. 9342 of 2011, the former Chief Justice Dr. Willy Mutunga extended jurisdiction of the Industrial Court (then to Magistrates Courts pursuant to Section 16(2) of Labour Act. Section 16(2) of the Labour Act was however repealed when the Industrial Court Act 2011 came in force.

16. Under Cap 2 Interpretation and General Provision of Acts Section 24:

“Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder”.

17. In essence this means that whereas Section 16(2) of Labour Act was repealed, regulation made thereunder shall remain in force unless revoked or repealed. This has not been done to the Gazette Notice No. 9342/1011 and so the Magistrates retain jurisdiction to handle injury at work cases.

18. This case has been filed before this Court which also retain its jurisdiction to handle injury at work cases but I will exercise my discretion and refer this case to the CMCC Court Nairobi to be heard and be determined there under jurisdiction donated by the Gazette Notice above stated. These are the orders of this Court.

Read in open Court this 30th day of January, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Claimant in person – Present

No appearance for Respondent