



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT

AT MOMBASA

CAUSE 833 OF 2015

FREDRICK OKOTH OWINO.....CLAIMANT

VERSUS

T.S.S. GRAIN MILLERS.....RESPONDENT

RULING

Introduction

1. On 4.11.2015, the claimant brought this Suit against the respondent claiming terminal dues and compensation for unfair termination of his employment contract on 20.6.2015. The respondent entered appearance through Muriu, Mungai & Company Advocates on 1.12.2015 but no defence was filed thereafter. On 6.7.2016, the suit was mentioned in court for direction and the parties told the court that the respondent was placed under administration under the Insolvency Act. Leave was therefore granted to the claimant to serve the Administrator of the respondent.

2. On 10.10.2016, the claimant filed Notice of Motion dated 26.9.2016 seeking for leave to proceed and continue with the suit against the respondent, and to enjoin the Administrator (P.V.R. Rao) as a defendant in the Proceedings for purposes of continuing of the Suit. The Motion is brought under section 560 (1) (d) of the Act and it is supported by the affidavit of the claimant. The Administrator appointed Munyao, Muthama & Kashindi Advocates to represent him in the Suit and file a Notice of preliminary objection (P.O.) to the claimant's Motion.

3. The P.O. is grounded on three grounds namely; that the Motion is fatally flawed and defective; the Motion is incompetent visa-vis section 2 of the Insolvency Act 2015 and Regulation 2,10 (1)(e) and (f) of the Insolvency Regulations 2016; and finally this court lacks the jurisdiction to entertain the said Motion. It is this P.O. that is the subject of this ruling. The P.O. was disposed of by written submissions.

Administrator's Case

4. The Administrator submits that the application for leave pursuant to section 560 of the Act amounts to an Insolvency dispute which is a substantive and distinct legal process from the employment dispute pending before this court. According to him the application is intended to interrupt the statutory moratorium and the administration process by the Administrator and as such the jurisdiction to determine the same lies not in this court but the High Court. He relied on the *Samuel Kamau Macharia & Another v. Kenya Commercial Bank Ltd & 2 others [2012] eKLR*, where the Supreme Court held that jurisdiction flows from the Constitution or Statute or both and the court cannot arrogate jurisdiction onto itself by way of judicial craft or skill.

5. He submitted that this court derives its jurisdiction from Article 162(2) of the Constitution and section 12(1) of the Employment and Labour relations Court Act (ELRCCA) 2011 and not from the Insolvency Act 2015. He sought to clarify that under section 2 of the Insolvency Act 2015, the court means the High Court. He therefore prayed for the Motion to be struck out because this court lacks jurisdiction to determine Insolvency disputes.

6. In addition to the issue of jurisdiction, the Administrator urged that the application has not met the threshold for the grant of the leave sought. He submitted that such leave should ordinarily be denied to avoid distracting or frustrating the administrator from exercising his mandate and increase costs of the administration. He submitted that any grant of the leave sought must be done cautiously and on very exceptional cases. He relied *Fox Croft vs. the Ink Group Ply Land [1994]12 A CLC 1063 SC (NSW) and Brian Rochford Ltd vs. textile Clothing & Footwear Union of NSW (1998) 30 AC SR 38* which were both cited with approval by the Supreme Court of New South Wales in *Arpic P/L v. Austin Austraka P/L [2004] Adj. L.R. 02/24* in dismissing an application for leave in a case similar to the one before the court now.

Applicant's Case

7. The claimant has opposed the P.O and contended that his Motion is competent and it is brought under the law. He admits that jurisdiction is everything and has cited the celebrated precedent, *Owners of Motor vehicle "Lilian S –v- Caltex oil (K) Ltd [1989] KLR 1 (CAK)*. However, he submitted that the dispute herein is an employment one under section 45 of the Employment Act and as such under Article 162 (2) (a) of the Constitution, this Court has the jurisdiction to continue hearing this suit. He further urged that under Article 165 (5) of the Constitution the jurisdiction of the High Court is not absolute but limited to exclude disputes for courts contemplated in Article 162(2) of the Constitution. He therefore submitted that the definition of the court by section 2 of the Insolvency Act does not elevate the High Court above this court.

8. As regards the threshold for the grant of the time sought, the applicant did not say more than stating that leave and the approval to proceed with the suit is a matter of discretion by the court. According to him the disconnection of the court is wide and unfettered. He relied on *Re Aro Co. Ltd [1980] 1 ALLER 1078* to support his case.

Analysis and Determination

9. There is no dispute that: the claimant brought this suit on 4.11.2015, claiming Kshs. 219,117 as employment dues from the respondent; the respondent never filed any defence to deny the claim; pending the determination of the suit, the respondent was placed under Administration by Kenya Commercial Bank (creditor) and Mr. P.V.R. Rao was appointed the Administrator. The issues for determination are:-

- a. Whether this court has jurisdiction to determine the leave application herein.
- b. Whether the application has met the threshold for granting the leave sought.

Jurisdiction

10. In the "*Lilian S*" Case, Nyarangi J.A. held that:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where the court has no jurisdiction, there would be no basis for a continuation of proceedings pending evidence. A court of law downs tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

11. More recently, the Supreme Court of Kenya in the *Samuel Kamau Macharia Case*, held that:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of law 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 the law... It cannot expand its jurisdiction through judicial craft or innovation.”

12. In this Case, the question that begs for answer is not whether the court has jurisdiction to determine the suit herein but whether this court has the jurisdiction to grant leave to enjoin the Administrator and to have the Suit continued while the respondent is still under administration under the Insolvency Act. It is clear from the wording of section 2 of the Insolvency Act that the Court means the High Court. The said Act was passed in 2015 while this court was operational and the parliament never extended the definition of the Court to include this court. In my opinion, if the parliament intended this court to have jurisdiction over Insolvency disputes, nothing was more easier than to expressly provide as such under section 2 of the Act.

13. I am bound by the said precedents from the Supreme Court and the court of Appeal. The Constitution of Kenya, Insolvency Act and the ELRCA have not donated to this court the jurisdiction to determine Insolvency disputes. As correctly submitted by the administrator, an application for leave to continue the Suit pending administration under the Act, and to enjoin the administrator as a defendant in the suit constitutes an administration dispute. The dispute must be investigated and determined by the court having the jurisdiction under the law to do so.

14. It is my considered view that the Insolvency Act intends to create a central forum for dealing with all insolvency disputes that may have been filed against the company. It does not matter whether the suits are pending appeal before the senior courts, the only court with the original jurisdiction to grant leave to continue suits against companies under administration, in my opinion, is the High Court. Consequently, I agree with the administrator that this court lacks jurisdiction to entertain the application for leave to continue the Suit pending the administration of the respondent or to enjoin the administrator as a defendant.

15. Under section 2 of the Insolvency Act, the right forum for the claimant to seek the said leave is the High Court of Kenya or the administrator himself. Once the leave is granted, this court will proceed with the suit and even allow any necessary joinder of parties as they may become necessary. Consequently and in view of the authorities cited above, I must now proceed to, down my tools for want of jurisdiction. The merits of the application shall be dealt with by the right forum if the claimant will chose to go there.

Disposition

16. For the reasons that this court lacks jurisdiction to determine the application for leave to continue the suit herein pending administration of the respondent under the Insolvency Act, I strike out the Notice of Motion dated 26.9.2016.

No order as to costs.

Signed, Dated and Delivered at Mombasa this 5th day of May 2017.

ONESMUS MAKAU

JUDGE