



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAIROBI

CAUSE NO.1491 OF 2017

ERIC KYALO MULINGE.....1ST CLAIMANT

MAXWELL MUIRURI GIKARU.....2ND CLAIMANT

VERSUS

HWAN SUNG INDUSTRIES (K) LIMITED.....RESPONDENT

RULING

The ruling herein relates to Notice of Preliminary Objection filed by the respondent, Hwang Sung Industries (K) Limited on 4th October, 2017 on the grounds that;

The orders sought by the claimants in the Notice of Motion cannot be issued by this court as it lacks jurisdiction to issue the same under Article 165(5) of the constitution of Kenya.

Both parties agreed and filed written submissions.

The respondent submits that the claimants filed a Notice of Motion dated 31st July, 2017 seeking for orders that the respondent be restrained from alienating, selling, leasing, assigning, disposing off, transferring, charging, encumbering and or entering dealings of any nature in any way with the property known as LR No.209/11138 situated in Nairobi, all shares and or shareholder on the respondent company. The claimants are also seeking that the respondent does furnish security as may be sufficient to satisfy the decree that may be passed against the respondent.

The respondent submits that this court has no jurisdiction to hear land matters as its jurisdiction emanates from article 162(2) (a) of the constitution and section 12 of the Employment and Labour Relations Court Act. The orders sought by the claimants of an injunctive nature pertaining to a land parcel LR No.209/11138 is a matter outside the court jurisdiction. Such is a matter clearly for the Environment and Land Court under article 162(2) (b) of the constitution and section 13 of the Environment and Land Court.

In the case of **Samuel Kamau Mahcaria & another versus Kenya Commercial Bank & 2 others, Supreme Court Appl. No.2 of 2011 [2012] eKLR**, the court held that a court's jurisdiction flows from either the constitution of legislation or both. A court cannot act or arrogate to itself jurisdiction exceeding that which is conferred upon it by law. In **Yusuf Gitau Abdallah versus Building Centre (K) Ltd & 4 others [2014] eKLR**, the Supreme Court held that the court ought to exercise its powers strictly within the jurisdictional limits prescribed and it ought to safeguard the autonomous exercise of the respective

jurisdictions of the other courts and tribunals as held in **Peter Nganga Muiruri versus Credit Bank Limited & another, Civil Appeal No.203 of 2006.**

On this basis, the orders sought being matters over land cannot be issued by this court and the claim should be dismissed with costs to the respondent.

The claimants submits that the objections made by the respondent are not proper as envisaged in the case of **Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd (1969) EA** where the court held that objections must be on a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. The court also gave examples of what forms an objection such as on questions of jurisdiction, limitation or parties are bound by contract to go to arbitration.

Rule 17(4), (5) and (6) and Rule 28(b) of the Employment and Labour Relations Court (procedure) Rules, 2016 allow the court to issue orders of injunction. The orders the claimants are seeking are in the nature of attachment before judgement and or security for eventual decree as anchored under Order 39 rule (1) and (5) of the Civil Procedure Rules.

The claim and Notice of Motion are proper matters for this court and the objections made should be dismissed with costs.

On the objection of the respondent, reliance has been given to the provisions of article 165(5) of the constitution, 2010. That the orders sought by the claimants relates to land and by application of articles 162(2) (b) of the constitution, 2010 read with section 13 of the Environment and Land Court Act, this court has no jurisdiction to hear and determine the matter.

Indeed where the jurisdiction of the court is challenged, all else must stop and address the same as held in **Central organisation of Trade Unions (K) & Another versus Cabinet Secretary of Labour, Social Security and Service, Cause No.2013 of 2014.** This in my view is the foundation set out in the case of Mukisa Biscuits Manufacturing case cited above.

On 31st July, 2017 the claimants moved the court with Notice of Motion seeking injunctive orders premised on the provisions of section 12(3) of the Employment and Labour Relations Court Act, 2011 and Rules 17 and 28 of the Employment and Labour Relations Court (Procedure) Rules, 2016. The orders sought are on the grounds that the claimants were employed by the respondent on diverse dates and were issued with employment contracts. In 2016 and 2017 the respondent unlawfully terminated the claimants from their employment. Following such termination of employment, the claimant is seeking various reliefs in the Memorandum of Claim.

However, while such suit is pending, the claimants state that they have discovered that the respondent, its directors and shareholders who are non-residents and foreigners from Korea are at an advanced stage of closing business and exiting the Kenyan market and leaving the court jurisdiction. The respondents have already disposed of all its known assets and they are about to dispose the only remaining asset and property known as LR No.209/11138 in Nairobi. Where such is allowed, the claimant herein will be defeated as the respondents have already obtained a buyer for the property.

In the memorandum of claim filed on 31st July, 2017 the issue in dispute is the unfair termination of employment.

The foundation of the claim is therefore premised on the employment of the claimants by the respondent. Such relationship is the core of the orders sought in the Memorandum of Claim. The Notice of Motion dated equal date is founded on the Memorandum of Claim and the orders sought linked to the final orders as set out in the Memorandum of Claim which are stated shall be defeated if the respondent is allowed to dispose of the only remaining asset within the court jurisdiction pending hearing and determination of the claim.

Article 165(5) of the constitution, 2010 removes jurisdiction from the High Court over matters specifically to be addressed by specialised courts under article 162(2) of the constitution, 2010. Under such article, this court is given original jurisdiction over matters relating to employment and labour relations. The specific matters to be addressed by the court are further enumerated under section 12 of the Employment and Labour Relations Court Act, 2012.

In addressing a similar question as herein and with regard to the jurisdiction of the court over matters of employment and labour relations, the court in **Okiya Omtatah Okoiti versus Cabinet Secretary for Water and Irrigation & 6 others [2016] eKLR** held as follows;

*‘Employment’ and ‘labour relations’ are therefore the broad constitutional mandate of the court. ‘employment’ is not defined under the Employment Act but this can be discerned from the jurisdictional matters set out under section 12 of the Employment and Labour Relations Court Act as involving employer and employee relations, trade unions and employer organisation(s) matters of collective bargaining and unionisation and employers organisation within employment relations. ‘Labour relations’ is equally not defined and can also be discerned from the work environment; socio-economic rights; and in some cases the civil and political rights within employment and labour relations as the aim and purpose of ‘labour relations’ is to promote economic development, social justice, labour peace and democracy in the workplace. Each case must be looked at in its circumstances and the labour context. This was aptly captured in **Wilbert Kipsang Choge 7 8 others versus Communications Authority of Kenya & Another [2016] eKLR** at paragraphs 30 to 32 thus;*

30. Whereas it is true that there is no contract of service between the Board and the company, the jurisdiction of this Court is not confined by the narrow path that employer-employee relationship must exist for it to have jurisdiction. The Court is granted jurisdiction by the Constitution and the Employment & Labour Relations Court Act, over employment and labour relations and connected purposes and not employer-employee dispute only.

Noting the above, I find a clear path, connection and link between matters set out by the claimants and the respondent as being based on employment and labour relations. The orders sought emanate from the employment relationship and the security sought is directly related to connected purposes in the Memorandum of Claim. Such is a matter for this court to address. To remove the claimants from this court to any other place would be to throw them into limbo. There would be nowhere else for them to anchor their case.

The objections filed by the respondent have no merit and are hereby dismissed with costs to the claimants. Orders accordingly.

Delivered in open court at Nairobi this 13th day of November, 2017.

M. MBARU JUDGE

In the presence of:

Court Assistants:

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