REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

APPEAL NO. 13 OF 2016

(Formerly Civil Appeal No. 259 of 2013)

(Before Hon. Justice Hellen S. Wasilwa on 7th June 2016)

RUAMBUZI COMPANY LIMITED.....CLAIMANT

VERSUS

ANTHONY MWANIKI NZIOKI.....RESPONDENT

JUDGMENT OF THE COURT

1. Before the Court is an appeal dated 15th May 2013. It is an appeal from the judgment of Honorable Mr. Ole Keiwua Principal Magistrate dated 7th of December 2012 and delivered by Honorable S. Atambo Principal Magistrate at Nairobi CMCC No. 2096 of 2007, where the learned Magistrate struck out the defence of the Appellant for want of evidence to support its defence and on grounds that no witnesses were called.

2. The Appeal is premised on the following grounds:

1. ***That the Learned Magistrate erred in law and in fact in striking out the Defendants statement of defence for want of oral evidence.***

2. That the Learned Magistrate consequently erred in law and in fact by failing to consider the Defendants defence as filed or at all thus contravening the provisions of natural justice.

3. ***That the Learned Magistrate erred in law and in fact by failing to hold that the Plaintiff was an employee of Argotan Company Limited and not the Defendant.***

4. ***The Learned Magistrate erred in law and in fact by finding that he had jurisdiction to hear and determine an employment dispute relating to an employment contract that was entered into and performed in Sudan.***

5. ***That the Learned Magistrate erred in Law and in fact in entertaining a claim whose monetary value was way above his pecuniary jurisdiction.***

6. ***That the Learned Magistrate erred in law and in fact by failing to dismiss the subject suit for want of consistency and congruity.***

7. ***The Learned Magistrate erred in law and in fact by failing to categorically and specifically indicate in his judgment what prayers he had allowed.***

3. And the Appellant prays:

1. ***That this Honorable court set aside Honorable Ole Keiwua's judgment delivered on the 7th of December 2012 together with all the consequent orders;***

2. ***That this Honorable Court be pleased to dismiss the Respondent's suit with costs to the Appellant and;***

3. ***That this Honorable Court be pleased to direct the Respondent to bear the costs of the suit and or the instant appeal.***

Facts

4. This matter was instituted via a plaint dated 12th March 2007 and filed in Court on the 14th March 2007, the Respondent brought an industrial claim against the Appellant seeking;

a. ***A declaration that the Defendant is bound by virtue of the Employment Act Cap 226 Laws of Kenya to pay the Plaintiff his terminal dues and damages for unlawful dismissal; and***

b. ***Costs and interests of the suit.***

5. Via fax dated 21st April 1997, Afrotan Company Limited a company duly incorporated in Khartoum, Sudan, contracted the Respondent as a Senior Store Keeper in its Khartoum offices at a monthly salary of Kshs 20,000.00.

6. Kenyan law dictated that a Foreign Contract of Service should be in the stipulated form and executed by the employer and the employee in the presence of a labor officer.

7. Afrotan sought the help of the Appellant as an agent of necessity to act on behalf of Afrotan and execute the standard document contract which was an auxiliary to the already existing contract between the Respondent and Afrotan. On 19th July 2006, Afrotan terminated the Respondent's employment on account of his continuous poor performance in the discharge of his duties as a Store Keeper.

8. It proceeded to trial, the Respondent together with his two witnesses testified and adduced documentary evidence in support of the claim, the Appellant put in its written submissions but was unable to avail witnesses. In his judgment, the trial Magistrate struck out the Appellant's statement of defence for want of oral evidence and entered judgment in favor of the Respondent as prayed in the plaint.

9. The Appellants submits that grounds upon which a pleading can be struck out are provided for under Order 2 Rule 15 of the Civil Procedure Rules 201 which reads:

"At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:

a. ***It discloses no reasonable cause of action or defence in law; or***

b. ***It is scandalous, frivolous or vexatious; or***

c. ***It may prejudice, embarrass or delay the fair trial of the action; or***

d. ***It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be".***

10. The Appellant therefore submit that there is no provision for striking out of pleadings for want of oral evidence. The trial Magistrate failed to demonstrate in his judgment the specific ground(s) invoked to strike out the defence.

11. They further submit that their statement of defence raised triable issues which ought to have been considered and determined on merit by the Court before a judgment is entered.

12. They cite the cases of **DT Dobbie & Co (Kenya Ltd Vs Muchira; Letang Vs Cooper (1996) Q.B 232** where is was held that striking out of pleadings is draconian measure that should be exercised cautiously by Court and only in the clearest of cases where the pleading in question cannot be remedied.

13. The Appellant further submit that the trial Magistrate erred in law and fact by failing to consider the Appellant defence as filed or at all thus contravening the provisions of natural justice. They state that the principles of natural justice dictate that *"audi altarem partem"* which simply means that every party should be heard before judgment is entered. Moreover, Article 50(1) of the Constitution entrenches this rule by providing that every person has a right to a fair and public hearing before a Court, which duty to promote and protect including the right to fair trial is imposed on judicial officers *via* Article 159 (2) of the Constitution.

14. They rely on the case of **Mbaki & Others vs Macharia & Another (2005) 2 EA 206 as cited in JMK vs MWM and Another (2015) eKLR** where it was observed that:

> ***"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced without the party being afforded an opportunity to be heard."***

15. They argue that where an adjudicator passes judgment without properly hearing and considering all the evidence before a Court then it is acting contrary to the provisions of natural justice and that the said decision should be set aside, as was observed in the case of **David Onyango Oloo vs. The Attorney General Civil Appeal No. 152 Of 1986.**

16. The Appellant submits that the trial Magistrate further erred when he failed to hold that the Respondent was an employee of Afrotan Company Limited and not the Respondent. The Appellant provides that in paragraph 3 of his plaint and in his entire witness statement the Respondent categorically states that they were employed by Afrotan Limited and not Ruambuzi Limited, the Appellant herein. Moreover, the Appellant states that from their statement of defence, the contract of service form and the form of bond for performance, it is clear that the employing company was Afrotan Company Limited and not the Appellant.

17. The trial judge failed to hold this in his judgment and erred in holding the Appellant liable to the Respondent for his terminal dues and compensation for unlawful termination. The suit should have been filed as against Afrotan Company Limited and not the Appellant.

18. The Appellant in this matter was merely an agent of a disclosed principle and as such was not liable to the Plaintiff under the Employment Contract in any way whatsoever. They cite the case of **Tota Ram vs. Mistry Waryam Singh (1933) 5 ULR 76** where it was held that:

> ***"A person who acts as another's agent in a transaction with the knowledge of the plaintiff is not liable to the plaintiff in respect of that particular transaction".***

19. Further in the case of **Anthony Francis Wareheim T/A & 2 Others vs. Kenya Post Office Savings Bank Civil Application No. Nai 5 Of 48 Of 2002** where the Court Of Appeal unanimously held as follows:

> ***"It was also prima facie imperative that the court should have dismissed the Respondent's claim against the second and third Appellant for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that where the principal is disclosed, the agent is***

not to be sued."

20. They therefore submit that the Honorable Magistrate did err by finding the Appellant liable in a suit that ought to have been instituted against it in the first place bearing in mind that it was a disclosed agent of a disclosed principal.

21. The Appellant further submits that the learned Magistrates erred in law and fact by finding that he had jurisdiction to hear and determine an employment dispute relating to an employment contract that was entered into and performed in Khartoum.

22. They submit that the Court does not have jurisdiction to go to the crux of the claim and where a Court entertains a suit it does not have jurisdiction over, its decision cannot stand but instead should be set aside. The cause of action arose in a foreign jurisdiction and on matters of contract the proper forum ought to have been in Sudan. They rely on Article 10 of the Form of Foreign Contract of Service which provides that:

> ***"This Contracts may be terminated in accordance and under the provisions of the law of the country in which an employee in employed to work".***

23. They state that the above statement infers that at the point of execution of the contract, parties agreed to subject any dispute about the contract to the law and Courts of Sudan where the contract was performed. They rely on the case of **United India Insurance Co. Ltd and Another vs. East African Underwriters Kenya Ltd & Another (1982 – 88)** where there was an exclusive jurisdiction clause that read:

> ***"all suits and other legal proceedings and all arbitration in connection with this agreement and touching the rights of the other parties herein shall be governed by the law prevailing in the Domain of India to the exclusion of all other laws and courts of Bombay alone shall have the jurisdiction to entertain any disputed between the parties."***

24. Accordingly they submit that the subject matter being performed in Sudan was subject to the laws of Sudan with the parties having agreed to have its termination governed by the laws of Sudan.

25. The Appellants also submit that the trail Magistrate erred in law and fact by entertaining a claim whose monetary values was above his pecuniary jurisdiction. They submit that at the time of the hearing and determination of the main suit, the Principal Magistrate had a pecuniary jurisdiction limited Kshs. 1,000,00.00/= whereas the monetary claim of the Respondent was Kshs. 12,501,370/= above that capped amount.

26. They rely on the case on Owners of the **Motor Vessel "Lillian S" vs Caltex Oil (Kenya) [1989] KLR 1** where it was held that jurisdiction is everything and without it, a Court has no power to make one more step.

27. The Appellants submit that the Learned Magistrate erred in law and fact by failing to dismiss the subject suit for want of consistency and congruity. To support this they argue that inconsistency lies with the amount of salary earned by Respondent as he claims that he earned Kshs 34,000.00 yet from the contract document the amount indicated is Kshs 20,000.00.

28. Moreover, the learned Magistrate failed to indicate in his judgment what prayers he had allowed. He did not give specifics of his judgment being amount to be paid as terminal dues and as damages for unlawful dismissal. He did not give an analysis of the fact and evidence both written and oral neither did he highlight the provisions of the law he relied on and the application of the same to the case at hand.

29. They rely on the case of **South Nyanza Co Ltd. vs. Omwando Omwando [2011] eKLR** where the Court observed that:

"I do not think that the judgment as crafted by the learned Magistrate really qualifies for a valid judgment. Ordinarily and in law, a judgment should deal with issues raised and should not be scanty. A judgment must comply with the mandatory provision of order 21 Rule 4 of the Civil Procedure Rules which provide that a judgment in a defended suit shall contain a concise statement of the case, points for determination, the decision thereon and reasons for such decision…… "

30. The judgment delivered they argue falls short of a proper judgment as it was ambiguous and prejudicial but also bad in law. It should therefore be set aside.

31. The Appellant for the foregoing reasons prays that this Honorable Court set aside the Judgment of the trial Court and that it be awarded costs of the suit and of the appeal together with interest thereon having established a prima facie.

Respondent Submissions

32. The Respondent in their Response submit that the Appeal herein is a nullity since the Memorandum was filed out of statutory time limit permitted by Section 79 G of the Civil Procedure Act Cap 21, Laws of Kenya which provides as follows:

"Every Appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be submitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time".

33. They submit that as the Appeal herein was filed out of time, it should collapse and no further proceedings should be taken pursuant to the said Appeal.

34. They rely on the case of **Macfoys United Africa Co. Ltd [1961] 3 ALL ER** where Lord Denning had the following to say:

"If an act is void then it is a nullity. It is not only bad in law, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad; you cannot put something on nothing and expect it to stay there. It will collapse".

35. They further submit that leave of the Court to file the Appeal out of time was not sought and granted, and that therefore that such Appeal is void and that the Court has no jurisdiction to hear it and further no satisfactory explanation was advanced as to the almost five 5 month delay.

36. They cite the case of **Patrick Kirunja Kithinji vs. Victor Mugira Marete Meru Civil Appeal (Application) No 48 of 2014 [2010] eKLR** at page 3 where it states as follows:

"In our view whether or not an appeal is filed on time goes to the jurisdiction of this court. It is trite law that this court has jurisdiction to entertain appeal filed within the requisite time and/or appeals filed out of time with leave of the court. To hold otherwise would upset the established clear principles of institutions of an appeal in this court. Consequently we find that an appeal filed out of time is not curable under Article 195".

37. The Respondent therefore argues that the Court cannot entertain the matter and that the law is clear that appeals should be filed within 30 days from the date the decision is made. On this ground, they urge this Honorable Court to dismiss the Appeal with costs.

38. The Respondents submit that the Learned Magistrate did not err by striking out the Appellant's statement of defence for want of oral evidence. They argue that where a party fails to call evidence in support of its case; the party's pleadings remain mere statements of facts or allegations, the pleading ought to be substantiated and the Appellant did not call any evidence to substantiate its pleadings.

39. They rely on the decision of Justice Odunga in the case of **Linus Nganga Kiongo vs. Town Council Of Kikuyu Nairobi (Milimani) HCCC NO 79 OF 2011** at page 2 where the decision of Lady Justice Lessit was cited in the case of Motex Knitwear Limited vs. Gopitex Knitwear Limited Nairobi (Milimani) HCCC No 834 of 2002 stated as follows:

> ***"Although the defendant has denied liability in the amended defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st plaintiff's case stand unchallenged but also the claims made by the defendant in his defence and counterclaim are unsubstantiated. In the circumstances, the counterclaim must fail."***

40. He further stated as follows:

> ***"Again in the case of*** **Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No 1243 of 2001** ***the learned judge citing the same decision stated that it is trite law that where a party fails to call evidence in support of its case, that party's pleadings remain mere statement of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged."***
>
> ***He further stated while citing the decision of Ali – Aroni J in Janet Kaphine Ouma & Another vs. Marie Stopes International (Kenya) Kisumu HCCC No 68 of 2007.***
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> ***"In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the plaintiff and that of the witness remain uncontroverted and the statement in the defence remains mere allegations… Sections 107 and 108 of the Evidence Act are clear that he who asserts or pleads must support by way of evidence".***

41. They further submit that where a party fails to call in evidence in support of its case, the party's pleadings remain mere statements of facts or allegations so, while he was afforded a fair opportunity to be heard he opted not to adduce any evidence in support of his case. They therefore should not claim that they were not heard. The learned Magistrate was not biased toward the Appellant as he was given the opportunity to cross examine and to call witness choosing not to do so.

42. The Respondent also submits that the Learned Magistrate did not err in law and fact by failing to consider that the Respondent was an employee of Agrotan Company Limited as it was their duty to commence third party proceedings and indemnify themselves as provided under Order 1 Rule 15 of the Civil Procedure Rules, 2010. As it sought no such indemnity, they cannot now allege that the Respondent should have directed his claim against Argotan Company Limited.

43. Further, the Respondent submits that the Appellant did not plead in its statement of defense that they were mere agents of a disclosed principle and that it is settled principle of law that parties are bound by their pleadings and cannot be allowed to depart from their pleadings. The issue was not before the trial judge and they therefore cannot raise it for the first time on appeal. They cite the case of **Global Vehicle Kenya Limited vs Lenana Road Motors, Mombasa Civil Appeal No 7 of 2015** at page 9 where it was stated as follows:

> ***"the respondent's contention that the appellant's suit was filed in violation of Order 1 Rule 4 of the Civil Procedure Rules need not engage us simply because the issue is being raised too late in the day. The objection ought to have been taken before the trial court. As it is, the issue was not***

raised and was never addressed by the trial court. We do not think it is an issue that can properly be raised for the first time in appeal..”

44. The issue of agency is therefore a new issue that was not pleaded and the Respondent not given the opportunity to respond to it in his pleadings or in his evidence before Court and the trial Magistrate could also not deliberate it and can thus not be faulted.

45. The Respondent submit that the contract of employment was entered into in Kenya executed by the Respondent and the Appellant in Kenya and payment of salary was to be made in Kenya and in Kenyan Currency, further, the witnesses were domiciled in Kenya and the Appellant is based in Kenya. In those circumstances, to file the suit outside the jurisdiction of Kenya would have denied the Respondent the chance to pursue justice.

46. They submit that there was no specific clause in the employment contract that ousted or limited the jurisdiction of the Kenyan Courts, and rely on the case of **Kanti & Co Limited Vs South British Insurance Company Limited, Nairobi Civil Appeal No 39 of 1980** where the Court of Appeal held as follows:

“Jurisdiction can only be exclusively conferred or reserved for the courts of a particular county to the exclusion of all other jurisdiction by a clear and unequivocal statement in the contract.”

47. In this instant, they submit that there is no clear and unequivocal statement in the Respondent’s contract of employment that excluded the jurisdiction of the Kenyan Court. They continue to argue that by entering an unconditional appearance to the Respondent’s claim, they submitted themselves to the jurisdiction of the trial Court hence the trial Magistrate in Nairobi was properly seized of jurisdiction to hear and determine the said suit. To this end they rely on the case **Kanti & Co Limited Vs South British Insurances Company Limited** supra where it was held as follows:

“A defendant by entering an unconditional appearance to the summons to enter appearance, submits to the jurisdiction of the court and as long as the unconditional appearance stands, the court is seized of the jurisdiction to try the suit, further in the same case it was stated that where there is concurrent jurisdiction in more than one country, the court ought to be guided by the principle of convenience between the parties”.

48. In this matter they argue that the balance of convenience titled in favor of the suit being heard and determined in Kenya.

49. The Respondent also claims that the trial Magistrate did not act above its pecuniary jurisdiction as nowhere in the Respondents pleadings was the sum of Kshs. 12, 501, 370 pleaded. The learned Magistrate further did not err by failing to dismiss because of inconsistencies as the salary of Kshs. 20,000 quoted in the pleadings was the sum that was offered at the beginning of the contract however, Kshs 34,000.00 was the sum being earned at termination 9 years later.

50. Finally the Respondents submit that the learned Magistrate did analyze the evidence adduced by the Respondent and his witness and the prayers in the plaint that were pleaded and proved, so, it was proper for him to enter judgment in favor of the Respondent as prayed taking into account that the Appellant never controverted the testimony of the Respondent and his witnesses.

51. They submit that because of the above stated reasons, the Honorable Court should dismiss the Appeal with costs to the Respondents.

52. I have considered the submissions of both parties and I set down issues for determination as follows:

1. ***Whether this Appeal is properly before this Court having been filed 5 months after delivery of judgment and without leave of this Court.***

2. ***Whether trial Court had jurisdiction both pecuniary and geographically to entertain the claim.***

3. ***Whether the trial Magistrate erred in law and fact in finding that the Appellant was the employer of the Respondent and not Argotan Company Limited and entering judgment against the Appellants.***

4. ***Whether the trial Magistrate erred in law in failing to analyze facts before him and therefore arriving at a wrong verdict.***

5. ***Whether the trial Magistrate erred in law in striking out the defence.***

6. ***What remedies to give in the circumstance?***

53. In the celebrated case of **Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) (1989) KLR 1**. It was held that jurisdiction is everything and without it, a Court has no power to make one more step. The Respondents have argued that this Appeal is not properly before this Court having been filed late and without leave of Court.

54. The judgment of the lower Court was delivered on 7.12.2012. A certificate of delay was however signed by the trial Court in December 2013 stating that certified copies of proceedings and judgment were applied for on 28th May 2013 and were ready for collection on 6.12.2013.

55. Section 79(g) of Civil Procedure Act states as follows:

"Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order, provided that an appeal may be admitted out of time if the Appellant satisfied the Court that he had good and sufficient cause for not filing the appeal in time".

56. It is apparent that after judgment was delivered, on 7/12/2012, the Appellants didn't file an appeal within the requisite period. They also only moved the Court for proceeding and judgment on 28.5.2013 – 5 months later and therefore the delay cannot be placed on the trial Court.

57. Section 79(g) of Civil Procedure Act is couched in mandatory terms and the only provision is where the Appellant seeks leave of Court to file an appeal out of time and then file with Court's approval for good cause. In this case however, it is apparent that the Appellants not only filed their appeal late but also didn't seek leave of the High Court before filing the said appeal.

58. The Respondents have cited several case law to show that if an appeal is filed late, the higher Court fails to be ceased with jurisdiction to handle the appeal. **In Macfoys United Africa Company Limited (1961) 3 ALLER** Lord Denning stated as follows:

"If an act is void, then it is a nullity. It is not only bad in law but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado though it is sometimes convenient to have the Court declare it to be so. And every proceedings which is founded on it is also bad and incurably bad, you cannot put something on nothing and expect it to stay there. It will collapse".

59. In **Patrick Kirunja Kithinji vs. Victor Mugira Marete Meru Civil Appeal (Application) No. 48/2014**, the Court also made similar findings:

"In our view whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite law that this Court has jurisdiction to entertain the appeals filed within the requisite time

and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently we find that an appeal filed out of time is not curable under Article 195".

60. Having considered that this Appeal is filed out of time and without leave of Court, it is improperly before Court and this Court is therefore not ceased of the jurisdiction to handle it. As stated in Lillian "S" 's case thus, this Court cannot go beyond this point and determine any other issue.

61. At this point, this Court will fold its hands and not go to the merits of the Appeal. The Appeal therefore fails and is dismissed with costs to the Respondents for the reasons given.

Read in open Court this 7th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Minjungu holding brief for Kamwendwa for Respondents – Present