



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

MISC. APPL. NO. 29 OF 2013

SEVEN SEAS TECHNOLOGIES LIMITED.....APPLICANT

VERSUS

ERIC CHEGE.....RESPONDENT

RULING

1. What is before the Court for determination is the Preliminary Objection dated 20th September 2013. The Respondent through its counsel Mr. Bwire raised the Preliminary objection to the effect that this Court does not have supervisory powers to issue the orders sought. The powers it was stated are exclusively awarded to the High Court.
2. Mr. Bwire submitted that this Court is a creature of statute and derives its existence from the Constitution of Kenya Article 162(2)(a) and that this Court lacks supervisory jurisdiction since the Industrial Court is a creature of statute. He stated that Parliament in Section 12 of the Industrial Court Act has stated that this Court has original and appellate jurisdiction. He went on to submit that this Court can only entertain disputes in regard to appellate jurisdiction only in cases where decisions come to it from subordinate Courts, tribunals or quasi-judicial bodies. He opined that under Article 165(6) of the Constitution supervisory jurisdiction is reserved for the High Court. He submitted that the issue of jurisdiction is not a mere technicality but is a substantive issue. He relied on the case of **Abdul Aziz Juma v. Mukisugu Investments** ELC 219 of 2013 in which Justice Mutungi stated that Article 159 of the Constitution was not intended to override clear provisions of statute. He also referred to the case of **Milkah Nanyokia Musungu v Robert Wekesa Mwembe & 2 Others [2013] eKLR** and **The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1**. He ended by stating that this Court cannot exercise its authority with respect to the supervisory jurisdiction of the High Court and that once the matter was filed in the magistrates Court, this Court cannot cure that defect. He submitted that this Court has no supervisory powers and thus no jurisdiction.
3. Mr. Luseno for the Applicant was opposed to the preliminary objection taken by the Respondent and submitted that in the mind of the Respondent's counsel this Court is a High Court as he referred to Justice Gikonyo as my brother. He stated that the question the Court should interrogate is whether a judge sitting in this Court is any less a judge than the one sitting in the Commercial or Lands & Environment division. He held that with respect to the Industrial Court Article 162 states that Courts of status of the High Court will be set up. To him that means this Court has the same jurisdiction as the High Court to determine the motion before it as it did. He submitted that this Court has supervisory jurisdiction over subordinate Courts on matters relating to employment and labour issues. To hold otherwise would be to negate the whole intent of having specialised Courts.

He stated that the power to transfer suit is not exclusively reserved for the High Court. he submitted that this Court was being asked to block access to the employer to recover from the employee benefits which had accrued to the employer on the contract of employment. He urged the Court to rise above the technical issues being raised by the Respondent.

4. Mr. Bwire in a brief reprise submitted that the issues he raised were far from technical and were substantial. They related to jurisdiction and without it a court could do nothing. He submitted that the power to transfer cases is a constitutional power reserved for the High Court alone. In exercising power under Article 165(6) the High Court would be exercising powers and supervision over the Magistrates Court and not this Court.
5. A preliminary objection is a point of law when if taken would dispose of the suit. It is what was formerly called a “demurrer”. The Respondent's Preliminary Objection fits the definition of a preliminary objection per the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. In the celebrated case Law J.A. stated a preliminary objection to be thus:-

“So far as I am aware, a preliminary objection consists of 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

6. Sir Charles Newbold, President stated in the same judgment 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.”

7. The Respondent does not seek the exercise of judicial discretion. No, what the preliminary objection seeks to do is determine the issue of whether there is a cause of action *in limine*. It is well taken because if it succeeds the Court will be saved the cost of a lengthy trial and attendant expenses on either side.
8. The *locus classicus* on jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1** where Justice Nyarangi of the Court of Appeal held as follows

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other 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.'

9. The authority for this holding by the learned Judge of Appeal is to be found in the writings of John Beecroft Saunders in a treatise which is no longer published headed **Words and Phrases Legally defined – Volume 3: I – N** and it states at page 113 the following about jurisdiction:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or

as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.

10. Clearly, if this Court lacks jurisdiction the matter will be at an end as I will have to down my tools and take no further step.
11. The Industrial Court is a superior court and has the same status as the High Court. It is among equals when it stands with the Environment & Land Court and the High Court with all its divisions. It is imbued with all the powers of the High Court. The High Court has extensive jurisdiction in matters except those that fall under Article 162. As the High Court is expressly excluded by the Constitution to deal with matters under Article 162, there is a constitutional imperative thrust upon this Court to deal with all aspects of disputes that relate to labour and employment matters wherever they arise within Kenya. To hold otherwise would be anathema to the Constitution and would abridge the rights of parties to access justice. It would run counter to the principles set out in Article 159(2) of the Constitution if I ordered that the Applications for transfer of suits relative to labour issues be heard by the High Court. Article 162(2) shuts the door on the High Court as far as labour and employment matters go. Why would the High Court entertain such an application while this Court is seized of all matters under Article 162(2)? Can a court split a cause of action into various parts depending on what portions the Claimant or Respondent is challenging? Would a dispute relating to an employee's housing and the employer's buildings and land be referred to the Environment & Land Court if the employee and employer are tussling over termination of employment and the unpaid rent, illegal occupation by the staff member and the like? Or would such a suit be transferred to the Commercial division? I think not. There has to be a purposive interpretation of the Constitution. I am not persuaded that the Industrial Court cannot determine whether a suit relating to employment matters can be transferred to it or not. Similarly, where an issue of employment rights under Article 41, for example, arises, I cannot refer parties to the High Court to determine the constitutional question before returning to this Court for determination of the labour dispute. The upshot of the foregoing is that the preliminary objection lacks merit and is dismissed with costs to the Applicant.

Orders accordingly.

Dated and signed at Nairobi this 26th day of February 2014

NZIOKI WA MAKAU

JUDGE

Delivered at Nairobi this 7th day of March 2014

JAMES RIKA

JUDGE