



**Jitolee v Wafula (Civil Appeal E1032 of 2023)
[2024] KEHC 1964 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1964 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1032 OF 2023

DAS MAJANJA, J

FEBRUARY 29, 2024

BETWEEN

VSO JITOLEE APPELLANT

AND

BETTY WAFULA RESPONDENT

(Being an appeal from the Ruling and Order of Hon. H. Ng'ang'a, PM dated 4th September 2023 at the Magistrates' Court, Milimani, in Civil Case No. 7283 of 2017)

JUDGMENT

1. The Appellant, as the 1st Defendant, in the suit filed by the Respondent in the Subordinate Court lodged a preliminary objection (“the Objection”) on the basis the court lacked jurisdiction to resolve the dispute between the employer and employee within the meaning of section 12 and 29(3) of the Employment and Labour Relations Act as read with section 87(1)(b) and (2) of the Employment Act, 2007 and that it ought to have been filed in the Employment and Labour Relations Court (“ELRC”).
2. After hearing the parties, the Subordinate Court rendered its ruling on 04.09.2023 holding that it had jurisdiction. It held that the matter did not relate to an employment contract between the Appellant and Respondent but related to shares purchased on behalf of the Respondent and held in trust for her. The court held that the dispute was in essence a commercial dispute hence it had jurisdiction. It is this ruling that has precipitated this appeal.
3. The Appellant filed the memorandum of appeal dated 04.10.2023. The thrust of the appeal is that the Subordinate Court lacked jurisdiction to determine the dispute between the parties as it was a dispute between the employer and employee hence within the province of the ELRC. Both parties have filed written submissions in which they reiterate their positions taken before the Subordinate Court.



4. Both accept the primacy of jurisdiction of the court to determine a dispute. This is settled and I would do no better than recite the formulation by Nyarangi JA., in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited* [1989] KLR 1 that jurisdiction is everything. Jurisdiction is conferred by *the Constitution* and or statute and it is within those confines that a court should operate. The Supreme Court in *Samuel Kamau Macharia v Kenya Commercial Bank and Others* SCK Application No. 2 of 2011 [2012] eKLR explained that:

A court's 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 the Court must operate within the constitutional limits. It cannot expand jurisdiction craft or innovation.

5. The ELRC is a court with the status of the High Court established by Parliament under section Article 162(2)(a) which empowers Parliament to, "establish Courts with the status of the High Court to hear and determine disputes relating to:(a) employment and labour relations." By dint of Article 162(3), Parliament is authorized to "determine the jurisdiction and functions of the Courts contemplated in clause (2)." Pursuant to this power, Parliament enacted the *Employment and Labour Relations Court Act*. Section 12(1) thereof further provides for the jurisdiction of the ELRC in the following terms:

12 (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 union organisation;
 - (d) disputes between trade unions;
 - (e) disputes between employer organisations;
 - (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.
6. It is against the background of the aforesaid provision that I propose to resolve the central issue in this appeal but before I do so, I think it is necessary to understand the Respondent's claim. The Respondent's case is set out in the Plaint dated 28.09.2017. She claimed that when she was employed by the Appellant her benefits and those of her fellow employees comprising cash bonus were invested in the purchase of Kenya Commercial Bank shares in a scheme where the Appellant and others were Trustees. The Respondent left the Appellant's employment in 2005. She alleged that the Appellant and Trustees continued to hold the shares and accrued dividends in trust for her hence she prayed for,



inter alia, a declaration that she was entitled to 27,500 shares and an account for dividends accrued on those shares.

7. The Appellant contends that the Respondent was employed by the Appellant and as a result of which she benefitted from the Appellant's employee benefit scheme. It urges that the benefit was the result of her being an employee within the meaning of the *Employment and Labour Relations Court Act* and the *Employment Act* hence the matter should be before the ELRC and not the Subordinate Court.
8. The Respondent supports the position taken by the trial court that the dispute is of a commercial nature. She contends that her claim is solely for the shares held in the Appellant's benefit scheme and has nothing to do with employment.
9. It is settled that where a dispute is between an employer and employee, the ELRC has exclusive jurisdiction to entertain such a claim. The exclusivity of the jurisdiction of the ELRC in relation to disputes between employer and employee was emphasised by the Supreme Court in *Republic vs Karisa Chengo & Others, Supreme Court [2017]eKLR* where it held follows:
 - (52) From a reading of *the Constitution* and these Acts of Parliament, it is clear that a special cadre of courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either Environment and Land Court or Employment and Labour Relations Court is the High Court or vice versa. The three are different and autonomous courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the Environment and Land Court and Employment and Labour Relations Court, it should, by the same token, be inferred that the Environment and Land Court and Employment and Labour Relations Court too cannot hear matters reserved to the jurisdiction of the High Court.
10. Whether the claim is one between an employer and employee is a matter of substance and not form. On the face of the plaint, whose contents must be taken as true and correct for purposes of determining the preliminary objection, the Respondent ceased being an employee of the Appellant in 2005. Her claim is grounded on the employee benefit scheme.
11. Such a scenario presented in this case is not novel and arose in *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR*. The Supreme Court was moved to decide whether the ELRC had jurisdiction to determine a dispute between a former employee and the Trustees of a pension scheme. In the court's view, the jurisdiction of the ELRC was based on an employer-employee relationship hence:
 - (146) In our view, once a member leaves the employment of a Sponsor, by becoming a pensioner, there is no longer a relationship of employer-employee that exists between such a pensioner and the sponsor. The relationship that exists in that case becomes that of trustee and beneficiaries (members) of a trust and that relationship is governed by the *Retirement Benefits Act, Trustee Act* Cap 167 of the laws of Kenya and the general common law on the law of trusts. It is important to note that nowhere in the *Employment and Labour Relations Court Act* is there jurisdiction conferred on the Employment and Labour Relations court to resolve issues between trustees of a pension scheme and members of the scheme (pensioners).



12. More recently the Supreme Court has considered the jurisdiction of the ELRC in relation to the employer/employee relationship. In reiterated its earlier position in *Kenya Tea Growers Association & 2 others v The National Social Security Fund Board of Trustees & 13 others* [2024] KESC 3 (KLR) (21 February 2024) (Judgment) as follows

(86) It is clear that our decision in *Chaurembo*, does not oust the jurisdiction of the ELRC to determine disputes, arising out of the application of the provisions of the NSSF Act 2013, to employees who are yet to become pensioners. What the ELRC lacks, is jurisdiction over disputes between pensioners and trustees of a specific pension scheme as the latter is governed by dedicated statutes and applicable common law. A pensioner is a person who is no longer in employment. He cannot therefore seek any redress arising from a dispute between him and the trustees of a Scheme to which he is a member from the ELRC.

13. From the plaint, in the Subordinate Court, the Respondent is no longer an employee of the Appellant and her claim is based on the employee benefit scheme. Based on the controlling precedents of the Supreme Court I have cited above, the trial magistrate cannot be faulted for reaching the conclusion that the dispute is outside the jurisdiction of the ELRC. The Magistrates Court has jurisdiction to determine it.

14. The appeal is dismissed. The Appellant shall bear costs of the appeal assessed at Kshs. 25,000.00.

DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF FEBRUARY 2024.

D. S. MAJANJA

JUDGE

Mr Kitulu instructed by Muema Kitulu and Company Advocates for the Appellant.

Mr Nyamweya instructed by Nyamwea Mamboleo and Company Advocates for the Respondent.

