



THE SUPREME COURT OF KENYA

ESPIE NJUGUNA & 46 OTHERS v SPIRE PROPERTIES (K) LIMITED & 12 OTHERS

PETITION NO. 28 (E030) OF 2022

DATE OF RULING: 16TH JUNE 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: The Preliminary Objection is upheld.

BACKGROUND

The appellants and the 5th – 13th respondents were employed by the 3rd respondent (*Hotel Span Limited*) on diverse dates between 1981 and 1997 in various capacities and departments at Diani Reef Grand Hotel. The 2nd respondent (*Transnational Bank Limited*) appointed the 4th respondent (*R.T. Dunnet*) as the Receiver Manager on 2nd September, 1998 under terms of a debenture, following the failure by Hotel Span Limited to meet its obligations therein.

At the point of taking over as Receiver Manager, R.T. Dunnet was presented with a list of existing staff and computation of their terminal dues owed to them as at 2nd September, 1998. The appellants opted to continue working at the Hotel and received their monthly dues, even after it was placed under receivership. However, unlike those who left employment, the appellants were not paid their terminal dues.

Aggrieved, the appellants and the 5th -13th respondents filed a suit before Mombasa High Court. The suit was transferred to the Industrial Court (as it then was) vide a ruling of *Mwongo J.* made on 25th March, 2013. The Employment and Labour Relations Court (ELRC), as the successor to the Industrial Court, in its judgment found that: the 2nd, 3rd and 4th respondents were liable to pay the appellants' terminal dues of Kshs. 29,603,973/-; that the termination of the appellants' contracts was irregular, unlawful and improper, and granted each of them Kshs. 500,000/- to be paid by all the 1st – 4th respondents jointly and severally; including costs and interest on terminal dues at 14% per annum from the date of filing the claim. This was after finding that the appointment of the Receiver Manger was substantively invalid.

Dissatisfied, the 1st and 2nd respondents filed two separate appeals at the Court of Appeal. In allowing the appeal, the appellate court held that the ruling by *Mwongo J.* could not be construed as having extended the jurisdiction of the ELRC beyond that conferred by the Constitution and statute. Hence, the pronouncement by the trial court invalidating and nullifying the receivership was a matter beyond the court's jurisdiction.

On liability, it held that the Receiver Manager terminated the appellants' employment by reason of redundancy and therefore, the 1st respondent was liable. That in the circumstances, a fair compensation for the appellants was an award of 6 months gross salary to each deserving appellant. The Court of Appeal also found that since the ELRC had no jurisdiction to entertain

the issue of the validity and/or legality of the appointment of the Receiver, it could not award general damages on that basis.

Displeased, the appellants instituted this appeal raising two issues for determination: (i) *Whether the ELRC had jurisdiction to entertain the issue of validity and/or legality of the receivership*; and (ii) *Whether the Court of Appeal's judgment violated Article 10 of the Constitution*. However, the 2nd respondent filed a preliminary objection on ***whether this Court has jurisdiction to hear and determine the appeal as a matter of right under Article 163 (4) (a) of the Constitution***. At the hearing, the Court directed the parties to limit their submissions on the preliminary objection.

In its determination, the Court observed that it must first establish whether each of the two issues raised in the appeal fall within its jurisdictional ambit.

With regard to the first issue, the Court determined that the ruling by the High Court transferring the matter to ELRC specifically addressed itself to section 12 of the ELRC Act and the pleadings before it and there was no question of interpretation or the application of Article 162 (2) of the Constitution. It noted the Court of Appeal's finding that the transfer of the matter to the ELRC could not be construed as having extended the court's jurisdiction. That the issue concerning the receivership therefore had a limited bearing to the main claim by the appellants. Consequently, the Court found that it lacks jurisdiction to determine this issue as it would amount to the Court interrogating the extent of the application of the provisions of section 12 of the ELRC Act, which statutory provision was not under constitutional challenge before any of the superior courts below.

On the second issue, the Court held that the anomalies in the appellate court's judgment as lacking clarity and self-contradicting particularly on who a *'deserving claimant'* is, are issues that can be addressed by the Court of Appeal vide rule 34(2) (d) and (e) of that court's Rules. Accordingly, the Court found that this issue does not fall for determination under Article 163 (4) (a) of the Constitution.

Upon consideration, the Court upheld the preliminary objection, dismissed the appeal and issued the following orders:

- 1. The Preliminary Objection dated 3rd November, 2022 be and is hereby upheld; with the result that;***
- 2. The Petition of Appeal dated 12th September, 2022 be and is hereby struck out; and***
- 3. Each Party shall bear their own costs.***

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