



REPUBLIC OF KENYA



KENYA LAW
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**Sawe v Ekaterra Tea Kenya PLC & 2 others (Civil Suit E005 of 2023)
[2024] KEHC 13241 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL SUIT E005 OF 2023
JK SERGON, J
OCTOBER 30, 2024**

BETWEEN

DAVID SAWE PLAINTIFF

AND

EKATERRA TEA KENYA PLC 1ST DEFENDANT

KENNETH ODIRE 2ND DEFENDANT

SYDNEY MUSEKIWA SHONIWA 3RD DEFENDANT

RULING

1. The application coming up for determination is a notice of motion dated 7th September, 2023 seeking the following orders;
 - i. That the suit herein, commenced vide the Plaint dated 14th August, 2023 be and is hereby struck out for want of jurisdiction.
 - ii. That in the alternative, the suit herein be and is hereby transferred to the Employment and Labour Relations Court for directions.
 - iii. That costs of the Application shall be borne by the Plaintiff.
2. The application is based on the grounds stated on the face of the motion and the facts deponed in the supporting affidavit of Lydia Musili, an advocate of the High Court and the 1st Defendant's General Manager.
3. She avers that at the date of his summary dismissal, the Plaintiff discharged his duties as the Defendant's General Manager - Kericho North.



4. She further avers that the summary dismissal was on account of breach of the Defendant's Sexual Harassment Policy. The Plaintiff is said to have failed to report an allegation of sexual harassment that was brought to his attention.
5. She stated that the Plaintiff being aggrieved by his dismissal filed a claim against the 1st Defendant at the Employment and Labour Relations Court in Kericho vide Kericho [Employment and Labour Relations Case No. E012 of 2023](#) David Sawe v Ekaterra Tea Kenya Plc alleging unfair termination of employment and malice in the conduct of the disciplinary proceedings.
6. She also averred that alongside the particulars of malice are claims relating to the alleged defamation of the Plaintiff by the 1st Defendant and its employees being the 2nd and 3rd Defendant herein.
7. It is averred that the Plaintiff thereafter filed the instant suit alleging particulars of defamation which are alleged to have arisen from the conduct of disciplinary proceedings culminating in summary dismissal.
8. She avers that the Plaintiff deliberately failed to disclose to this Court that a suit had been filed at the Employment and Labour Relations Court in Kericho to address the grievances he had with the Defendants in the tenure of his employment.
9. She also stated that the cause of action in both matters arises from the same set of facts and that the instant suit is a veiled attempt to have this Court adjudicate over matters that are the preserve of the Employment and Labour Relations Court.
10. She further stated that this Court lacks jurisdiction to hear and determine the suit and it is therefore in the interest of justice that it be struck out in its entirety for want of jurisdiction or in the alternative be referred to the Employment and Labour Relations Court for directions.
11. The respondent filed a replying affidavit in response to the application, however, at the time of writing this ruling it was not on record.
12. The court directed the parties to file submissions. However, at the time of writing this ruling, the applicant had complied and filed their written submissions in support of their notice of motion application dated 7th September, 2023.
13. The applicant contended that the issues raised in the plaint relate to statements made within the employment context, the plaintiff/ respondent alleges to have been defamed by the defendant during its investigative and disciplinary processes and the same were raised in the memorandum of claim filed in ELRC No. E012 of 2023.
14. The applicant is adamant that all the issues with respect to the plaintiff/respondent's claim ought to have been addressed by the Employment and Labour Relations Court at Kericho. The applicant cited the Court of Appeal case of Kenya Medical Research Institute v Davy Kiprotich Koech [2018] KECA 128 (KLR), where the Court of Appeal expressed itself as follows;

“We have considered the pleadings, the submissions of the parties and the law, and are of the view that the central issue for determination is whether the High Court or the Industrial Court had jurisdiction to entertain a suit, which was predominantly employment related, but which also contained a claim for defamation...

As seen above, sections 47 and 87 (1) of the [Employment Act](#) 2007 were explicit that the court had jurisdiction to deal with any question, difference, or dispute as to the rights and liabilities of an employer or employee, as well as on matters touching on misconduct, neglect, ill treatment, or any injury to the person or property of either party or infringement



of statutory rights. Considering that the respondent's claim was that his employer was alleged to have injured to his person by way of defamation, we find that the court had the requisite mandate with which to determine the dispute between the parties."

15. The applicant reiterated that this Court ought to down its tools for want of jurisdiction. The applicant argued that matters filed in a Court without jurisdiction are a nullity and cited the court of appeal case of Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service [2019] KECA 767 (KLR) where the Court of Appeal stated inter alia as follows; "Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied."
16. The applicant contended that in light of the judgement delivered by the Employment and Labour Relations Court on 18th July, 2024, this Court was precluded from making any further determination based on the doctrine of res judicata.
17. I have considered the pleadings and submissions on record and the issue (s) for determination are whether this Court has the jurisdiction to hear and determine the suit and whether this Court can transfer the matter to the Employment and Labour Relations Court.
18. On the issue of jurisdiction, it is this Court's finding that it does not have jurisdiction to hear and determine the dispute which arose in the employment context. The plaintiff/ respondent claims to have been defamed by the defendant during its investigative and disciplinary processes which is the preserve the Employment and Labour Relations Court.
19. In Republic v Chengo & 2 others [2017] KESC 15 (KLR) the Supreme Court observed as follows; "The Constitution, the Environment and Land Court Act and the Employment and Labour Relations Court Act revealed that a special cadre of courts with sui generis jurisdiction were provided for. Such parity of hierarchical stature did not imply that either the Environment and Land Court or the Employment and Labour Relations Court was the High Court or vice versa. The three were different and autonomous courts and exercised different and distinct jurisdictions."
20. On the issue as to whether to transfer the suit, this Court took into account the decision in the case of Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR in which the Court of Appeal stated as follows; "In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under S.18 of the Civil Procedure Act to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent court would be to muddle up the waters and allow confusion to reign, It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek refuge under the O2 principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the same. ...In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer."
21. It is clear from the foregoing that the plaint by the claimant was filed before a court devoid of jurisdiction, therefore, the suit was a nullity ab initio and the same is not transferable to any other court.
22. The upshot therefore is that the application succeeds. The plaint is hereby struck out for want of jurisdiction with costs to the Defendants.



DELIVERED, SIGNED AND DATED AT KERICHO THIS 30TH DAY OCTOBER, 2024.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh

Kipkorir for Plaintiff

Miss Onyango for the applicant

