



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**MISC CIVIL APPLICATION NO. 159 OF 2013**

**WYCLIFFE MWANGAZA KIHUGWA.....APPLICANT**

**-VERSUS-**

**GRAINBULK HANDLERS LIMITED.....RESPONDENT**

**RULING**

**INTRODUCTION**

1. The application before court is the Notice of Motion dated 27th May 2013 brought under **Section 18(1) (b) (ii) & (2)** of the Civil Procedure Act for the following main orders:
  - i. **That the suit filed by the Applicant against the Respondent being Mombasa CMCC No. 3392 of 2010: Wycliffe Mwangaza Kihungwa vs. Grainbulk Handlers Limited in the Chief Magistrate's Court be transferred therefrom to the Industrial Court at Mombasa District Registry for trial and determination.**
  - ii. **That costs of the Application be provided for.**
2. The Application is supported by the Affidavit of **Linda Bii** sworn on 27th May 2013. It is premised on the ground that the suit relates to a breach of employment contract which is gazetted to be heard before the Industrial Court as a labour matter.
3. The Applicant submits that **Section 18(1) (b) (ii) & (2)** of the Civil Procedure Act gives the High Court powers to transfer a matter filed in a court subordinate to the High Court to a court competent to try the issues in question.
4. The Respondent opposed the Application on the basis of its Grounds of Opposition dated 19th August 2013 as follows:
  - i. That this Court does not have jurisdiction to grant the orders sought.
  - ii. That the Application is incurably defective.
  - iii. That the Application has been filed after inordinate delay and if the orders sought are granted the Respondent shall be prejudiced.
5. The Respondent submits that **Section 11** of the **Labour Institutions Act No. 12 of 2007** which established the Industrial Court commenced operation on the 2nd June 2008. That the Applicant filed the suit in the Magistrate's Court instead of the Industrial Court yet the Industrial Court was

operational at the time the suit was filed. What I hear the Respondent to be saying in that regard is that since the suit was first filed in a court without jurisdiction, there is no competent suit capable of being transferred to the Industrial Court.

6. The Respondent further submits that by virtue of **Article 165 (5) (b)** of the Constitution of Kenya, the High Court does not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162 (2) of the Constitution which include the Industrial Court. That as a result of lack of jurisdiction, the High Court cannot order for a transfer of a suit to the Industrial Court.
7. In my view, the main issue for this court's determination is whether the High Court has jurisdiction to order that a suit instituted in the subordinate court be transferred to the Industrial Court for hearing and determination.
8. It is not in dispute that **Mombasa CMCC No. 3392 of 2010: Wycliffee Mwangaza Kihungwa – Vs- Grainbulk Handlers Limited** (hereinafter “**the subject case**”) relates to breach of employment contract. Parties are in agreement that the right court to hear and determine the subject case is the Industrial Court.
9. **Section 18** of the Civil Procedure Act, Cap. 21 of the Laws of Kenya provides as follows:

**“(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—**

- a. **transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and**
  - a. **competent to try or dispose of the same; or**
  - b. **withdraw any suit or other proceeding pending in any court**
  - b. **subordinate to it, and thereafter—**
    - b.
      - i. **try or dispose of the same; or**
      - ii. **transfer the same for trial or disposal to any court**
      - ii. **subordinate to it and competent to try or dispose of the**
      - ii. **same; or**
      - iii. **retransfer the same for trial or disposal to the court from**
      - iii. **which it was withdrawn.**

**(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.”**

10. The power of the court to transfer a suit under **Section 18** of the Civil

Procedure Act has been discussed by the High Court before. **Nyamweya, J.** in the case of **Aberdare Investments –Vs- Bernard Wachira & 5 Others [2014] eKLR** held as follows:

**“It is clear from those provisions [Sections 17 & 18 of the Civil Procedure Act] that the court with jurisdiction to transfer a suit from or to a subordinate court is the**

**High Court, or courts of similar status.**

11. A similar holding was made by **Makau, J.** in the case of **Joseph Mururi**

**-Vs- Godfrey Gikundi Anjuri [2012] eKLR** where the learned judge held as follows:

**“It is therefore clear from the above mentioned section [section 18 (1) of the Civil Procedure Act] that the High Court has on an application by any of the parties after due notice to the parties and after hearing such of them as desires to be heard on its own motion without such notice may at any stage order withdrawal of any suit pending in any court subordinate to it and thereafter try to dispose of the suit or transfer the same for trial or disposal to any court subordinate to it and competent to try and dispose of the same.”**

12. The general jurisprudence, therefore, is that the High Court (or a

court of similar status) has power to withdraw a suit pending in a court subordinate to it and dispose of the suit or transfer the same for trial and disposal to any court subordinate to it and competent to dispose of the suit.

13. The Respondent's argument is that although the High Court has the

power to transfer a suit from a court subordinate to it, that transfer can only take place if the court from which the suit is being transferred had jurisdiction to try the case in the first instance. That if the suit was filed in a court that lacked jurisdiction, then there would be no suit capable of such transfer.

14. To support its position, the Respondent relied on the well known

Ugandan case of **Kagenyi –Vs- Musiramo & Another [1968] EA 43** where it was held that whereas section 18 of the Ugandan Civil Procedure Act (which is in *pari materia* with section 18 of our Civil Procedure Act) gives the High Court a general power of transfer of all suits, which power may be exercised at any stage of the proceedings, even *suo motu* by the court, an order for transfer of a suit from one court to another cannot be made unless the suit has been in the first instance brought to a court which has jurisdiction to try it.

15. The holding in the **Kagenyi Case (supra)** has been adopted by many

Judges in Kenya. It was followed by **Ibrahim, J.** in the case of **Rob De Jong & Another –Vs- Charles Mureithi Wachira [2012] eKLR** in which the learned judge held as follows:

**“The second issue is whether this court can direct the transfer of the suit before the Magistrate's Court to the Industrial Court.**

**I concur with the position taken by the learned counsel for the Appellants that to invoke this power the power should be before a court with jurisdiction. If the matter was filed in a court without jurisdiction then the suit is a nullity and there is nothing capable of being transferred.”**

16. **Makau, J.** also followed the principle of the **Kagenyi Case** in **Joseph**

**Mururi Case (supra)** where the learned judge stated as follows:

**“In view of the above-mentioned decision [the] High Court can only transfer a suit which had been filed in a suit (sic) of competent jurisdiction and not otherwise.”**

17. The **Kagenyi Case** was also followed by **Waweru, J.** in the case of **Linda**

**Alal Ochieng' & Another v Moses Maina & Another [2007] eKLR.**

18. The position, therefore, has been that an order to transfer a suit from

one court to another cannot be made unless the suit has been, in the first instance, brought to a court which has jurisdiction to try it. However, it seems that since the enactment of **Sections 1A** and **1B** of the Civil Procedure Act, a new jurisprudence departing from the principle in the **Kanyegi Case** is beginning to emerge.

19. In **John Mwangi Karanja –Vs- Alfred Ndiangui [2011] eKLR**, **Waweru,**

**J.** made a departure from the **Kanyegi Case** by delivering himself as follows:

**“With the enactment of sections 1A and 1B of the Civil Procedure Act, the time has perhaps now come for this matter of transfer of suits to be looked at afresh. These sections provide as follows:-**

**“1A (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

**(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court.**

**1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-**

- (a) the just determination of the proceedings;**
- (b) the efficient disposal of the business of the Court;**
- (c) the efficient use of the available judicial and administrative resources;**
- (d) the timely disposal of the proceedings, and all other proceedings in the Court at a cost affordable by the respective parties; and**
- (e) the use of suitable technology.”**

**It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction.**

**If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the**

**Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1)).**

**The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions.”.**

20. **Waweru, J.** again, in a ruling delivered in the case of **Grace Thogori**

**Komo –Vs- Dan Njagi Ndwiga [2013] eKLR**, made a similar departure from the **Kanyegi Case** and quoted extensively from his earlier ruling in the **John Mwangi Case** and held as follows:

**“It is conceded that Nairobi CMCC No. 6966 of 2012 was filed in the wrong court as that court did not have jurisdiction to hear and determine it by virtue of the provisions of section 2 of the Magistrate's Courts Act, Cap. 10. That being the case, what is the sensible thing to do? Is it not to take the case to the right court? I will in the circumstances allow the application.”**

21. I agree with the approach adopted by **Waweru, J.** in the cited cases. It

is my considered view that the holding in the **Kanyegi Case** has perhaps been overtaken by the development in law. The overriding objectives of the Civil Procedure Act contained in **Sections 1A** and **1B** of the Act as well as the principles of exercising judicial authority enshrined in **Article 159 (2)** of the Constitution of Kenya now enjoin this court to perform its duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities.

22. In my view, the High Court can now transfer a suit to another

competent court even where that suit had been, in the first instance, brought to a court which had no jurisdiction to try it. However such transfer must be in compliance with **Section 18** of the Civil Procedure Act and the Constitution of Kenya. That leads me to the next question.

23. Should the court therefore transfer the subject case from the

Magistrate's Court to the Industrial Court for disposal? Section 18 of the Civil Procedure Act has been discussed above. The said section is clear that the High Court can only withdraw a suit or other proceeding pending in a court

subordinate to it for disposal by the High Court itself or for trial or disposal by any court

subordinate to the High Court. Is the Industrial Court as presently constituted a court subordinate to the High Court?

24. **Article 162** of the Constitution of Kenya provides as follows:

**“(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts mentioned in clause (2).**

**(2) Parliament shall establish courts with the status of the High**

**Court to hear and determine disputes relating to—**

**(a) employment and labour relations; and**

**(b) the environment and the use and occupation of, and title**

to, land.

**(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).**

**4. The subordinate courts are the courts established under Article 4. 169, or by Parliament in accordance with that Article.”**

(underlining mine)

25. The Industrial Court is a creature of **Article 162 (2) (a)** of the Kenya

Constitution. It is clear from that Article that the Industrial Court has the same status as the High Court and is not subordinate to it. Since the High Court, by dint of **Section 18** of the Civil Procedure Act, can only withdraw and transfer a case to a court subordinate to it, it is clear to me that the High Court has no powers to withdraw a suit filed in the subordinate court and transfer the same to the Industrial Court. In my view an application should be made in the Industrial Court for the Industrial Court to transfer the matter to itself.

26. The upshot of the foregoing therefore is that this court should make

the following findings:

- i. **The High Court has the power to withdraw a suit pending in a court subordinate to it and transfer the same to either the High Court itself or to another competent court subordinate to it for hearing and disposal, even in instances where the suit was filed in the subordinate court without jurisdiction to try the case.**
- ii. **The High Court cannot withdraw a suit from a court subordinate to it and transfer the same to the Industrial Court because the Industrial Court has exclusive jurisdiction over labour and employment matters and has the same status as the High Court.**
- iii. **The Application of 27th May 2013 is for the reasons given above struck out with costs to the Respondent.**

**DATED and DELIVERED at MOMBASA this 20<sup>TH</sup> day of MARCH, 2014.**

**MARY KASANGO**

**JUDGE**