



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 637 OF 2014

ISIS AFRICA LTD CLAIMANT/APPLICANT

VERSUS

PATRICIA S. MUMO DEFENDANT/RESPONDENT

RULING

By a plaint dated 18th July 2014 and filed in Milimani chief Magistrate's Court Civil Suit No. 4163 of 2014, the plaintiff Isis Africa Ltd filed suit against the defendant Patricia S. Mumo claiming for repossession of motor vehicle registration No. KBQ 725N Toyota Corolla saloon which is alleged to be the plaintiff's property in possession of and used by the defendant by virtue of her previous employment with the plaintiff. The plaint further seeks for damages against her for illegal and unlawful use of the subject motor vehicle from the date she left employment until the same is delivered to the plaintiff's custody. The plaintiff further sought a mandatory injunction to issue compelling the defendant to return the motor vehicle in question and a declaration that the defendant has committed an offence under Section 278A of the Penal code and an order for attachment of the same at her cost. It also prayed for costs of the suit.

On 1st August 2014, the plaintiff filed a notice of motion dated 31st August 2014 before the same court under certificate of urgency seeking for interlocutory mandatory injunction for restoration of the subject motor vehicle and a temporary injunction restraining the defendant from disposing of the motor vehicle pending hearing and determination of the application. The plaintiff alleged that it was apprehensive that the defendant who was no longer in their employment would damage, waste or dispose of the motor vehicle.

It is worth noting that the plaint in question alleges that the defendant had been in lawful employment of the plaintiff from 19th January 2012 until 19th May 2014 when she resigned. During the term of her employment, she was, since April 2012 given the motor vehicle in question on a loan basis for as long as she was in the plaintiff's employment and as she was repaying the same on a monthly basis. As at the time of her resignation on 19th May 2014, she is expected to have paid Sh. 546,987 out of a total of 1,410,000/- inclusive of interest of Ksh. 410,000. She was to complete payment in March 2016.

Upon her resignation from the plaintiff's employment on 19th May 2014, the defendant took off with the motor vehicle which the plaintiff seeks to recover as the employee - employer relationship no longer exists.

Upon receipt of the summons to enter appearance and notice of motion dated 31st July 2014, the

defendant filed a replying affidavit denying the claim in toto and alleging that her services were terminated on 26th May 2014 by a letter attached thereto (PSM 3) which letter released the defendant from employment immediately on account of her resignation letter.

She also filed a notice of preliminary objection on the grounds that

“the alleged cause of action is a dispute arising out of the relationship between the parties herein as employer and an employee and can only be exclusively determined by the Industrial Court pursuant to the express provisions of Article 162 (2) (a) of the Constitution as read with Section 12 (1) (a) of the Industrial Court Act”

And that the Chief Magistrate’s Court had no power, ability and or jurisdiction to declare that a criminal offence has been committed as prayed for in prayer (a) of the plaint.

The defendant did not file any defence in the said suit. It is alleged that when the notice of motion came up for hearing before the Chief Magistrate, she directed that the claimant/plaintiff do make the relevant application to have the primary file being Milimani CMCC No. 4163 of 2014 transferred to the appropriate court to preside over the court proceedings.

It is that “order” by the Chief Magistrate which prompted the applicant herein Isis Africa Ltd to file notice of motion dated 24th September 2014 before this court seeking among other orders – transfer of Milimani CMCC No. 4163 of 2014 to the Industrial Court at Nairobi for hearing and determination.

The application is supported by the affidavit of Steve Mburu sworn on 24th September 2014 and several annexures. The respondent Patricia S. Mumo through her advocates Mwangi & Guandaru advocates filed grounds of opposition dated 6th October 2014 and filed the same day in which they state among others, that the High Court has no jurisdiction under Section 18 of the Civil Procedure Act to transfer a suit pending in the Chief Magistrate’s Court to the Industrial Court. They further contend that the application herein should have been filed before the Industrial Court and that the suit pending before the Chief Magistrate was filed in court without jurisdiction and this court has no power to move a dead case to any other court. They also aver that the application is misplaced and the content therein scandalous.

When the matter came up for hearing before me on 7th October 2014, it was agreed that the respondent begins as they had a preliminary point of law to raise then the applicant would respond while at the same time arguing the whole substantive application.

Miss Oyagi on behalf of the respondent submitted that as the High Court and the Industrial Court are courts of the same status, the High Court has no power to transfer a suit from a Subordinate Court to the Industrial Court. She further submitted that the suit pending in the lower court arises from employee/employer relationship and that as such, it was filed in a wrong court and this court cannot exercise jurisdiction to transfer a matter that is non-suited for want of jurisdiction in the first instance. She submitted that the respondent was paying for the motor vehicle and that she was ready to set off the balance with her benefits which the applicant still owed her like mileage allowance. She submitted that the lower court having ruled that it had no jurisdiction to hear the matter, and having ordered that parties apply for its transfer, and the applicant having complied with the said order instead of appealing against it, this court could not assist him. She cited two cases of **Abraham Mwangi Wamigwi – Vs – Simon Mbiriri Wanjiku & Another [2012] eKLR** and **Wycliffe Mwangaza Kihugwa – Vs – Grainbulk Handlers ltd – Misc Application No. 159 of 2013** at Mombasa in support of her contentious.

In response, Mr. Mungai advocate for the applicant submitted that the dispute between the parties is not an industrial one but one for return of property held by the respondent by virtue of her former employment and that as the employment relationship terminated by her own resignation, there was no dispute pitying her and her former employer on any dues. He contended that this was a purely civil matter and that he was equally surprised when the Chief Magistrate directed that the parties file an application to transfer the suit from her court to the appropriate venue and that he filed this application in

compliance with the said court order. Further, that as no defence or counterclaim was filed disclosing a dispute between employee and employer it was mischievous for the respondent to allege that the dispute is industrial in nature. He relied on the 2 authorities namely **NRB HCC 609/2002 Agnes W. Kinuthia & 607 Others – Vs – University of Nairobi & 2 Others (2013) eKLR** and **NRB HCC No. 27 of 2013 Grace Thogori Komo – Vs – Dan Njagi Ndwiga (2014) eKLR** both by **Waweru J** to advance the argument that the High Court has powers to transfer suit to the correct forum where such suit was filed in a wrong court that lacked jurisdiction to hear it in the first instance. He further relied on Article 159 (2) (d) and Sections 1A & 1B of the civil Procedure Act. He further submitted that he considers the Industrial Court to be a division of the High Court and that under Section 18 of the Civil Procedure Act, this court has power to transfer suit pending in the Subordinate Court to itself or the Industrial Court.

Miss Oyagi maintained that the applicant should have withdrawn the suit from the lower court and filed the same in the Industrial Court which has jurisdiction and that they had raised a preliminary objection in the lower court to protest the jurisdiction of the court.

I have considered all the rival submissions made before me by the parties to this application. I have also considered the decided cases that were referred to me by the learned advocates for the applicant and the respondent.

The issue for determination by this court is whether the applicant has established a case to have the suit which it filed in the subordinate court transferred to the Industrial Court for hearing and final determination. Certain facts are not in dispute in this application. It is not disputed that the applicant filed a suit in the Chief Magistrate's Court Milimani over a property to wit, a motor vehicle registration number KBQ 725N Toyota saloon. It is further not in disputes that at the time the said motor vehicle was acquired, the respondent was in the employment of the applicant and that she got the motor vehicle on loan recoverable through monthly instalments until March 2016.

It is further an undisputed fact that the respondent resigned from the employment on 19th May 2014 by tendering a written notice and seeking to terminate her employment with immediate effect in lieu of notice. In the said letter of resignation addressed to the general manager of the applicant, she stated,

“Dear Sir,

Please accept this letter as my formal notice of resignation from Isis Africa Ltd with effect from today 19th May 2014. I have enjoyed my employment here and appreciate all I have learned. I would like to thank you for having me as part of your team.

While I believe that I am moving for good reasons, I am sorry to leave, and I thank you for your support during my time with the company, which I have found enjoyable and fulfilling.

I wish you all the best and God bless Isis Africa.

Yours faithfully,

Patricia Mumo”

Upon receipt of the aforesaid resignation letter, the applicant responded on 26th May 2014 releasing her immediately and pointing out that it was discovered that she was unable to carry out her duties as required by the organization. The applicant also attached the outstanding loans and motor vehicle schedule, demanding for settlement by Friday 6th June 2014.

This is the letter which the respondent claims terminated her employment. It however appears from the said letter that the respondent did not submit her resignation letter immediately upon writing it and hence, the reason why the employer's letter accused her of either failing to report on duty in time as expected on 23rd May and Monday 26th May 2014.

The record shows that the applicant's letter demanding for settlement of the loan and motor vehicle instalments by 6th June 2014 prompted the respondent to write to the applicant on 6th June 2014 demanding for her dues which are in excess of Ksh. 1,545,094 inclusive of her May and June salary "*in lieu of one month notice to terminate her employment, her severance pay...*" among others and stating that the loan advanced amounting to Sh. 75,850/- would be deducted from the claimed amounts. She gave 7 days notice to settle or face legal proceedings for unlawful termination of employment.

The applicant responded on 17th June 2014 denying the claims and demanding for the return of the motor vehicle registration No. KBQ 725N Toyota Corolla saloon within 7 days.

It was following the above bitter exchange that on 18th July 2014, the applicant filed suit in the magistrate's court seeking for return/possession of the subject motor vehicle followed by the notice of motion filed on 1st August 2014 seeking for interlocutory orders.

As at the time the said notice of motion came up for hearing, the respondent had not filed any defence to the claim. She submits that she did not file such defence because she did not wish to submit to the jurisdiction of the court which had no jurisdiction to hear the dispute which she considers to be an industrial dispute.

She however filed a notice of preliminary objection as well as a detailed replying affidavit on 11th August 2014 giving the history of the dispute and asserting her rights to the subject motor vehicle.

Before I answer the questions whether the applicant has established a case to have the suit in the Subordinate Court transferred to the Industrial Court, and following the above analysis, it is important to mention that the applicant's case on the face of it is a civil claim against the respondent for recovery of a motor vehicle whose legal ownership is not denied. Further, there is no dispute that the employer – employee relationship between the two disputants herein ended upon the respondent resigning on 19th May 2014, which letter of resignation never mentioned that there was acrimony leading to her taking that decision. Surprisingly, upon the applicant accepting the resignation, changed her story and claimed that her services had been terminated illegally as contained in her demand letter of 6th June 2014, the deadline which she was expected to have cleared her loans with the applicant.

To date, no suit or claim has been filed by the respondent in the Industrial Court which has the jurisdiction to hear and determine all disputes relating to employment and labour relations. Neither has she filed defence in the Subordinate Court asserting her claim to the motor vehicle subject matter of the dispute herein. She simply filed a replying affidavit to the notice of motion and a preliminary objection to the suit on account of the court lacking jurisdiction and asserting that the dispute was an industrial one.

In my view, the respondent's conduct in this matter is wanting. She has not been honest as she deliberately omitted her resignation letter in her affidavit sworn before the Subordinate Court and only attached the applicant's letter acknowledging her resignation. She further made the court to believe that her services with the applicant had been unlawfully terminated by sending a demand letter upon being asked to return a motor vehicle which she had been advanced by virtue of her employment. This court's view is that if the respondent was all along aggrieved by the applicant's conduct, nothing prevented her from lodging her claim against the applicant in the Industrial Court seeking for her dues as she may deem fit. She has instead, held the applicant hostage by alleging that she has a claim against it which can only be determined by the Industrial Court and not the Subordinate Court or this court, and in a sense, getting away with it. She has hung on her preliminary objections to determine the dispute which unfortunately, is not available to her.

My view is that there was no industrial dispute before the Subordinate Court necessitating this application for transfer to the Industrial Court. If there is such dispute, then it is the respondent who is aggrieved who should have filed the same in the Industrial Court and sought a stay of proceedings in the Subordinate Court stating that though purely civil, had a bearing on her main claim for her dues. It is not expected that after the employment relationship had ended as shown by the resignation letter of the respondent, the

applicant would, in seeking to recover its property from the respondent, drag her into the Industrial Court.

I quite concur with the decisions submitted by the respondent that where there is no jurisdiction, the High Court may not have jurisdiction to transfer the suit to the right forum, in line with the holding in **Omwoyo – Vs – African Highlands and Produce Ltd (2002) 1KLR 698** quoting with approval the decision in **Kagenyi – Vs – Musiramo & Another (1968) EA 48 Sir Udoma (CJ)** which decisions have been criticized by Hon. Waweru. In the two decisions relied on by Mr. Mungai as bad law in modern constitutional dispensation. However, I do not agree with the respondent that the lower court lacked jurisdiction to entertain the dispute as presented, and therefore I cannot transfer a claim from the court with jurisdiction to a court without jurisdiction.

I further do not agree with the applicant's submission that the Industrial Court is a division of the High Court. Article 162 (2) (a) of the Constitution clearly envisaged a court of the same status as the High Court and independent of the High Court as fortified in Article 165 (5) of the Constitution which ousts the jurisdiction of the High Court from entertaining any dispute that is exclusively in the preserve of the Industrial Court.

That being the case, the only court that would be clothed with the necessary jurisdiction to entertain an industrial dispute or to transfer an industrial dispute on matters from one subordinate court to another, assuming the subordinate courts had the jurisdiction or from therein to the Industrial Court and no other is the Industrial Court.

It therefore follows that this court cannot certainly cause a transfer of a matter pending in the Subordinate Court to the Industrial Court. That notwithstanding, and having found that the matter pending before the Chief Magistrate is not an industrial dispute as the pleadings before the said court (noting that an affidavit is not a pleading and neither is it evidence) do not disclose an industrial dispute, there is therefore nothing to be transferred to the Industrial Court as the Chief Magistrate's Court has jurisdiction to hear and determine that specific dispute for recovery of a motor vehicle being held by the respondents whose value is known.

In my view, it is not necessary to withdraw a suit from a court which has jurisdiction to another court that has no jurisdiction. The respondent's submissions, unfortunately, are tending to unclench the Chief Magistrate's courts jurisdiction to hear a purely civil suit for recovery of a movable property namely, a motor vehicle and the Chief Magistrate, albeit it is submitted that she conceded to that submission, there is no order or ruling attached to the affidavits filed in this court to that effect. If that were to be the case, the aggrieved party would be entitled to an appeal. there being no such order exhibited to demonstrate a decision that the Magistrate's Court has no jurisdiction to hear the dispute herein as filed and without this court purporting to sit on an appeal which it is not seized of, I find that the respondent's insistence that the Chief Magistrate's Court lacks jurisdiction to entertain a civil suit for recovery of a motor vehicle and hanging on the applicant's back is a deliberate move to obstruct the course of justice.

I am conscious of the fact that jurisdiction can only be conferred by statute or the Constitution not parties or even the court. However, I find it absolutely unwarranted for the respondent to force the applicant to submit to the jurisdiction of the Industrial Court when no claim has been filed therein and when it is crystal clear that the claim herein against her does not fall in the purview of the Industrial Court. It must be clearly understood by the parties hereto that this court is not conferring jurisdiction to the Chief Magistrate's Court to entertain the claim subject matter of this application. It is simply stating that there is nothing exhibited before this court that would make me arrive at a decision that the Chief Magistrate's court has no jurisdiction to entertain a claim as presented. If the respondent has a counter claim or set off to plead in view of the allegation, she knows the forum where to take her claim. She cannot be allowed to hold the applicant at ransom.

Accordingly, I order that:-

- 1) The preliminary objection raised by the respondent to this application is rejected and dismissed.

2) The notice of motion seeking transfer of Milimani CMCC No. 4163/2014 to the Industrial Court for hearing and final determination is rejected and dismissed.

3) Each party to bear their own costs of this application.

Dated, signed and delivered at Nairobi this 28th day of October, 2014.

R.E. ABURILI

JUDGE