REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 83 OF 2002

AGNES NGATIA & 61 OTHERS ..... PLAINTIFFS/APPLICANTS

VERSUS

MOI UNIVERSITY …..... DEFENDANT/RESPONDENT

RULING

Before me for determination is Notice of Motion dated 26th September, 2013 brought under Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiffs pray that the suit herein be transferred to the Industrial Court for hearing and disposal.

The application is based on the following grounds:-

1. That there is now in place an industrial court with powers to handle the issues raised in this suit.

2. That the issues raised in this suit largely relate to employment (and/or termination thereof) issues and the same can be completely dealt with by the Industrial Court.

3. That this suit has been pending for a long time and the Plaintiffs who are continuing to advance in age, are extremely anxious to have the same concluded within the shortest time possible.

4. That owing to the Constitution of Kenya 2010, Industrial and Labour Relations Issues fall within the jurisdiction of the Industrial Court.

It is further supported by the affidavit of John Mutoro, one of the Plaintiffs sworn on 26th September, 2013. It expounds on the grounds the application is premised on.

The application is opposed by way of a Replying Affidavit sworn by Wilkister Simiyu, a legal officer with the Defendant sworn on 17th October, 2013. The gist of the Replying Affidavit is that the deponent to the supporting affidavit has no authority of other Plaintiffs to swear the affidavit, that the Constitution of Kenya, 2010 does not take away the High Court's jurisdiction to entertain the matter, that the matter has substantially proceeded before this court and the transfer would delay its disposal and that all parties are resident and situated in Eldoret and so Eldoret High Court is the most appropriate to hear and conclude the suit.

The application was disposed of by way of filing written submissions. Those of the Applicants were filed on 20th November, 2013 and of the Respondent on 28th April, 2014.

I have considered the entire application together with the respective submissions and I take the following view of the matter.

In the case of **JAMES DAVIES NJUGUNA -VS- JAMES CHACHA (SUED AS CHAIRMAN PARKLANDS SPORTS CLUB & 3 OTHERS) (2013) @ KLR**, the court observed that since the hearing had not commenced, the matter could be transferred to the Industrial Court.

In the **SAMUEL MUTUNGA THIRU & 8 OTHERS -VS- COLGATE PALMOLIVE (EAST AFRICA) LTD (2013) @ KLR**, Hon. Justice H. P. G. Waweru opined:-

"In my considered view, the transitional provisions under Section 22 of the 6th Schedule to the Constitution are not included to facilitate two parallel but different jurisdiction with regard to employment and labour relations disputes. The intention is that where hearing of a matter filed in the High Court or in a subordinate court has already convened, such hearing ought to be concluded in the High Court or in the subordinate court.

On the other hand, where actual hearing has not commence, then such suit ought to be transferred to the High Court, that court being the Industrial Court."

It is trite that under Article 162 of the Constitution, the Employment and Labour Relations Court is distinct from the High Court. The latter's jurisdiction is limited to matters outlined under Article 165 (3) of the Constitution. But Section 22 of the 6th Schedule of the Constitution did cure the mischief that was foreseen on how to deal with matters that were already filed in a court without jurisdiction as envisaged by the Constitution, 2010. The same states;

"All judicial proceedings pending before any court shall continue to be heard and shall be determined in the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court."

The instant case is not a fresh matter and has substantially been heard by the High Court. Pursuant therefore to the transition clause, and further giving regard to the old age of this matter, justice can only be served if the High Court concluded it.

I am, in making the finding, minded about the requirement of the Employment Act No. 11 of 2007 which requires that labour matters be heard by the Industrial Court. But the Act is not subordinate to the Constitution and could not apply retrospectively so as to affect matters that had already been heard by the High Court. Had this been the position, nothing was easier than to state so in the transition clause.

In my considered view therefore, and in the spirit of expeditious disposal of justice, since this matter has actually commenced in the High Court, the High Court should continue with it to its logical conclusion. And this should be the best practice, anyway.

In the event, I dismiss the application with costs in the cause.

DATED and **DELIVERED** at **ELDORET** this 17th day of November, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Cheruiyot for the Plaintiffs/Applicants

Mrs. Khayo for the Defendant/Respondent