



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC APPLICATION NO 699 OF 2012

HENRY THIONG'O THAIRU.....APPLICANT

VERSUS

ITALIAN STYLES LIMITED.....RESPONDENT

RULING

1. The Applicant's Notice of Motion application dated 15th November 2012 and filed on 16th November 2012 was brought under the provisions of Section 3A and 18(1)(a) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. It sought orders for the transfer of Milimani **CMCC No 5019 of 2007 Henry Thiong'o Thairu vs Italian Styles Limited** to the Industrial Court, Nairobi for hearing and determination.
2. The said application was supported by the Affidavits of Peter Gachuhi sworn on 15th November 2012 and 21st March 2013 in which he had attached a copy of an order from the subordinate court which had directed that the Applicant herein to apply to have the suit transferred from the said subordinate court to the Industrial Court failing which the suit would stand as struck out.
3. On the other hand, on 6th December 2012, the Respondent filed Grounds of Opposition dated 4th December 2012 opposing the Applicant's application on the following grounds:-
 - a. **THAT the court had no jurisdiction to grant the orders sought.**
 - b. **THAT the Chief Magistrate's Court had no powers to order the High Court to hear this application.**
 - c. **THAT the application was a nullity in law and had no basis in law.**
 - d. **THAT the Applicant had been guilty of laches and had been indolent.**
 - e. **THAT the application was frivolous, vexatious and an abuse of the process of the court.**
4. In its undated written submissions filed on 29th April 2013, the Applicant averred that the suit in the subordinate court was filed on 11th June 2007 and that the legislation on Labour Laws was enacted on 26th October 2007. He stated that the legislation did not have transition clauses to provide for cases pending in the subordinate courts which necessitated him to seek the current orders from this court. He requested the court to bear in mind Article 159 of the Constitution which required the courts to proceed with undue technicality.
5. The Applicant pointed out that it was the Respondent who raised a preliminary objection in the subordinate court that that court did not have jurisdiction of the case between the Applicant and the Respondent. Consequently, the Applicant argued that the Respondent could not therefore object to the transfer of the suit to the Industrial Court.
6. On 7th May 2013, the Respondent filed its submissions dated 3rd May 2013. It argued that this

- court did not have any jurisdiction to deal with a matter the subordinate court had no jurisdiction to entertain. It relied on the case of **HCCC No 2893 of 1997 Joslin Mumo vs Gideon Muthama** (unreported) in which it argued Ang'awa J held the said view. The court considered this case but found the same not to have been of assistance to the Respondent. It was distinguishable from the facts of this case because although the subordinate court did not have jurisdiction to hear labour matter, the Industrial Court had such jurisdiction.
7. It also submitted that the Applicant was required to provide sufficient grounds why a suit should be transferred to another court as had been held in **Kagenyi vs Misaramo & Another [1968] E.A.** It was his submission that since this court did not have jurisdiction to deal with the matter, the only option the Applicant had was to withdraw the suit from the subordinate court and file the same afresh. He was emphatic that the Applicant's lawyer should shoulder the consequences of his negligent acts. He relied on the case of **HC Misc Civ App No 308 of 2002 Charles Omwata Omwoyo vs African Highlands and Produce Company Limited** (unreported) to support his argument.
 8. The Applicant filed the present application on 15th November 2012 which was within the thirty (30) days he had been granted by the subordinate court to file the said application. The said application is therefore properly in record. This court thereby rejects the Respondent's ground of opposition that the Applicant was guilty of laches.
 9. Perusal of the documents that have been tendered before this court show that the Applicant was an employee of the Respondent. It is common knowledge that the court that is seized of hearing and determining labour matters and relations is the Industrial Court. This court notes that this fact is not disputed as it was in fact the Respondent which raised an objection of the subordinate court hearing the **CMCC No 5019 of 2007 Henry Thiong'o Thairu vs Italian Styles Limited**.
 10. It is also not disputed that before the establishment of the Industrial Court, the subordinate courts had jurisdiction to hear employment and labour relation matters. The said Industrial Court was established under Article 162 (2)(a) of the Constitution of Kenya, 2010 and it became operational after the Applicant filed suit in the subordinate court. The court is therefore not persuaded by the Respondent's arguments that the Applicant's lawyer was negligent in having filed the suit in the subordinate court and/or that he was indolent as alleged or at all. The court accordingly rejects the said grounds of opposition.
 11. The Applicant filed its application under the provisions of Section 18 (1)(a) of the Civil Procedure Act. The said provision is misplaced as the matter the Applicant is seeking to transfer is not in the High Court. As was rightly argued by the Applicant, the court has an obligation to determine all matters without undue technicalities. This power is embodied both in the Civil Procedure Rules, 2010 and in the Constitution of Kenya, 2010.
 12. Order 51 Rule 10 of the Civil Procedure Rules, 2010 provides as follows:-

“(1) Every order, rule or other statutory provision under or by virtue of which any application is brought shall not be refused merely by reason of a failure to comply with this rule”

“(2) No application shall be defeated on a technicality or for want of form that does not affect the substance of the application.”

13. Article 159 (2) (d) of the Constitution of Kenya, 2010 that was referred to by the Applicant herein provides that:-

“ In exercising judicial authority, the courts and tribunals shall be guided by the following principles..

(d) justice shall be administered without undue regard to procedural technicalities.”

14. Section 3A of the Civil Procedure Act also stipulates that nothing in the said Act shall otherwise limit or otherwise affect the inherent power of the court to make such orders as are necessary for the ends of justice or to prevent abuse of the process of the court. In addition, Section 1A of the said Act also mandates this court, while exercising power, to bear in mind the overriding

- objectives, which is, to facilitate the just, expeditious and affordable resolution of disputes. This is aimed at attaining the efficient disposal of the business of the court.
15. Having carefully analysed the submissions by the parties and the legal position, this court has no hesitation in finding that the technical objections by the Respondent regarding the ruling of the subordinate court find no place in the new dispensation of justice. The Respondent's Grounds of opposition that the application herein was a nullity in law, had no basis in law, was vexatious, frivolous and an abuse of the process of the court are hereby rejected. The court finds that the Respondent's Grounds of Opposition dated 4th December 2012 and filed on 6th December 2012 have no merit and the same are hereby rejected in their entirety.
 16. On the other hand, it is the view of the court that it will be cost effective and in line with the overriding principles of dispute resolution to transfer the suit in the subordinate court to the Industrial Court, Nairobi as opposed to the Applicant filing a fresh suit as had been contended by the Respondent.
 17. Accordingly, the court finds that the Applicant's Notice of Motion application dated and filed on 15th November 2011 is merited and the same is hereby allowed as prayed.
 18. Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 30th day of August 2013

J. KAMAU

JUDGE