



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION 468 OF 2010

BERNARD ALOYO YAYA. PLAINTIFF/APPLICANT

VERSUS

KENYA REVENUE AUTHORITY.DEFENDANT/RESPONDENT

R U L I N G

Before me is a Notice of Motion dated 29th September 2010 filed by M/s Maina Wachira & Company Advocates for the plaintiff/applicant **BERNARD ALOYO YAYA**. It was filed under Order 50 rule 1 of the Civil Procedure Rules as well as section 18(1) (b) and section 3A of the Civil Procedure Act (**Cap 21**), and section 87(2) and 93 of the Employment Act 2007.

The prayers in the application are as follows: -

- 1. That this honourable court be pleased to withdraw Nairobi Chief Magistrate's Court case No. 12505 of 2004 between Bernard Aloyo Yaya and Kenya Revenue Authority from the said court.**
- 2. That as a consequence of prayer 1 above this honourable court be pleased to transfer the said Nairobi Chief Magistrate's Court Case No. 12505 of 2004 from the said court to the Industrial Court of Kenya for hearing and disposal.**
- 3. That costs of this application be provided for.**

The application has grounds on the face of the Notice of Motion. It was filed with a supporting affidavit sworn by Maina Wachira advocate for the plaintiff/applicant. It was deponed in the said affidavit, inter alia, that the case was filed in the Chief Magistrate's Court at Milimani on 12th August, 2004; that the suit which was in the nature of an employment dispute was filed in the court with competent jurisdiction; that the said court was deprived of the said jurisdiction by the enactment of the Employment Act 2007 which required employment disputes to be filed at the Industrial Court; that when the matter came up for mention before the Chief Magistrate's Court on 10th June 2010, the said court was of the view that it lacked the jurisdiction to hear and determine the dispute by the operation of law; and that in the interests of justice and fairness the suit be transferred to the Industrial Court of Kenya for expeditious hearing and determination.

The application was served. The defendant/respondent did not file any response to the application.

On the hearing, date Mr. Odicho appeared for the applicant, while Mr. Nganga appeared for the

respondent. Counsel for the respondent did not oppose the application.

I have considered the application and the law. Though the application is well intentioned, and was filed following the directions of the learned Magistrate, and is unopposed, in my view it is for dismissal.

The first reason is as follows.

I have perused the provisions of the Employment Act No. 11 of 2007 which came into effect on the 2nd of June 2008 and the Labour Institutions Act No. 12 of 2007 which also came into force on 2nd June 2008. I have also have perused section 18 of the Civil Procedure Act (Cap 21).

Under the above section of the Civil Procedure Act, the High Court may on its own motion or on application by any of the parties, transfer any suit, appeal or other proceedings, pending before it to any court subordinate to it and competent to try and dispose of the same. It may also withdraw any suit or any other proceedings pending in any court subordinate to it and try the same or transfer the same for trial or disposal to any court subordinate to it and competent to try and dispose of the same. It may also transfer a suit to the court from which it was initially withdrawn, for trial and disposal.

In my view, the subordinate courts envisaged under section 18 of the Civil Procedure Act (Cap 21) are the courts in which the Civil Procedure Act (Cap 21) and the Civil Procedure Rules apply. These present proceedings having been brought under the Civil Procedure Rules, in my view, cannot be transferred to the Industrial Court which is not governed by the Civil Procedure Rules. The requirements applicable to proceedings in the Industrial Court are totally different from those applicable in civil proceedings. The contents of pleadings in the Industrial Court are also totally different from those applicable to civil proceedings. The rules which apply in the Industrial Court were made under the Labour Institutions Act as Legal Notice No. 78 of 2010. The distinction between the procedures applicable in proceedings under the Civil Procedure Rules on the one hand, and those in the Industrial Court, in the other hand, can be clearly demonstrated as hereunder: -

The proceedings before the Magistrate herein were started by way of a plaint. Order 7 of the Civil Procedure Rules gives what shall be included in a plaint. Order 7 rule 1 provides as follows: -

“1. (i) The plaint shall contain the following particulars: -

a) The name of the court in which the case is brought

b)The name, description and residence of the plaintiff and address for service,

c) The name, description and place of residence of defendant so far as can ascertained

d)Where the plaintiff or defendant is a minor or a person of unsound mind a statement to that effect.

e) An averment that there is no other suit pending and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter;

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averment contained in the plaint.

(3) The court may on its own motion or on application of the defendant order to be struck out any plaint which does not comply with sub rule (2) of this rule.”

On the other hand, the Employment Act No. 11 of 2007 and the Labour Institutions Act, and Rules made thereunder as L.N 78 of 2010 provide that the proceedings before the Industrial Court have to be brought by way of a complaint. In this regard, Section 87 of the Employment Act No. 11 of 2007 provides as follows:

“87(1) Subject to the provisions of this Act whenever –

- (a) An employer or employee neglects or refuse to fulfil and contract of service: or***
- (b) Any question, difference or dispute arises as to the right or liabilities of either party; or***
- (c) Touching any misconduct, neglect or ill treatment of either party or any injury to the person of either party, or any contract of service the aggrieved party may complain to the Labour Officer or lodge a complaint or suit to the Industrial Court.***

(2) No Court other than the Industrial Court shall determine any complaint or suit referred to in subsection 1.

(3) This section shall not apply in a suit where the dispute or the contract of service or any other matter referred to in subsection 1 is similar or secondary to the main issue in dispute.”

It is clear from the above that what is to be lodged in the Industrial Court is a complaint, not a plaint.

In addition, the Rules of Procedure in the Industrial Court made under Legal Notice of 78 of 2010, describe the parties in proceedings before the Industrial Court as claimants and respondents. This is totally different from Plaintiffs and Defendants in civil proceedings under the Civil Procedure Act and Rules. The claimant, in proceedings before the Industrial Court is required to file a statement of claim and not a plaint as is currently before the learned magistrate. The respondent files a statement of response rather than a defence. Perusal of Rule 4 and 5 of the Industrial Court Rules shows that the pleadings, and procedure, and content of pleadings therein are totally different from those in civil suits. The above rules provide: -

“4. Institution of claim.

A party who wishes to refer a dispute to the court under any written law shall file a statement of claim setting out: -

- (a) The name, physical and mailing address and full particulars of the claimant***
- (b) The name, the physical and mailing address and description of the respondent;***
- (c) The name, the physical and mailing address of any other party involved in the dispute.***
- (d) the facts and grounds of the claim specifying issues which are alleged to have been violated, infringed, breached, not observed and in case of a trade dispute the rights of the party not granted which ought to be granted, any other employment benefits sought under the terms of collective bargaining agreements on which the jurisdiction of the court is involved;***
- (e) the principle or policy, contention, law or industrial relations issue or management practice to be relied upon; and***
- (f) The relief sought.***

5. A verifying affidavit to accompany a statement of claim.

(1) A statement of claim filed under rule 4 must be accompanied by an affidavit verifying the facts relied on.

(2) Where a claimant, in the cause of hearing seeks to adduce additional evidence, the claimant may, with the leave of the court file a further affidavit or adduce other evidence.”

In my view, the pleadings and contents of the pleadings and procedures in the Industrial Court are totally different from those that apply before the learned magistrate. There is definitely more detail required in the Industrial Court to describe the parties, the claim, and the relief sought. In addition, unlike in the case of a plaint where the affidavit filed with a plaint is meant to confirm the correctness of the averments, the verifying affidavit to be filed under Rule 5 of the Industrial Court Rules is for purpose of verifying the facts relied on. I am therefore, of the view that as the pleadings and procedures in the two forums being materially different, the two cannot be interchanged. On that ground, this application will have to fail.

The second reason why the application will not succeed, is that Acts of Parliament come into operation on the effective date. The Employment Act No. 11 of 2007 came into effect on 2nd June 2008 in accordance with section 1 of that Act. The Labour Institutions Act No. 12 of 2007 by virtue of section 2 of the Act, came into force on the 2nd June, 2008. None of these Acts provides for retrospective operation of the new legislation, nor do they provide for the taking over of cases which were already pending in other courts. Therefore, in my view, proceedings which were commenced in ordinary courts on employment matters, before the commencements dates of the new legislation, will have to be heard and determined in the courts in which they were instituted. My above view is strengthened by the provisions of section 92 of the Employment Act No. 11 of 2007, which states: -

“92 (1) The Employment Act is repealed.

(2) except where otherwise provided the provisions of this Act shall be in addition to, and not in substitution for or in derogation of any provisions of any other Acts”

In my view, since the new legislation did not specifically provide that all existing cases were to be taken over by the Industrial Court, and since the above section provides that the new laws were not meant to be a substitution or derogation of any existing laws, that means that, cases that were lawfully filed in various courts before the effective dates could continue in those other courts. The Civil Procedure Act (Cap 21) and the Civil Procedure Rules under which the case before the learned magistrate was instituted, are definitely still alive and operating.

For the above reasons, I dismiss the application, and hold that the Magistrate’s Court has jurisdiction to hear and determine the suit herein. I decline to transfer the case to the Industrial Court. I set aside the orders of the learned magistrate, and order that the Magistrate’s Court do hear and determine the case before it.

Costs in the cause.

Dated and delivered at Nairobi this 14th day of February 2011.

GEORGE DULU
JUDGE

In the presence of

Mr. Irari for the applicant
C Muendo – court clerk