

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

MISC. CIVIL APPLICATION NO. 89 OF 2010

STEPHEN NDIRANGU

NDUNGO.....APPLICANT

VERSUS

G. K. MATHENGE T/A MATHENGE & MUCHEMI

ADVOCATES.....1ST RESPONDENT

WANJUKI MUCHEMI.....2ND
RESPONDENT

RULING

Pursuant to the provisions of *Section 18 (1) (b) (ii)* of the Civil Procedure Act and *Section 87 (1) Part XII* of the Employment Act (No. 11 of 2007) and Section 4 of the Judicature Act, Stephen Ndirangu Ndungo, the Applicant herein, took out the Motion dated 4th June 2010, whereupon he sought for an order to issue to transfer **Nyeri C.M.C.C. No. 58 of 2008** to the Industrial Court for hearing and Disposal. He also prayed for costs. The Motion is supported by the affidavit of Andrew Kariuki, learned advocate for the Applicant he swore on the date of the Motion. When served with the Motion, G. K. Mathenge and Wanjuki Muchemi, being the 1st and 2nd Respondents, each filed grounds of opposition through their respective advocates to oppose the Motion.

Mr. Andrew Kariuki, learned advocate for the Applicant, urged this Court to issue an order to withdraw **Nyeri C.M.C.C. No. 58 of 2008** from the Chief Magistrate's Court, Nyeri and transfer it to the Industrial Court for hearing and determination because the dispute between the parties is that of an employer and employee. I have looked at the pleadings filed before the Chief Magistrate's Court and it is clear that the Applicant alleges that he was under the employment of the Respondents from 10th September 1984 upto 28th November 2003 when the Respondents terminated his services. The Applicant says that by the time of his dismissal, the Respondents had not paid him salary for the month of November 2003, one month's salary in lieu of notice, Housing allowance, redundancy pay and overtime, all totalling to Ksh.259,010/25 which he now prays to be paid. The Respondents have each filed a defence to deny the Applicant's claim. In response to the Application, the Respondents urged this Court to dismiss the same because there is no competent suit to transfer. The question which must be answered is whether or not in the first instance, the suit was competently before the Chief Magistrate's Court? There is no doubt that the dispute between the Applicant and the Respondents is that between an employee and an employer. The same was filed on 14th February 2008. The Employment Act, 2007, (No. 11 of 2007) came into effect on 2nd June 2008. Under *Section 87 (2)* of the aforesaid Act, the ordinary civil courts were barred from hearing such disputes. The Act gave the exclusive jurisdiction to the Industrial Court to hear and determine a dispute between employee/employer. However, that provision came into effect after the suit before the Chief Magistrate's Court had been filed. By that time, the Employment Act (Cap. 226 Laws of Kenya), was still in force. Under Section 40 of the Employment Act (Cap. 226 Laws of Kenya) an aggrieved party had a

right to file a complaint or suit before any Magistrate's Court. It cannot therefore be said that the Applicant's suit was before a Court without jurisdiction. The preliminary objection raised by the Respondents is dismissed.

The dispute being that between an employer and employee, the competent court at the moment is the Industrial Court. I find the Motion to be well founded. It is allowed as prayed. This ruling only relates to the 2nd Respondent since the suit against the 1st Respondent was withdrawn upon his death.

Dated and delivered at Nyeri this 3rd day of June 2011.

J. K. SERGON

JUDGE

In the presence of Mr. Chweya holding brief for Mr. Mungai for the 2nd Respondent and Mr. Kimunya holding brief for Kariuki for Plaintiff.