



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL & TAX DIVISION – MILIMANI**

**CIVIL CASE NO. 465 OF 2011**

**DERECK MUNAGWI**  
**LUBUTSE.....APPLICANT**

**VERSUS**

**ROM EAST AFRICA LIMITED (IN**  
**RECEIVERSHIP).....DEFENDANT/APPLICANT**

**RULING**

The application before the court is brought by a notice of motion dated 10<sup>th</sup> May, 2011, and taken out under Sections 18 and 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law. By the application, the plaintiff/applicant seeks the following orders from the court: -

- (1) That the Honourable court do issue an order for transfer of Civil Suit No. 1497 of 2010 to the Industrial Court at Nairobi.**
- (2) That the Honorable court do issue any such further or other orders as it may deem fit in the interest of justice.**
- (3) That costs of this application be in the cause.**

The application is supported by the annexed affidavit of Purity K Makori and is based on the following grounds: -

- (a) That the applicant filed Civil Suit No. 1497 of 2010 before the Chief Magistrate’s Court at Milimani on the 19<sup>th</sup> of April, 2010.**
- (b) That the Employment Act 2007 has since given the Industrial Court jurisdiction to deal**

**with all matters regarding disputes between employers and employees.**

**(c) That it is in the interest of justice the orders sought herein be granted so that the matter can be dealt with in the right forum.**

The wording of paragraph (b) herein above gives the impression that the Employment Act gave the Industrial Court jurisdiction to deal with all matters regarding disputes between employers and employees after the filing of this suit in the Chief Magistrate's Court at Milimani. That is incorrect. On the contrary, the correct position is that the suit herein was filed in the lower court in 2010 which was long after the Employment Act had commenced operation on 2<sup>nd</sup> June, 2008. Therefore, the parties herein were bound by the Employment Act and should have filed this suit in accordance with the provisions of that Act.

Section 87 (1) of the Act states as follows -

**“Subject to the provisions of this Act whenever –**

- (a) an employer or employee neglects or refuses to fulfill a contract of service; or**
- (b) any question, difference or dispute arises as to the rights or liabilities of either party; or**
- (c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the Labour Officer or lodge a complaint or suit in 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 over a contract of service or any other matter referred to in subsection (1) is similar or secondary to the main issue in dispute.”**

In addition to the above provisions, paragraph 12 of the supporting affidavit states that –

**“The claim by the applicant against the respondent is that of the employer failing to provide safe working environment resulting to his injury while under a contract of service.”**

This clause places the applicant's complaint within the scope and ambit of Section 87 (1) of the Act. That in turn invokes Section 87 (2) which constitutes the Industrial Court the only court with the jurisdiction to hear and determine this matter.

The outcome of these observations is that the Chief Magistrate's Court has no jurisdiction over this matter. Since it lacks jurisdiction, it follows that the case is before a court which lacks jurisdiction to try it, and therefore there is nothing to be transferred.

In the Ugandan case of **KAGENYI v MUSIRAMO & ANOR** [1968] EA, Sir Udo Udoma C.J., held that in relation to Section 18 of the Ugandan Civil Procedure Act, which was in pari materia with Section 18 of Cap 21 of the Laws of Kenya, an order for the transfer of a suit from one court to another cannot be

made unless the suit has been in the first place brought to a court which has jurisdiction to try it. This case has been followed and applied in several subsequent Kenyan cases such as **OMWOYO v AFRICAN HIGHLANDS & PRODUCE CO LTD** [2002] I KLR 698, among others.

Since the case sought to be transferred was filed in a court which has no jurisdiction to try it, this court lacks the competence to transfer it from that court. In a nutshell, there is nothing to be transferred.

This application is accordingly dismissed.

**DATED** and **DELIVERED** at **NAIROBI** this 28<sup>th</sup> day of July, 2011.

**L NJAGI**

**JUDGE**