



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 273 OF 2011

PHILOMENA MUTHEU NZYOKA (suing as administrator and Legal representative of the estate of

TIMOTHY KIEMA

MUSANGO.....APPLICANT

-VERSUS-

TRANSPARES KENYA

LIMITED.....RESPONDENT

RULING

I have the Notice of Motion dated 13th June, 2011 premised under Sec. 3A and Sec. 63 (e) of the Civil Procedure Act for determination.

It seeks prayers that the CMCC No. 1402/08 Milimani Courts be transferred to the court for trial and determination. It is supported by grounds shown on the Notice of Motion and by supporting affidavit sworn by the Applicant on 13th June, 2011.

The brief background of this application must be stated and which in any event, is narrated by both parties. However, I may state that the replying affidavit sworn by Martin Gichovi Mwaniki, the Respondent's Advocate sworn on 20th June, 2011 has appropriately annexed the pleadings filed in the aforesaid suit.

As per the Plaintiff (a widow and the legal representative of the estate of Timothy Kiema Musango, the deceased), the deceased was working as a driver with the Defendant and met with a fatal accident in Uganda during course of his employment.

As per the Amended Plaint, the Plaintiff claims damages under the Law Reform Act, Fatal Accidents Act and Work Injury Benefit Act (Act No. 13 of 2007) (referred to as the Act)

In the Amended Defence, the claims of the Plaintiff are denied and in paragraph 7 thereof the Jurisdiction of the subordinate court was denied on the grounds that –

(1) *The cause of action arose in Uganda which is outside the territorial jurisdiction of the court under the Magistrates Court Act.*

(2) *The claim is governed under the Work Injury Benefits Act (2007) and by virtue of Sec. 58 (2), the jurisdiction of the court was ousted.*

The Preliminary Objections were raised by the Defendant raising the aforesaid two issues, which was heard and determined by The Hon. C.M. Mr. B N Olao vide his Ruling delivered on 27th May 2011. He upheld the objections but directed that the court would not strike out the plaint as suggested but will stay the proceedings and directed the Plaintiff to have it transferred to the High Court.

The learned Chief Magistrate observed that apart from the Work Injury Benefit Act, the Plaintiff is claiming under other Acts.

Hence the application, which is opposed, the Respondent having filed grounds of opposition and replying affidavit as mentioned hereinabove.

Mr. Nyagito, the learned counsel for the Applicant submitted that the accident did occur in Uganda but relied on Sec. 11 (1) of the Act which stipulates:

“(1) if an employee carried on business chiefly in Kenya and an employee ordinarily employed in Kenya is injured in accident while temporarily deployed outside Kenya, the employee is subject to sub-section (3), entitled to compensation as if the accident had happened in Kenya.”

He contended that the Kenyan Courts are thus having jurisdiction to entertain the claim of the Plaintiff. I shall have no hesitation to accept this proposition as per the pleadings in the suit.

Mr. Mwaniki, the learned counsel for the Respondent relied on Sec. 58 of the Act which stipulates that any claim regarding accident occurred before the commencement of the Act, shall be deemed to have been lodged under the Act.

Having relied on the said provision, it was submitted that the claim must be notified as per Section 21 of The Act to the employer who in turn has to refer the same to the Director appointed under the Act.

I may not, at this stage, give any finding on this submissions, in view of the fact that the death occurred in 2005 and the suit was filed on 6th March, 2008 and Notice of demand is averred and denied. Thus this issue would have to be heard and determined at the hearing.

It shall be apposite at this stage to determine the issue, i.e. whether after the subordinate court having accepted that it lacked jurisdiction, this court can now entertain the application.

Mr. Nyangito urged the court that it has jurisdiction to do so as the subordinate court itself directed the Applicant, that it shall be in the interest of justice and that the Defendant shall not suffer any prejudice if application is granted. He relied on Article 159 2(d) and (e) of Constitution which directs that the justice shall be administered without undue regard to procedural technicalities, and that the purpose and principles of the Constitution shall be protected and promoted by the courts.

Mr. Mwaniki on the other hand emphasized that the issue of jurisdiction goes to the core of the matter and, if the court has ruled that it does not have the jurisdiction, the suit is a nullity and not in existence to be capable of being transferred to this court.

Two High Court cases were relied upon by Mr. Mwaniki, namely,

- (1) ***Omwoyo –vs- African Highlands & Produce Co. Ltd. (2002) 1 KLR 698.***
- (2) ***Private Development Co. Ltd. –vs- Rebecca Ngonyo & Another 2006 e KLR.***

In both cases, the applications to transfer the suit from one court which did not have pecuniary jurisdiction to the one which has that jurisdiction were disallowed.

Mr. Nyagito, on the other hand, relied on cases of –

- (1) ***Beatrice Awino –vs- Konoike Veidekkes (Misc. C.A. 94/05)***
- (2) ***Monier 2000 Ltd. –vs- Kenindia Assurance Co. Ltd. (Misc. Application No. 789/07)***
- (3) ***Insect Ltd. –vs- Mastermind Tobacco Co. Ltd. (Misc. Application No. 363.04)***
- (4) ***Geoffrey Mutali –vs- Albert Marango Mangeni & Others (Misc. C. A 8/05)***

Out of those cases, only one which is relevant to the Applicant is ***Monier’s case (supra)***. In the said matter, the Defendant had intended to plead Counter-claim exceeding the jurisdiction of the court where the plaint was filed. Thus he made an application to transfer the suit to the High Court and leave to file the pleadings as per the draft. That was the reason the application was granted to preserve interest of justice.

Before me, the suit was filed in the court, the Defence raised issue on jurisdiction of the court and the court agreed that it did not have territorial jurisdiction and asked the Applicant to apply to this court so that the suit be transferred to appropriate court.

The Plaint was filed in the subordinate court considering Sec. 11 of the Act. It is pertinent to note that the Plaintiff could not have challenged the said Ruling because of the other orders made in the Ruling.

The discretion of this court granted under Sec. 1A and 3A of the Civil Procedure Act is wide and, of course, unfettered. Sec. 1A gives the power to the court to facilitate just, expeditious, proportionate and affordable resolution of the Civil proceeding. Sec. 3A of the Civil Procedure Act further gives the inherent power to the court to make orders necessary for the ends of justice.

Sec. 4 of the Civil Procedure Act stipulates that nothing herein contained (i.e. in Part I of the Civil Procedure Act) shall operate to give any court the jurisdiction over suits, in which the amount or value of the subject-matter exceeds its pecuniary limits.

It shall be appropriate to quote the said Section:-

“4. Save in so far as in otherwise expressly provided, nothing herein contained shall operate to give any court jurisdiction over suit the amount of value of the subject-matter of which exceeds the pecuniary limits, if any, of its ordinary jurisdiction.”

The Chief Magistrate's court did not lack the pecuniary jurisdiction but it upheld the objection against its jurisdiction over the territorial issue.

The authorities, which are before the court and also within my own knowledge, have decided the issue of pecuniary jurisdiction and if the suit is filed in a court which lacked the pecuniary jurisdiction, the High Court cannot have any discretion to transfer such case to the courts having such jurisdiction.

But the issue before the sub-ordinate court was not of pecuniary jurisdiction and that could be the reason the learned Chief Magistrate exercised his discretion to refer the matter to this court to be determined.

It is on record that the Respondent has applied for leave to appeal against the Ruling but has not applied for only interim orders. Thus this court is at liberty to decide this matter.

It was also contended that the matters between the employers and employees should be heard only by the Industrial Court as stipulated in Sec. 12 of the Industrial Dispute Act (Act No. 12 of 2007).

It may be true that under the Act, this matter should be referred to the Industrial Court but looking at the Amended Plaint, the claims of the Plaintiff are also made under two other Acts which are outside the jurisdiction of the Industrial Court.

In short I have considered the circumstances of this case and, despite the shortcomings in the pleadings and in the application, I do think that in the interest of justice, I shall not close the door of this court on the Applicant.

I order that the suit be transferred to this court.

Costs in the cause.

Dated, signed and delivered at Nairobi this 7th day of **July, 2011**

K. H. RAWAL

JUDGE

7.07.2011