



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 4973 OF 1992

D. P. BACHHETAPLAINTIFF

VERSUS

THE GOVERNMENT OF THE

UNITED STATES OF AMERICA.....DEFENDANT

RULING

The Notice of Motion dated 20th September, 2011 is premised under Article 162(2) (a) of the Constitution of Kenya, Sec. 1A and 1B of the Civil Procedure Act and Sec. 12 of The Industrial Court Act, 2011. It seeks the order that the present suit be transferred to the Industrial Court for hearing and determination. The application is supported on the grounds set forth on its face and supporting Affidavit sworn by Clement Muturi Kigano, the counsel for the Plaintiff/Applicant, on 20th September, 2011.

The Defendant/Respondent has opposed the application and has filed the grounds of opposition dated 3rd October, 2011.

It is common ground that this is a very old case and claims are made for damages in respect of wrongful termination of the employment of the Plaintiff by the Defendant. The judgment on liability was entered on 29th September, 2001 and the issue which remains to be determined is assessment of damages.

The Plaintiff contends that on promulgation of the Industrial Court Act (No 20 of 2011), and by virtue of Sec. 12 thereof, the Industrial Court is vested with exclusive jurisdiction to hear and determine the present suit which relates to the employment dispute. Mr. Kigano relied on the provisions of Articles 162(2) and (3), 165 (5)(b) and Clause 22 of Sixth Schedule of the Transitional and Consequential Provisions of the Constitution, which I quote:

162. (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the court contemplated in clause (2).

165. (5) **The High Court shall not have jurisdiction in respect of matter –**

(a) -----

(b) **falling within the jurisdiction of the courts contemplated in Article 162 (2).**

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6th Schedule

22. All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court. (emphasis mine)

It is not in doubt that the Parliament has, as per the aforesaid Provisions of Article 162 of the Constitution, enacted the Industrial Court Act and Sec 4 thereof stipulates that the Court is established for purposes of settling employment and industrial relations disputes and that it shall be a superior court of record with status of the High Court. Moreover, Sec. 12 of the Act gives exclusive original and appellate jurisdiction to hear and determine all disputes referred to in accordance with Article 162(2) of the Constitution.

In opposition to the aforesaid submissions Mr. Fraiser, the learned Counsel for the Defendant/Respondent, contended that the application lacks merit. He started with the provisions of the Constitution and contended that the enactment of the Act, which commenced on 30th August 2011, does not oust the jurisdiction of this Court which had the jurisdiction to hear and determine the present suit. The parties had submitted to its jurisdiction since the filing of this suit and the only issue remaining to be heard in this case is that of assessment of the damages. The delay decried by the Applicant was as per the record of the case due to non action by the Plaintiff. This court is the superior court with unlimited jurisdiction in civil and criminal matter. Moreover it was stressed that the wordings of Clause 22 of the Transitional Provisions have specifically retained the powers of the courts to continue to hear the judicial proceedings pending before it.

I have carefully considered the application, the submissions made, the grounds in favour and against it and specifically the applicable Constitutional and Statutory Provisions. It cannot be disputed that this suit was filed in this court and not in any other relevant Tribunals or the court in existence at the time of presentation. The parties have unhesitantly submitted to the jurisdiction of this court. The Industrial Court Act 2011 came into force on 30th August 2011 which does not have any retrospective effect. More importantly, Clause 22 of the sixth schedule of the Transitional and Consequential provisions of the Constitution retains the powers of the courts to continue hearing the cases before it when it stipulates, ***“All judicial proceedings pending before any court shall continue to be heard and be determined by the same court...”***

I do not understand ground 5 of the application and I am also not told how it shall not be just, more efficient, prudent and expeditious if this court shall continue to hear this part heard old matter. I may also agree that the Industrial Court is not a subordinate court to the High Court and cannot transfer a case to it as per the provisions of the Civil Procedure Rules. Finally, I may also state that no compelling grounds are placed before this court to exercise its inherent powers under Sec. 1A and 1B of the Civil Procedure Act.

The upshot of all the above is that I am not inclined to grant the prayer of transfer of this suit to the Industrial Court. I dismiss the application. The cost thereof in the cause.

I am also directing the Registry to give a hearing date for this case on priority before the end of the Court session.

Orders accordingly.

Dated, signed and delivered at Nairobi this 4th day of **November, 2011**

K. H. RAWAL

JUDGE
4.11.2010