



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL CASE NO. 747 OF 2005**

**JOSEPH MAINA GICHUHI ..... PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD..... DEFENDANT**

**AND**

**CIVIL CASE NO. 848 OF 2005**

**SHADRACK OPON ADEM ..... PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LTD..... DEFENDANT**

**CONSOLIDATED RULING**

In each of these two matters, there is an application by the Plaintiff by **notice of motion dated 5<sup>th</sup> October 2011** seeking the main order that the case be transferred to the **Industrial Court** for hearing and determination. The main ground for the application is that the Industrial Court now has exclusive jurisdiction to hear and determine all disputes involving employment and industrial relations.

The applications are stated to be brought under **sections 17, 18 and 3A** of the **Civil Procedure Act, Cap 21**. There are supporting affidavits sworn by the Plaintiff's advocate, **RAY TOLLO**.

The Defendants have opposed the applications by grounds of opposition dated 17<sup>th</sup> October 2011. Those grounds are:-

1. That the High Court has no jurisdiction under sections 17 and 18 of the Civil Procedure Act to transfer a case to the Industrial Court as -

(a)The Industrial Court is not a subordinate court but a

Court with the same status as that of the High court as per the provisions of sections 4(2) of the Industrial Court Act, 2011 and section 162(2) of the Constitution, 2010.

(b) The exclusive jurisdiction clauses in the Employment Act, 2007, the Labour Institutions Act,

2007 and the Industrial Court Act, 2011 do not in any way oust or deprive the High Court of jurisdiction in cases properly filed before the High Court over which it has taken cognizance.

2. That the present suit was filed in the year 2005 prior to the coming into force of the Employment Act, 2007, the Labour Institutions Act, 2007 and the Industrial Court Act, 2011 which conferred exclusive jurisdiction to the Industrial Court, and thus cannot be transferred as: -

(a) By virtue of section 23 of the Interpretation and General Provisions Act, Cap 2 the High Court is property seized with the case that arose and was filed during the subsistence of the Employment Act, Cap. 226 (now repealed) which the High Court had civil jurisdiction over.

(b) The provisions of the sections 87 and 90 of the Employment Act, 2007 expressly deny limitation.

(c) The legislation of 2007 does not apply retrospectively to substantively affect matter instituted and pending in the High Court prior to the commencement dates of the 2007 statutes.

I have considered the submissions of the learned counsels appearing. In so far as sections 17 and 18 of the Civil Procedure Act are concerned, the application is clearly misconceived. Section 17 deals with situations where suit may be instituted in any one of two or more subordinate courts and is instituted in one of those courts. In that situation, the High Court has power to determine in which of the several courts having jurisdiction the suit shall proceed.

In the present cases, we are dealing with cases filed in this court.

Regarding section 18, this court has power thereunder to transfer any suit, appeal or other proceedings pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same. Under the same section, this court may also withdraw any suit or other proceedings pending in any court subordinate to it and thereafter try or dispose of the same; or transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or re-transfer the same for trial or disposal to the court from which it was withdrawn.

The Industrial Court is no longer a court subordinate to the High Court.

But in so far as the application invokes the inherent power of this court under section 3A of the Civil Procedure Act, the court certainly has power to transfer a suit from itself to the Industrial Court, such suits having been filed here when this court had jurisdiction to deal with them.

It is common ground that the suits herein involve disputes over employment. Except for the transitional jurisdiction provided for in **section 22** of the **6<sup>th</sup> Schedule** to the Constitution, this court no longer has jurisdiction to deal with suits involving disputes relating to employment and labour relations.

**Article 162** of the provides as follows in **Clauses (2)(a)** and **(3)**: -

**“(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) ....”**

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

And **Article 165 (5)(b)** of the Constitution provides as follows: -

**“(5) The High Court shall not have jurisdiction in respect of matters-**

(a) .....

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

The transitional provision in section 22 of the 6<sup>th</sup> schedule is as follows: -

**"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."**

In a recent **ruling dated 30<sup>th</sup> November and delivered on 2<sup>nd</sup> December 2011** in Nairobi HCC 515 of 2003 I had this to say regarding that transnational provision:-

**"The term "...shall continue to be heard..." is in my view instructive. It can only mean that the "judicial proceedings pending" are those cases that are part-heard, not those whose hearing is yet to commence.**

**The Industrial Court has, since the promulgation of the new Constitution, been re-established under section 4 of the Industrial Court Act, No. 20 of 2011 in order to bring it within the new Constitution. That section provides: -**

***4. (1) In pursuance of Article 162 (2)(a) of the Constitution, there is established the Industrial Court for the purpose of settling employment and industrial relations disputes and the furtherance, securing and maintenance of good employment and labour relations in Kenya.***

***(2) The court shall be a superior court of record with the status of the High Court.***

***(3) The court shall have and exercise jurisdiction throughout Kenya".***

**Jurisdiction of the Industrial Court is further provided for in section 12 of the said Act. Subsection (1) of that Act provides as follows in part:-**

***"12. (1) The court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the court relating to employment and labour relations..."***

**It is clear that the Constitution intends that the Industrial Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes and appeals involving employment and labour relations.**

**The Industrial Court is a superior court of record with the status of the High Court. The court will no doubt in due course develop its own jurisprudence in employment and labour relations disputes.**

**On the other hand the Constitution specifically denies the High Court jurisdiction in disputes involving employment and labour relations.**

**In my considered view, the transitional provisions under section 22 of the 6<sup>th</sup> Schedule to the Constitution are not intended to facilitate two parallel but different jurisdictions with regard to employment and labour relations disputes. The intention is that *where hearing of a matter filed in the High Court or in a subordinate court has already commenced*, such hearing ought to be concluded in the High Court or in the subordinate court.**

**On the other hand, where actual hearing has not commenced, then such suit ought to be transferred**

***to the right court, that court being the Industrial Court.***

**In the present suit, actual hearing has not commenced. For good conduct of cases involving employment and labour relations disputes, it is best that such cases pending in the High Court or in subordinate courts *where actual hearing has not commenced* be forwarded to the Industrial Court for disposal. I so hold”.**

These two present cases are on all fours with the afore-quoted case. Though the cases were filed in this court when the court had jurisdiction to deal with them, the court no longer has jurisdiction. Hearing of the cases has not commenced in this court. The cases must therefore be transferred to the correct court now with exclusive jurisdiction to hear and determine or otherwise dispose of them, that court being the Industrial Court.

In the event, I allow the two applications. These two cases are hereby transferred to the Industrial Court for hearing and determination, or some other disposal. Costs of the applications shall be in the causes. It is so ordered.

**DATED AT NAIROBI THIS 6<sup>TH</sup> DAY OF DECEMBER 2011**

**H.P.G. WAWERU  
JUDGE**

**DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER 2011**