



REPUBLIC OF KENYA



**KENYA LAW**

THE NATIONAL COUNCIL FOR LAW REPORTING

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**Amukowa v Premier Cookies Limited & 3 others (Civil Miscellaneous Application  
E039 of 2023) [2023] KEHC 19870 (KLR) (Civ) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19870 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL MISCELLANEOUS APPLICATION E039 OF 2023**

**AN ONGERI, J**

**JULY 6, 2023**

**BETWEEN**

**PAUL AMUKOWA ..... APPLICANT**

**AND**

**PREMIER COOKIES LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**DIAMONDALI HASHAM LAJI NURANI ..... 2<sup>ND</sup> RESPONDENT**

**SHAHID DIAMOND LALJI NURANI ..... 3<sup>RD</sup> RESPONDENT**

**AHAMEDALI HASHMAM LALJI NURANI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The application coming for consideration in the ruling is the one dated January 27, 2023 seeking transfer of Milimani MCELRC/E507 of 2022 to the Milimani Small Claims Court (SCC) for hearing and determination.
2. The application is supported by the affidavit of the applicant Paul Amukowa sworn on January 27, 2023 in which it is deponed as follows;
  - i. The applicant retired from the respondent's employment in January, 2016 having been their employee since May 1, 1994, a total of nearly 22 years.
  - ii. It was mutually agreed between the parties that the dues owed to the applicant by the respondents at the time of retirement amounted to Kshs 711,249.44, constituting salary for days worked up to January 15, 2016 leave balance upto end of December 2015 gratuity for every year completed and any other benefit.



- iii. The parties entered into a post-employment agreement for settlement of the amount owed in installments. The respondents breached that agreement by failing to pay as agreed.
  - iv. The claim herein constitutes a borderline case which raises cross cutting issues that fall both within the jurisdiction of the Employment and Labour Relations Court and the mainstream Civil Court as a simple breach of contract dispute.
  - v. The applicant, through erstwhile firm of advocates Messrs, Ong'ato, Ochieng' and Co. Advoates had filed Milimani Cause no. MCELRC/E507/2022, Paul Amukuwa –vs- Premier Cookies Limited and others at the Employment and Labour Relations Court but the same was yet to be certified as ready for hearing.
  - vi. The applicant has however on the advice of his new advocates on record elected to pursue the cause of action in breach of the oral contract to pay the amount firstly because it will lead to conclusion of the matter quicker and with the least judicial resources and secondly because it is the dominant issue in the litigation.
  - vii. The respondents will not be prejudiced in any way by grant of the orders sought as they will still have the opportunity to defence the claim. On the other hand, denial of the orders sought will prejudice the applicant because his claim at the Small Claims Court, were he to be ordered to file a fresh one, will have been caught up by limitation of time.
  - viii. It is proper and just that the orders sought are granted.
3. Respondent filed grounds of opposition dated 27/4/2023 stating that the suit that is sought to be transferred is an employment dispute and the jurisdiction to transfer is vested in the Employment and Labour Relations Court. That the Small Claims Court has no jurisdiction to hear the matter.
  4. The parties filed written submissions as follows; the applicant submitted that this court has unlimited jurisdiction according to Article 165 (3) of the Constitution and that section 18 (1) (b) (ii) of the Civil Procedure Act confers the jurisdiction to transfer suits from one subordinate court to another.
  5. That it is not disputed that the applicant retired from the 1<sup>st</sup> respondent's employment on or about January 2016 having worked for it from August 10, 1995. It was submitted that the 1<sup>st</sup> respondent owes the applicant Kshs 711,349 at the time of his retirement and that the respondent made a post-employment agreement with the applicant to liquidated the amount owed in unspecified installments up to completion but defaulted on their obligation under the agreement.
  6. The applicant submitted that since the agreement was made after the employer-employee relationship the dispute between the applicant and respondent falls within the jurisdiction of the small claims court. that the employment and labour relations court was also seized with the requisite jurisdiction to hear and determine the matter because of the amount sought to be recovered.
  7. The applicant indicated that having this matter resolved in the small claims court will cut down on the time it will take to conclude the matter substantially. That the applicant is not retired and he is without an income and should be enjoying his sunset years without stress and anxiety of litigation hanging over his head all the time.
  8. The respondent contrary submitted that while the high court exercises supervisory jurisdiction over matters falling within the civil jurisdiction of subordinate courts; the supervisory jurisdiction over employment matters is within the exclusive jurisdiction of the employment and Labour Relations Court. That this court therefore lacks the jurisdiction to consider the applicant application which falls within the exclusive jurisdiction of the ELRC.



9. On transfer to the small claims court the respondent submitted that the applicant suit is an employment dispute and that the applicant filed it as such. The small claims court therefore has no jurisdiction to hear the same as it only hears civil claims.
10. It was submitted finally that it is settled that it would be illegal for the High Court to transfer a suit filed in a Court lacking jurisdiction to a Court with jurisdiction and therefore sanctify an incompetent suit and in support cited *Equity Bank Limited vs Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, where the Court of Appeal held that:

“In numerous decided cases, Courts including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act*, to transfer a suit filed in a Court lacking jurisdiction to a Court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred...

It is so fundamental that where it [jurisdiction] lacks, a party cannot even seek refuge under the O2 Principal or the overriding objective under the *Civil Procedure Act*, the *Appellate jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.”

11. The sole issue for determination is whether the suit should be transferred to the Small Claims Court.
12. The claim in MC ELRC/E507 of 2022 relates to employment.
13. The constitution set up special court to handle employment disputes and the applicant ought to file this application in the ELRC division.
14. I strike out the application dated January 27, 2023 for want of jurisdiction.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 6<sup>TH</sup> DAY OF JULY, 2023.**

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**A. N. ONGERI**

**JUDGE**

In the presence of:

- ..... for the Applicant
- ..... for the 1<sup>st</sup> Respondent
- ..... for the 2<sup>nd</sup> Respondent
- ..... for the 3<sup>rd</sup> Respondent
- ..... for the 4<sup>th</sup> Respondent

