REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 181 OF 2010

SPINNERS AND SPINNERS LIMITED……..…….....…APPELLANT

VERSUS

IDRIS WABUKHATA ……..... RESPONDENT

R U L I N G

This is a ruling to a Preliminary Objection dated the 2nd day of December, 2015 and filed on the same day. The objection has been raised by the Respondent and the same is premised on the following grounds:-

1. THAT the High court has no jurisdiction to entertain an application arising from a suit involving an employer and an employee.
2. THAT the application dated the 24th November, 2015 in any event is res judicata.

The brief facts of this matter are that, the Appellant herein filed a Memorandum of Appeal on the 24th April, 2015. The Appeal arises from the judgment of the Ag. Principal Magistrate J.W Onchuru delivered on the 25th day of March, 2015 in Thika Chief Magistrate's Court Civil Case No.146/2010.

On the 24th of November, 2015, the Appellant filed a Notice of Motion seeking the following orders, inter alia:-

1. Spent.
2. That there be a temporary stay of execution in Thika CMCC No.146/2010 the subject of this appeal pending the hearing and determination of the application inter partes.
3. That there be a stay of execution in Thika CMCC No. 146/2010 pending the hearing and determination of the Appeal.
4. Costs of the Application be provided for.

The application is brought under Order 42 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act Cap 21 Laws of Kenya.

It is premised on the grounds set out in the body of the application and on the annexed affidavit of Gerald Wambugu Kihiu sworn on the 24th day of November, 2015.

The Respondent has raised a Preliminary Objection to that application which the court is being called upon to determine.

On the 7th day of December, 2015, parties agreed to dispose off the application and the Preliminary Objection by way of written submissions. I propose to deal with the Preliminary Objection first because its outcome will determine the fate of the application.

In his submissions, the Respondent has relied on the provisions of Section 12(2) of the Employment and Labour Relations Court Act which provides as follows:-

> ***"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 between an employer and an employee."***

Section 12(3) of the said Act provides that in the exercise of the jurisdiction under the Act the court shall have power to make any of the following orders inter alia:-

i. Interim preservatory orders including injunction in case of urgency.
ii. An award of compensation in any circumstances contemplated under this Act or any other written law.
iii. An award of damages in any circumstances contemplated under this Act or any written law.
iv. Any other appropriate relief as the court may deem fit to grant.

In his further submissions counsel for the Respondent submitted that the appeal filed herein is against an award of damages made in a workplace injury claim and therefore, it is obvious that the suit herein is a dispute on an award of damages arising out of a relationship between an employer and an employee.

According to him, Section 12(1) confers exclusive appellate jurisdiction to the Employment and Labour Relations Court and such jurisdiction includes the making of preservatory and/or stay orders and therefore the court lacks jurisdiction to entertain the application.

It is further submitted that the High Court is a creature of the Constitution under Article 165(1) and its jurisdiction is limited by Article 165 (5) (b) and does not extend to matters falling within the jurisdiction of the Employment and Labour Relations Court.

According to the counsel for the Respondent, the Appellant's application is lodged in a forum without jurisdiction as it is premised on an Appeal which is a nullity. He prays that the application be dismissed with costs and the Appeal be struck out.

On his part, counsel for the appellant is in agreement that Section 12(2) of the Employment and Labour Relations Act confers jurisdiction to the Employment and Labour Relations Court but argues that though the constitution contemplated the establishment of the Employment and Labour Relations courts, they were not established immediately. They were established through Act No. 20 of 2011 whose commencement date was 30/8/2011. The suit the subject of this Appeal was commenced on the 1st day of February, 2010 and continued as a civil suit until judgment was delivered on the 25th day of March, 2015 by the same court.

According to the counsel for the Appellant, the Appeal is in the right court by virtue of the powers conferred upon it by its Appellant jurisdiction and by virtue of Section 165(6) of the Constitution. He relied on sixth schedule to the Constitution of Kenya 2010 on the transitional and consequential provision which provides:-

> ***"All judicial proceedings pending before any court 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."***

The Respondent has relied on the case of **Francis Mutunga Musau Vs Devki Steel Mills Limited (High Court Misc. Application No. 91/2015)** where Justice Mabeya observed that its only the Employment

and Labour Relations Court that has jurisdiction to deal with causes of action pegged on and its dependent primarily upon the relationship of employment.

On his part , the Appellant has relied on the case of **Prof. Daniel N. Mugendi Vs Kenyatta University & 3 others (Court of Appeal) Civil Appeal No. 6/2012** where in dealing with a similar case, the judges of appeal held:-

> ***"Believing as we do that the approach taken by Majanja J is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the Appellant's petition and direct that the High Court do transfer it to the industrial court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertains to industrial and labour relation matters .....***
>
> ***And in order to do justice, in the event where the High Court, the Industrial Court or the Environment and Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well acquainted with the appropriate forum for each kind of claim. However, parties should not file "mixed grill" cases in any court they fancy. This will only delay dispensation of justice."***

In the case of **John Mwangi Karanja Vs Alfred Ndirangu (2011) eKLR** Waweru J pronounced himself as follows:-

> ***"With the enactment of Sections 1A and 1B of the Civil Procedure Act, the time has perhaps now come for this matter of transfer of suits to be looked at afresh. He went on to say:-***
>
> > ***'if a suit finds itself in the wrong court, surely it is in the interests of justice and in the interest of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the Civil Procedure Act and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (Section 1A)"***

In the case of John Mwangi supra, Justice Waweru held as follows:-

> ***"It is conceded that Nairobi CMCC No.6966 of 2012 was filed in the wrong court as that court did not have jurisdiction to hear and determine it by virtue of the provisions of Section 2 of the Magistrate's Court Act, Cap 10. That being the case, what is the amiable thing to do? Is it not to take the case to the right court? I will in the circumstances allow the application."***

I agree with the finding by Justice Waweru and the Court of Appeal in two cases cited above.

The upshot of the foregoing therefore is that this court finds no merit in the preliminary objection dated the 2nd day of December, 2015 and the same is dismissed with no orders as to costs.

The appeal herein be and is hereby transferred to the Employment and Labour Relations Court for hearing and final determination. This also applies to the Notice of Motion dated the 24th day of November, 2015.

DATED, **SIGNED** and **DELIVERED** at Nairobi this 10th day of March, 2016.

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L NJUGUNA

JUDGE

<u>In the presence of:-</u>

..... for the Appellant

..... for the Respondent