



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 198 OF 2012**

**JAMES DAVIES NJUGUNA ..... PLAINTIFF**

**VERSUS**

**JAMES CHACHA (sued as Chairman**

**Parklands sports Club ..... 1<sup>ST</sup> DEFENDANT**

**ONESMUS GITHINJI (sued as Secretary**

**Parklands Sports Club ..... 2<sup>ND</sup> DEFENDANT**

**JOHN NGURI (sued as Treasurer**

**Parklands Sports Club ..... 3<sup>RD</sup> DEFENDANT**

**PARKLANDS SPORTS CLUBE ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff's Notice of Motion dated 14th February 2013 seeks to have this suit transferred to the Industrial Court for hearing and disposal. The first ground in support of the Application details that the dispute arises out of an employment contract between the Plaintiff and the Defendants. The first 3 Defendants are office bearers of the 4th Defendant – the Parklands Sports Club. The Plaintiff details that the Industrial Court has the competence and capacity to hear this matter and it will be dealt with more expeditiously by that Court. The Application is brought under the provisions of **sections 1A, 1B, 18 and 3** of the *Civil Procedure Act* as well as *Articles 162 (2) and 165 (a)* of the *Kenya Constitution* and also **section 12** of the *Labour Institutions Act (2007)*. The Application is supported by the brief Affidavit sworn by the Plaintiff on 14th February 2013 detailing that the suit does arise out of his contract of employment with the 4th Defendant.
2. The Plaintiff's Application is opposed with the 1st Defendant (sued as the Chairman of the 4th Defendant) swearing a Replying Affidavit dated 14th May 2013. In the third paragraph of the Replying Affidavit, the deponent details that indeed the suit herein is grounded upon the contract of employment of the Plaintiff with the 4th Defendant. However, the deponent goes on to say that

upon advice received from the advocates on record for the Defendants, the Plaintiff has filed his pleadings in this Court which is devoid of jurisdiction as per the express provisions of the Constitution – Articles 162 and 165 as well as **section 12** of the Labour Institutions Act 2007. The deponent further referred to **section 18** of the *Civil Procedure Act* which noted that the Industrial Court was not one of the Courts enumerated therein to which this Court could exercise its jurisdiction and transfer a suit of this nature. He maintained that the Plaintiff’s only remedy was to withdraw the suit herein and file a fresh suit in the Industrial Court.

3. The Plaintiff’s written submissions were filed herein on 23rd May 2013. The Plaintiff submitted that it was perfectly within the powers of this Court to order a transfer of the suit to the Industrial Court for the following reasons:
  - a. Under Article 162 (2) (a) and (b) of the Constitution it was provided that Courts could be set-up with the status of the High Court to hear and determine disputes relating to employment and labour.
  - b. The Industrial Court is a creature of the Industrial Court Act of 2011 and under that Act, the Industrial Court is given exclusive jurisdiction under section 12 thereof to hear and determine disputes such as the one before Court.
  - c. Under Articles 165 (3) and (5) (b) of the Constitution the jurisdiction of the High Court is taken away as regards matters falling within the purview of the Courts contemplated in Article 162 (2) of which the Industrial Court is one.

The Plaintiff noted that **section 12 (1)** of the Industrial Court Act grants exclusive jurisdiction to the Industrial Court “to hear, determine and the grant of the relief” therein stated. This section, in the Plaintiff’s view, did not take away the power of the High Court to transfer a matter pending before it to the Industrial Court. Further, by conferring upon the Industrial Court equal status to the High Court, such meant that any industrial cases pending before the High Court may be transferred to the Industrial Court.

4. The Plaintiff then went on to say that the High Court had adopted a common practice for transferring cases to the Environment and Land Court and as that Court and the Industrial Court were both set up under the same Article of the Constitution, it should be possible to transfer cases from the High Court to the Industrial Court. The Plaintiff also pointed out that under Article 159 (d) of the Constitution, justice should be administered without undue regard to procedural technicalities. The Plaintiff concluded its submissions by urging this Court to interpret broadly and make a distinction between the exclusive jurisdiction of the Industrial Court “to hear” this suit and the transfer of the suit as the Constitution did not confer on the High Court jurisdiction “to hear” the same. The Court was referred to the authorities of **HCCC No. 608 of 2002 – John Miumu & Ors. v Jomo Kenyatta University of Agriculture & Technology** as per **Waweru J.** and **Petition No. 459 of 2011 – Samson O. Ngonga v the Public Service Commission & Ors** as per **Lenaola J.**
5. The Respondents after quoting the facts and the law in relation to the Application before this Court submitted that under **Section 2** of the Civil Procedure Act the definition of a Court was: “The High Court or Subordinate court acting in exercise of its Civil Jurisdiction”. The Respondent was of the opinion that for this Court to be moved, it must have Civil Jurisdiction over the suit to hear and determine it. As the Court did not have such Civil Jurisdiction, it could not issue any orders of transfer of this suit since there is no suit before it. The Respondent maintained that *Article 165 (5) of the Constitution* expressly removed that jurisdiction. The Respondent referred the Court to a number of cases including **The Owners of Motor Vessel “Lillian S” v Caltex Oil Kenya Ltd (1989) KLR**, **Gipson K. Langat v Kenya Kazi Services Ltd (2012) eKLR**, **Rob de Jong & Anor. v Charles M. Wachira (2012) eKLR**, **Bishop Christopher Ndungu v Andrew Abungu (2006) eKLR** and **Precious Gems Ltd v Siteyia (2010) e KLR**.
6. In my opinion, the **Precious Gems** case cited by the Respondents herein concerned matters in connection with registered land and can be distinguished from the instant case before Court. However, I was impressed at the findings in the other cases quoted by the Respondents. I would identify the position adopted by **Mutava J.** in the **Gipson Langat** case viz.:

“7. My understanding of Section 18 of the Civil Procedure Act is that it provides a window through which proceedings instituted in the subordinate courts and which subsequently become untenable in such courts due to emergent developments dethroning the jurisdiction of the subordinate courts can be transferred to the High Court for trial and disposal. However, the above procedure does not apply as to give the High Court jurisdiction to transfer suits from one subordinate court to another or from a subordinate court to any other dispute resolution institution as by law established.

8. In that regard, given that the Industrial Court as presently constituted is a court that is subordinate to the High Court, I do not think that this court is bestowed with any jurisdiction under Section 18 of the Civil Procedure Act to order matters filed in the Chief Magistrates Court to be transferred to the Industrial Court for disposal notwithstanding the provisions of Section 87 of the Employment Act. Perhaps this would be possible once the employment and labour relations courts to be established under Article 162 (2) (a) of the Constitution of Kenya, 2010, are finally established”.

It must be borne in mind that **Mutava J.** was dealing with an application to transfer a suit filed in the Chief Magistrate’s Court. However, the finding of **Ibrahim J.** in the **Rob de Jong** case was of a more general nature:

“The legislature has in its wisdom created a specialized court for adjudicating upon labour related disputes. The law created the Industrial Court as a specialized court to determine all labour related disputes. The Labour Institutions Act in Section 12 provides as follows:

“The Industrial Court shall have exclusive jurisdiction to hear, determine and grant any appropriate relief in respect of an application, claim or complaint or infringement of any provisions of this Act or any other legislation which extends jurisdiction to the Industrial Court or in respect of any matter which may arise at common law between an employer and employee in the course of employment, between employee and employer’s Organization and a trade union or between a trade union, an employer’s organization, a federal and a member thereof”.

It is clear that the law gives exclusive jurisdiction to the Industrial Court to hear and determine all industrial related matters. It is therefore wrong for other courts at the instigation of litigants to take away or attempt to share jurisdiction with the Industrial Court. This in the end also serves the interest of the industry in allowing quick and effective disposal of Industrial disputes by specialized courts.

The second issue is whether this court can direct the transfer of the suit before the Magistrate court to the Industrial Court.

I concur with the position taken by the learned counsel for the Appellants that to invoke this power the matter should be before a court with jurisdiction. If the matter was filed in a court without jurisdiction then the suit is a nullity and there is nothing capable of being transferred”.

Here again, **Ibrahim J.** was ruling upon a transfer between a Magistrate’s Court and the Industrial Court. However this issue as between the parties herein revolves around whether this Court has jurisdiction over an employment case which is within the sole province of the Industrial Court. Again, I am guided by **Kimaru J.** in the **Bishop Ndungu** case in which the learned Judge quoted from the finding of **Ringera J.** (as he then was ) in **Omwoyo v African Highlands & Produce Co. Ltd.** (2002) 1 KLR 698 in which he stated:

**“That being the case, the sole issue of determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. (In) Kagenyi vs. Misiramo & Anor. [1968] EA 48, Sir Udoma Udoma CJ held in relation to section 18 of the Uganda Civil Procedure Act – a provision which is in pari materia with section 18 of our code – that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. In that case the appellant had sought to transfer a suit from the magistrate’s court to the High Court on the basis that the claim exceeded the pecuniary jurisdiction of the lower court. And in the very early case of Mendonca vs. Rodrigues [1906-1980] 2 KLR 51, Hamilton J. held that the High Court did not have power to order a transfer of a suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local jurisdiction of the lower court in which it had been filed. The principle of law to be gleaned from these authorities is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first place in a court which does not have pecuniary and/or territorial jurisdiction to try it”.**

**I agree with the reasoning of the court in the above case. The applicant cannot apply to transfer a suit which was filed in a court which had no jurisdiction to a court which has jurisdiction. The applicant cannot purport to cure a mistake which he made when he filed the suit in a court which lacked jurisdiction. It is no excuse that the applicant, being a layman, had filed the said suit because he was not aware of the court in which he was to file the suit.”**

7. In this matter, I would distinguish **Waweru J’s** finding in the **John Miumu** case (supra) as that case was filed in 2002 well before the Industrial Court was established pursuant to *Article 162 (2) (a)* of the *Constitution*. This case before Court, was filed after the Industrial Court was established as above. Further, it seems to me that in citing **Petition 459 of 2011 of Samson Ngonga** the Applicant herein is arguing against himself. **Lenaola J.** at paragraphs 10 and 11 of his Ruling in that matter detailed as follows:

**“10. It therefore follows that issues of employment and labour relations are entirety under the purview of the Industrial Court. Indeed the preamble of the Industrial Court Act No. 20 reads:**

**‘An Act of Parliament to establish the Industrial Court as a superior court of record; to confer jurisdiction on the Court with respect to employment and labour relations and for connected purposes’.**

**The Industrial Court is established by Section 4 (1) of the enabling Act reads thus:**

**‘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’.**

**The specific Jurisdiction of that Court is granted by Section 12 of the Industrial Court Act which reads thus:**

**‘The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 62 (2) of the Constitution (emphasis mine) and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including –**

- a. Disputes relating to or arising out of employment between an employer and an employee;
- b. Disputes between an employer and trade union;
- c. Disputes between an employers' organization and a trade unions organization;
- d. Disputes between trade unions;
- e. Disputes between employer organizations;
- f. Disputes between an employers' organization and a trade union;
- g. Disputes between a trade union and a member thereof;
- h. Disputes between an employer's organization or a federation and a member thereof;
- i. Disputes concerning the registration and election of trade union officials; and
- j. Disputes relating to the registration and enforcement of collective agreements'.

**11. It is my opinion therefore that the Industrial Court has jurisdiction to hear and determine both disputes relating to employment and labour relations including those involving members of the Kenya Police Force where such violations arise in an employment context. Once the Industrial Court was established and was functional, then this Court had no jurisdiction to entertain disputes relating to labour and employment. It matters not that the employee may be in the Police Service or the Defence Forces”.**

8. I have no doubt of the correctness of the decisions of my learned brother Judges as above and I adopt their reasoning that since the establishment of the Industrial Court pursuant to *Article 162 (2) (a)* of the *Kenya Constitution*, this Court has no jurisdiction over labour and employment matters. I would only add that in my view **section 18** of the *Civil Procedure Act* only covers the power of the High Court to withdraw and transfer cases instituted in a subordinate Court. In my view, this section does not allow the transfer of a case from the High Court to any other Court of equal status. As a result, I find no merit in the Plaintiff/Applicant's Notice of Motion dated 14<sup>th</sup> February 2013 and the same stands dismissed with costs to the Defendants.

**DATED and delivered at Nairobi this 3<sup>rd</sup> day of October 2013.**

**J. B. HAVELOCK**

**JUDGE**