Godi v Njuguna & another (Miscellaneous Application 100 of 2024) [2024] KEELRC 1844 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 1844 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION 100 OF 2024

SC RUTTO, J

JULY 12, 2024

BETWEEN

ESBORN GODI ..... APPLICANT

AND

SYLVESTER NJUGUNA ..... 1ST RESPONDENT

CASCADE COMPANY LIMITED ..... 2ND RESPONDENT

RULING

1. Vide a Notice of Motion dated 12th March 2024, the Applicant seeks to have Nairobi CMEL Case No. E1873 of 2021; Esborn Godi vs Sylvester Njuguna & another transferred to Thika Magistrates Court for hearing and determination. The Application is expressed to be brought under Sections 18 1(b) (ii) and 3, 3A of the *Civil Procedure Act* and Article 159 of *the Constitution*.

2. The Application is premised on the grounds set out therein and the Supporting Affidavit sworn by the Applicant on 12th March 2024. The grounds in support of the Application are that the Applicant filed his Claim in person but inadvertently filed the same before Nairobi Milimani Commercial Court in NRB.CMEL Case No. E1873 of 2021 Esborn Godi v Sylvester Njuguna & another as opposed to Thika Magistrate's Court where the cause of action arose and the parties reside.

3. That in taking over the matter, his Advocates did not notice the mistake immediately and therefore inadvertently proceeded to amend the Claim to include the 2nd Respondent and set the matter down for hearing. The Respondents have since moved the lower Court by way of a Preliminary Objection dated 30th January 2024 for purposes of having the Claim struck out with costs.

4. That the three (3) years statutory period has lapsed and the Applicant has no option to withdraw the Claim and file it before the right forum. That further, the Applicant stands being condemned unheard and he will continue to suffer for the Respondents' misgivings should his Claim be struck out due to an inadvertent mistake.

5. The Respondents filed Grounds of Opposition dated 11th April 2024, through its Counsel. The Respondents contend that pursuant to Section 15 of the *Civil Procedure Act*, the Applicant ought to have filed the suit in question within the jurisdiction of Thika Law Courts where the cause of action arose and where both Respondents reside. That furthermore, the Applicant resides in the aforesaid locality.

6. That since filing of the aforesaid suit on 5th November 2021, the Applicant has had various opportunities to make this prayer considering that he has so far amended the Statement of Claim thrice. It is further contended that the present Application is reactionary and has only been made in response to the Notice of Preliminary Objection filed by the Respondents on 30th January 2024.

7. It is further contended that the present Counsel has had conduct of the matter since 13th June 2022 and they ought to have advised their client accordingly on the question of jurisdiction.

8. That the Respondents are apprehensive that the Application has only been made upon collapse of the attempt to forum shop.

Submissions

9. The Application was canvassed by way of written submissions. The Applicant filed written submissions which I have considered. Notably, the Respondents uploaded their written submissions on the online portal but failed to pay for the same. As such, the said submissions were not duly filed.

Analysis and Determination

10. I have considered the Application, the grounds in support thereof, the Respondents' Grounds of Opposition as well as the Applicant's submissions and the singular issue that stands out for determination is whether this Court should exercise its discretion in favour of the Applicant and transfer NRB.CMEL Case No. E1873 of 2021 Esborn Godi vs Sylvester Njuguna & Another from Nairobi Milimani Commercial Court to Thika Magistrates Court for hearing and determination.

11. The power of this Court to transfer a case from one subordinate court to another is found in Section 18 of the *Civil Procedure Act* which is couched as follows:

    18. Power of High Court to withdraw and transfer case instituted in subordinate court (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

        (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

        (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

            (i) try or dispose of the same; or

            (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

            (iii) retransfer the same for trial or disposal to the court from which it was withdrawn.

12. It is this Court's view that in exercising the power under Section 18 aforementioned, it ought to be guided by its principle objective which is to facilitate the just, expeditious, efficient and proportionate resolution of disputes.

13. Pursuant to Section 15 of the *Civil Procedure Act*, a suit ought to be instituted in a court within the local limits of whose jurisdiction the defendant or each of the defendants at the time of the commencement of the suit actually and voluntarily resides or carries on business or personally works for gain or the cause of action, wholly or in part, arise.

14. Turning to the case herein, it is common ground that the Claimant and the Respondents in NRB.CMEL Case No. E1873 of 2021 Esborn Godi vs Sylvester Njuguna & Another reside in Thika. Further, it is common ground that the cause of action arose within the said locality.

15. Therefore, it goes without saying that the Court with the territorial jurisdiction to hear and determine the Claim in question is the Thika Magistrates Court as opposed to Nairobi Milimani Commercial Court.

16. To this end, I am satisfied that by allowing the Application herein, this court will be furthering the principal objective of this court as decreed under Section 3 of the *Employment and Labour Relations Court Act*. In so holding, I have also considered the fact that the Respondents will not suffer prejudice should the matter be transferred. If anything, it will be more convenient for all parties and less costly.

17. For the above reasons, I hereby allow the Application dated 12th March 2024 and NRB.CMEL Case No. E1873 of 2021 Esborn Godi v Sylvester Njuguna & another is hereby transferred to Thika Magistrates Court for disposal.

18. With respect to costs, the Applicant having filed the suit in the wrong court will bear the costs of the Application.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

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STELLA RUTTO

JUDGE

In the presence of:

Mr. Iriga instructed by Ms. Karwitha for the Applicant

No appearance for the Respondents

Millicent Kibet Court Assistant

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty

of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE