



REPUBLIC OF KENYA



Baka v Harambee Cooperative Savings & Credit Society Limited (Miscellaneous Application E279 of 2024) [2025] KEELRC 254 (KLR) (31 January 2025) (Ruling)

Neutral citation: [2025] KEELRC 254 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E279 OF 2024**

**SC RUTTO, J
JANUARY 31, 2025**

BETWEEN

LEONARD OUMA BAKA APPLICANT

AND

**HARAMBEE COOPERATIVE SAVINGS & CREDIT SOCIETY
LIMITED RESPONDENT**

RULING

1. Vide a Notice of Motion dated 23rd September 2024, the Applicant seeks to have the suit MCELRC No. E1198 of 2024; Leonard Ouma Baka vs Harambee Cooperative Savings & Credit Society Limited filed at the Chief Magistrate's Court at Milimani Commercial Courts transferred to the Employment and Labour Relations Court for hearing and determination. The Application is expressed to be brought under Section 3(1) of the *Employment and Labour Relations Court Act*, Sections 1A, 1B and 18 (1) (b) of the *Civil Procedure Act* and Article 159(2) of the *Constitution*.
2. The Application is premised on the grounds set out therein and the Supporting Affidavit sworn on 23rd September 2024, by Margaret Ameka, Counsel on record for the Applicant. Ms. Ameka avers that she inadvertently and by mistake filed the said case in the Chief Magistrates Court Milimani Commercial Courts.
3. According to Ms. Ameka, the error ought not to be visited upon the Claimant.
4. She further avers that court fees have been duly paid and the matter is active and that the Respondent will not suffer any prejudice if the case is transferred to this Court.
5. She further avers that the Claimant's suit stands to be dismissed and the Claimant will suffer great injustice.



6. Ms. Ameka further deposes that this Honourable Court has jurisdiction to transfer the suit. She avers that the transfer of a suit from the subordinate court to the High Court is not an issue of jurisdiction but a procedural function.
7. That it is in the interest of justice and in the interests of all parties concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated.
8. Opposing the Application, the Respondent filed a Replying Affidavit sworn on 22nd October 2024 by Paul Kiplangat Tanui, its Human Resources Manager.
9. Mr. Tanui states that he is aware that in the Respondent's defence in response to the cause in CMELRC Cause No. E189 of 2024, the Respondent challenged the jurisdiction of the Chief Magistrates Court to hear and determine the matter on grounds, that the Claim exceeds the pecuniary jurisdiction of the Chief Magistrates Court and that the said cause is time-barred by dint of the limitation under Section 90 of the Employment Act.
10. He is advised by the Respondent's advocates, which advice he believes to be accurate, that the issue of the Chief Magistrates Court's lack of jurisdiction is still a live issue pending hearing and determination before that Court.
11. Mr. Tanui further deposes that Sections 1A, 1B and 18 of the Civil Procedure Act relied on by the Claimant do not apply to the proceedings before this Honourable Court, particularly since the ELRC Act and the ELRC Rules provide for the transfer of suits.
12. It is his assertion that the Claimant's failure to properly move this Honourable Court under the statutory and procedural provisions which apply to this Honourable Court renders this Court devoid of jurisdiction to hear and determine the Application.
13. He is further advised by the Respondent's advocates, which advice he believes to be accurate, that the suit that the Claimant seeks to be transferred to this Court, that is, CMELRC Cause No. E189 of 2024 is incompetent for want of jurisdiction and as such a nullity in law and there is nothing for this Court to transfer.
14. He is also advised by the Respondent's advocates, which advice he believes to be accurate that no cogent reason has been given as to why the cause in CMLERC Cause No. E189 of 2014 (sic) was filed in the Chief Magistrates Court where said Court lacks jurisdiction to hear and determine the matter.
15. According to Mr. Tanui, the alleged error by the Claimant's Counsel is not an ordinary error and is fundamental as it concerns the question of the jurisdiction of the Chief Magistrates Court.
16. Mr. Tanui further avers that should this Honourable Court grant the Order for transfer, it would inadvertently interfere with the proceedings and conduct of the Chief Magistrates Court, which does not augur well for the dispensation of justice.
17. That save for the challenge to jurisdiction and pending determination of the Respondent's Notice of Preliminary Objection the said Cause for all intents and purposes is ready to proceed to hearing. That a transfer of the Cause to this Honourable Court is therefore, not necessary in the circumstances.

Submissions

18. The Application was canvassed by way of written submissions. Both parties complied and I have considered their written submissions.



Analysis and Determination

19. I have considered the Application, the Respondents' Replying Affidavit as well as the rival submissions and the issues that stand out for determination have been identified as follows:
 - a. Whether reference to the *Civil Procedure Act* in the Application goes to the jurisdiction of this Court;
 - b. Whether the Application is merited thereby allowing transfer of the suit MCELRC No. E1198 of 2024; Leonard Ouma Baka vs Harambee Cooperative Savings & Credit Society Limited from the Chief Magistrate's Court at Nairobi Milimani Commercial Courts to the Employment and Labour and Relations Court for hearing and determination;

Whether reference to the *Civil Procedure Act* in the Application goes to the jurisdiction of this Court

20. The Respondent has submitted that the jurisdiction of this court is under the *Employment and Labour Relations Court Act* (ELRC) Act and the ELRC (Procedure) Rules and that since the Applicant has failed to invoke the said statutory provisions, this Court lacks jurisdiction to hear and determine the Application.
21. In the same breath, the Respondent has submitted that the provisions of the *Civil Procedure Act* do not apply to the proceedings before this Court.
22. On this issue, the Applicant has submitted the ELRC (Procedure) Rules do not have a specific provision to tackle applications for transfer of suits hence reference to Sections 3(1) of the ELRC Act. To this end, the Applicant has urged that the Court has inherent powers to address procedural gaps and ensure real and substantial justice.
23. Section 18 of the *Civil Procedure Act* provides for the power of the High Court to withdraw and transfer a case instituted in a Subordinate Court.
24. It is notable that the ELRC Act and the ELRC (Procedure) Rules 2024 do not expressly provide for the transfer of suits instituted in a Subordinate Court. Thus, the question that comes to the fore is whether the provisions of Section 18 of the *Civil Procedure Act* apply in the circumstances.
25. It is worth pointing out that there have been different schools of thought on the applicability of the *Civil Procedure Act* and the attendant Rules to employment and labour relations matters in circumstances where the ELRC Act and Rules are silent.
26. It should be appreciated that there are several procedural aspects that have been left unaddressed by the ELRC Act and the ELRC (Procedure) Rules. In this regard, this Court holds the view that where there is a lacuna in the ELRC Act and ELRC (Procedure) Rules, the Court should where necessary and in the interest of justice, borrow from the relevant provisions of the *Civil Procedure Act* and Rules.
27. On this issue, I agree with decision of the Court of Appeal in the case of TNT Express Worldwide (Kenya) Limited v Timothy Graeme Steel [2022] KECA 881 (KLR), that where it is established that the ELRC rules and regulations have come up short of provisions that would aid in the making of such orders, nothing precludes the ELRC from relying on available Civil Procedure provisions to address the extant gaps.
28. In any event, an omission to cite the relevant statutory provisions is not so fatal as to affect the substance of the suit. Dismissal of a suit on such a ground is not only unjust but is contrary to Article 159(2)(d) of the *Constitution* which requires this Court to administer justice without undue regard to technicalities.



29. Accordingly, it is this Court's finding that failure by the Applicant to invoke the ELRC Act and attendant Rules and reference to the Civil Procedure Act does not go to the jurisdiction of the Court.

Merit in the Application to transfer the suit from the Chief Magistrate's Court at Nairobi Milimani Commercial Courts to the Employment and Labour and Relations Court

30. The principal order sought by the Applicant in this case is the transfer of MCELRC No. E1198 of 2024; Leonard Ouma Baka vs Harambee Cooperative Savings & Credit Society Limited from the Chief Magistrate's Court at Nairobi Milimani Commercial Courts to the Employment and Labour and Relations Court for hearing and determination.
31. Opposing the Application, the Respondent has submitted that the suit sought to be transferred by the Applicant is incompetent for want of jurisdiction and as such, there is nothing to transfer. On this score, the Respondent has averred in its Replying Affidavit that it had filed a Notice of Preliminary Objection raising two issues being the pecuniary jurisdiction of the Chief Magistrates Court in light of Gazette Notice No. 6024 of 2018 and that the suit is time-barred by dint of Section 90 of the Employment Act.
32. The Respondent has further posited that the issue of the Subordinate Court's jurisdiction is still alive and pending before that Honourable Court. The Respondent has further submitted that it has a right to be heard on its Notice of Preliminary Objection.
33. The Applicant on the other hand has submitted that this Court has the discretion to grant the prayers sought judiciously to facilitate justice. Relying on the case of John Mwangi Karanja v Alfred Ndiangui (2011) eKLR, the Applicant urged that the transfer of a suit from a Subordinate Court to the High Court is not an issue of jurisdiction but a procedural function.
34. The Applicant has further submitted that the transfer of the suit will not prejudice the Respondent as it will still have an opportunity to defend itself in the appropriate forum.
35. Notably the Applicant has not disputed that the Respondent filed a Notice of Preliminary Objection dated 30th September 2024 and that the same is still pending hearing and determination at the Chief Magistrate's Court.
36. On this issue, I subscribe to the position taken by the court in the case of Prisca Jepngétich v Generation Career Readiness Social Initiative Limited [2021] eKLR that the Respondent should not be denied the right to be heard, before the Chief Magistrate's Court, on its Preliminary Objection as there are other aspects of the dispute to be dealt with by that Court, such as costs sustained in responding to the Claim.
37. The Court further agrees with the sentiments expressed in the foregoing precedent that the Applicant would be in a position to file a fresh Claim at the right forum, if his matter is dismissed for want of jurisdiction in the event the Chief Magistrate's Court upholds the preliminary objection, in that the Claim is deemed a nullity, as good as if it was never filed, hence would not impact the Claimant's ability to file another Claim at the appropriate forum.
38. What's more, the Court agrees that it would be improper to interfere with the work of other Courts and the Chief Magistrate's Court should be allowed to hear and determine the Notice of Preliminary Objection lodged by the Respondent without the interference of this Court.
39. For the above reasons, the Application dated 23rd September 2024 is declined with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2025.



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STELLA RUTTO

JUDGE

In the presence of:

Mr. Mabach instructed by Ms. Ameka for the Applicant

Mr. Okere for the Respondent

Millicent 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

