



**Kenya Plantation & Agricultural Workers Union v Mahee Flowers Limited
(Cause E013 of 2021) [2024] KEELRC 307 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELRC 307 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E013 OF 2021
DN NDERITU, J
FEBRUARY 22, 2024**

**BETWEEN
KENYA PLANTATION & AGRICULTURAL WORKERS UNION . APPLICANT
AND
MAHEE FLOWERS LIMITED RESPONDENT**

RULING

I. Introduction

1. In a ruling dated 8th June, 2023, this court made an order, suo motto, transferring this cause to the Nakuru Chief Magistrate’s Court for trial and disposal for the reason captured in the following words –

“Suo motto, this court notes that the pleaded gross monthly salary of the grievant as at the time of termination was Kshs.11,341/= which is within the limit of Kshs.80,000/= for the jurisdiction of the magistrate’s courts. As clarified by the by the Chief Justice in Legal Notice No. 5476 of 28th April, 2023 causes such as this one should be heard and disposed of in the lower courts of competent jurisdiction. For this reason, this matter is hereby transferred to the Nakuru Chief Magistrate’s Court for allocation, hearing, and disposal.”
2. In a notice of motion dated 21st September, 2023, filed in court on 26th October, 2023 (the application) the applicant is seeking for the following orders –
 1. That there be a stay of execution of the order of Honourable Justice David Nderitu transferring this matter to the Nakuru Chief Magistrates court.
 2. That the honourable court be pleased to order transfer of this matter back to the Employment and Labour Relations Court at Nakuru.
 3. That the costs of the Application be provided for.



3. The application is based on the grounds on the face of it and supported with the affidavit of Mbakhila Musumba sworn on even date.
4. Essentially, the respondent is in support of the application as per the replying affidavit of Vitalis Osodo sworn on 10th November, 2023, and filed in court on even date.
5. By consent of Mr. Musumba for the applicant and Miss Wachira for the respondent, the court directed that the application be canvassed by way of written submissions. The applicant's submissions were filed on 21st November, 2023, and those for the respondent were filed on 10th November, 2023.

II. Background

6. In a memorandum of claim dated 29th March, 2021 filed in court on 9th April, 2021, the applicant herein (a trade union) commenced this cause for an on behalf of Irene Chelangat, the grievant, seeking various reliefs for alleged unfair and unlawful termination of the said grievant by the respondent.
7. The reliefs sought are –
 1. An order directing the Respondent to:-
 - a. To unconditionally reinstate the grievant without loss of benefit.
 - b. To pay the grievant for the entire period she was dismissed.
 2. Should the prayer 1 above fail, an order directing the respondent to:-
 - a. Salary arrears for November and December, 2019.....Kshs.22,682/=
 - b. Salary in lieu of notice as provided for by CBA.....Kshs.11,341/=
 - c. Pay the grievant monthly Salary for a period of 12 months.....Kshs.136,092/=
 - d. Pay the grievant leave travelling Allowance and leave for the period of dismissal till judgment;
 - e. Pay the grievant gratuity for the 13 years served with respondent as in the CBA.....Kshs.122,860/
 - f. Pay the cost of the suit;
 - g. Interest on (a),(b), (c), (d), (e),(f) above;
 - h. Any other relief this honourable court deems fit to grant.
8. It is upon evaluating the claim, based on the pleadings and the documentary evidence filed with the claim, that the court, suo motto, directed and ordered that the cause be transferred to the lower court for hearing and determination. However, the applicant has come back to court seeking that the court reverses the above direction and subsequently that this court conducts the hearing and determination of the cause.



III. Submissions By Parties

9. The application is expressed to be brought under the provisions of section 12 of the *Employment and Labour Relations Court Act* (ELRC Act), sections 1A, 1B, 3, 3A,18, & 63 of the *Civil Procedure Act* and Order 51 rule 1 of the Civil Procedure Rules and Article 162(2)(a) and 165(5) of *the Constitution* of Kenya, and all other enabling provisions of the law.
10. In the grounds and the supporting affidavit, the applicant takes the view that the court misdirected itself and or made an error in referring the cause to the lower court as, according to the applicant, the cause entails a trade dispute for which the lower court has no jurisdiction to deal with. That is the same position taken by the respondent in the replying affidavit.
11. In the written submissions, it is submitted by the applicant that the cause entails a trade dispute which is not within the jurisdiction of the lower court based on Legal Notice (LN) 6024 of 2018 by the Chief justice, which donated some jurisdiction to the lower court in dealing with specific issues or causes in employment and labour relations. It is submitted that since the subject matter of this cause is allegedly a trade dispute the lower court has no jurisdiction over the same.
12. It is submitted that while this court may transfer a cause to the lower court for disposal, this cause is not in that category. The court is urged to recall the matter to this court for hearing and determination. The applicant has cited Kenya Engineering Workers Union V E-Fil Enterprises Limited (2020) eKLR in support of its position.
13. For the respondent, it is submitted that while this court may order or direct for transfer of an appropriate cause to the lower court for trial and disposal, this cause is not an appropriate one as it allegedly entails a trade dispute over which the lower court has no jurisdiction.
14. It is submitted that the subject matter of this cause is a trade dispute as defined in section 2 of the *Labour Relations Act*. The Kenya Engineering Workers Union (supra) cited by the applicant is also relied upon by the respondent in advancing the argument that the lower court has no jurisdiction over trade disputes.
15. It is on the basis of the foregoing that the court is urged to recall the matter from the lower court and bring it to this court for hearing and determination.

IV. Analysis & Determination

16. In my considered view there is only one main issue for determination is this application – Is the subject matter of the cause a trade dispute? This is so because the parties agree, and correctly so, that this court has powers and authority to transfer an appropriate cause from this court to the lower court for trial and disposal. It is also clear from the application and the submissions from both sides that the only reason why the applicant and the respondent object to the order of transfer is that the cause allegedly entails a trade dispute over which the lower court has no jurisdiction.
17. However, there is one more issue that demand the attention and resolution of this court. Once this court made the order for transfer of the cause to the lower court, the court became funtus officio as far as that particular issue is concerned and legally the court may only revisit the same issue on an application for review. Any other approach shall be un-procedural, irregular, and unlawful as the court shall be sitting on appeal of its own orders. This brings to the fore a fundamental issue that calls for determination even before consideration of the issue stated above. The issue is – Is the application herein properly before the court?



18. In the circumstances, and for the foregoing reasons, the following issues commend themselves to this court for determination in this application –
 - a. Is the application properly before the court?
 - b. Does the cause entail a trade dispute?
 - c. Costs?
19. As stated in an earlier part of this ruling, this court became *funtus officio* once it made the order for transfer of the matter to the lower court, as far as that particular issue is concerned. The cause was then transferred to the lower court and allocated and assigned new reference as Nakuru CM ELRC NO. E001 OF 2023.
20. This means that Nakuru ELRC No. 13 of 2021 does not and should not exist as such in this court's records. It is therefore a misnomer that the applicant has through this application approached this court under a non-existent cause for all intents and purposes. The above lower court file and the proceedings therefor have not been availed and there is no mention at all of the status of that matter in the lower court.
21. In the considered view of this court the applicant ought to have approached this court by way of a miscellaneous application as the referenced cause in the header no longer exists in this court's records as an active cause.
22. Be that as may, that this application is improperly filed based on a non-existent court file, the court shall nonetheless consider the second issue on merits as hereunder.
23. The court has gone out of its way and called for the lower court file for perusal to confirm the contents thereof for reasons that shall become clear in a moment. Is the subject matter of the cause a trade dispute? In my considered view, the subject matter of the cause is not and never was a trade dispute for the reasons elaborated hereunder.
24. Before giving the reasons for the finding and holding above, there is another angle of the fundamental merits of the application that need to be inquired into. Obviously, no court can sit on appeal over its own decision. However, a court may review its own decision.
25. Rule 33 of the Employment and Labour Relations Court (Procedure) Rules, 2016 is the applicable law where a party seeks review. Further, where an applicant is asking for the court to correct or rectify clerical mistakes, incidental error, or omission the applicable law is rule 34. It is illustrative that none of the foregoing provisions have been cited by the applicant in this application. What then is the applicant seeking from this court?
26. In the considered view of the court, the applicant is of the view that the court misapprehended the law in making the order for transfer of the cause to the lower court. This court has not been asked to review that order for transfer but rather that the court sets aside the transfer and order a re-transfer of the cause back to this court for hearing and determination.
27. In the considered view of this court, the applicant is asking this court to sit on appeal of its own order for the reason that the court, in the opinion of the applicant, misapprehended the law when it ordered for transfer of a "trade dispute" to the lower court which has no jurisdiction to hear and determine the same.
28. It is also my finding and holding that if the application was intended to have this court review the order for transfer of the cause to the lower court, there is no evidence, circumstances, and or reasons that may



- persuade the court to review the said order under rule 33 cited above. It is not alleged that the order was made as a result of clerical mistake, incidental error, or omission that may be corrected or rectified under rule 34 cited above.
29. For completeness, the court shall now tackle the last issue on whether the subject matter of the cause entails a trade dispute. The starting point is to pose the question – what is a trade dispute?
30. Section 2 of the *Labour Relations Act* defines a trade dispute as –
- A disagreement between employers and employees, employers and trade unions, employer’s organisations and trade unions, disputes between trade unions, disputes between employer organisations, employer’s organisations and trade unions, trade unions and their members and employers’ organisations and their members.
31. In the considered opinion of this court, following the above definition of a trade dispute, a trade dispute shall be detected from the substance of the claim, the parties to the claim, and the orders sought. However, a most distinguishing feature and nature of a trade dispute is the steps taken by the parties, and more so the claimant, preceding the filing of the claim in court.
32. It is important to clarify in earnest that a claim does not qualify as a trade dispute of the mere fact that a trade union or an employer organization is a party in the proceedings. Evidently and clearly, the claimant herein is named in this cause only for and on the ground that the grievant is allegedly a member thereof. The subject matter is not one affecting a group of employees, a section of employees of the respondent, a sector, industry, factory, industrial action or relations, collective bargaining, or such trade dispute issues. It is a cause about an individual employee who lost her job in circumstances that she considers unfair and unlawful.
33. The question then becomes – Other than that the claimant, a trade union, is representing the grievant, and there is nothing unlawful about that, what makes the substance of the claim a trade dispute? Put in another way – Had the grievant filed her claim in person or through her lawyer, would the claim qualify as a trade dispute? The answer is an emphatic no.
34. Sections 62 to 74 of the *Labour Relations Act* provides on how a trade dispute is to be resolved, only to come to court if conciliation fails. I have perused the cause file, now in the lower court, and there is no evidence whatsoever that the provisions of the law cited above were complied with or even attempted before the cause was filed in court. This aspect completely eliminates the claim in the cause from the realm of a trade dispute.
35. In the ruling of 8th June, 2023, the court observed that there was no evidence availed in the pleadings to demonstrate, prima facie, that the grievant is a member of the respondent and nothing has been availed to court so far to confirm the grievant’s membership with the claimant.
36. Suffice to state that there is need to disabuse litigants of the notion that once a trade union or an employers organization is named a party in a cause, in whatever capacity, with or without direct interest or benefit or orders in its favour, that the matter qualifies as a trade dispute.
37. The court is well aware of the contents of LN 6024 of 2018 which stated as follows –
- The Employment And Labour Relations
Court Act
(No. 20 of 2011)
Appointment Of Magistrates’ Courts To



Hear Matters Relating To Employment And Labour Relations

In Exercise of the powers conferred by section 29(3) and (4) (b) of the *Employment and Labour Relations Court Act*, 2011, and in consultation with the Principal Judge of the Court, the Chief Justice appoints all Magistrates of the rank of the *Senior Resident Magistrates and above* as Special Magistrates designated to hear and determine the following employment and labour relations cases within their respective areas of jurisdiction:

1. Disputes arising from contracts of employment (excluding trade disputes under the *Labour Relations Act*, 2007) where employees gross monthly pay does not exceed Ksh.80,000.00 as commenced and continued in accordance with the Employment and Labour Relations Court (Procedure) Rules, 2016.
2. Matters relating to the following specific areas-
 - (i) Offences under the *Work Injury Benefits Act*, 2007.
 - (ii) Offences under the *Employment Act*, 2007.
 - (iii) Offences under the *Labour Institutions Act*, 2007.
 - (iv) Offences under *Occupational Safety and Health Act*, 2007; and
 - (v) Offences under the *Labour Relations Act*, 2007.

The conferment under Gazette Notice No. 9243 is revoked.

Dated the 10th June, 2018.

David K. Maraga,

Chief Justice/President, Supreme Court of Kenya.

38. There is no dispute that the respondent is purely and entirely a representative of the grievant in this cause. It is otherwise purely and entirely a claim for alleged unfair and unlawful termination of the grievant and for her own benefit and compensation, if the same succeeds. As stated elsewhere in this ruling, the grievant may as well have filed the claim in person or through a private lawyer. Either way, it does not become or qualify as a trade dispute for the reasons stated above. The dispute in the cause is not between the union and the employer. It is strictly speaking a dispute between the grievant and the respondent, her former employer.
39. The court is aware of the holding in Kenya Engineering Workers Union (supra). The ratio of the decision in regard to the jurisdictional issue raised in the preliminary objection was that this court, ELRC, did not have jurisdiction in causes whereby the claimants earned less than Kshs.80,000/= . The court, and correctly so, held that the matter was properly before the court as ELRC has concurrent jurisdiction with the lower courts in claims where the monthly salary of the claimant is below Kshs.80,000/=. What that decision did not inform is whether the claimants had complied with sections 62 to 74 of the *Labour Relations Act*. If they had not complied, then, even that cause did not qualify as a trade dispute.
40. The court has said enough in demonstrating that the application herein is without merits for the following reasons –
 - a. The application is premised on a referenced cause that does not exist as the matter was effectively transferred to the lower court vide a ruling made by the court on 8th June, 2023 and the same allocated a different reference.



- b. In view of (a) above, the applicant ought to have filed the application by way of a miscellaneous application.
- c. Once this court made the ruling of 8th June, 2023 it became funtus officio in regard of that issue.
- d. The only way that this court may revisit the above ruling and order is by way of an application for review but that is not what the application by the applicant is seeking for. And in any event, no reasons have been advanced as to persuade this court to review the said order for transfer.
- e. This court cannot sit on appeal of its own orders or decision and as such this application is misconceived, bad in law, and an abuse of the court process.
- f. The subject matter of the cause is not a trade dispute and the lower court has jurisdiction to hear and determine the same as the monthly salary of the grievant was below Kshs.80,000/= at the time of termination.

V. Orders

- 41. The notice of motion by the applicant dated 21st September, 2023 is hereby dismissed with no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 22ND DAY OF FEBRUARY, 2024.

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DAVID NDERITU

JUDGE

