



Nyamai v Kenya Hospital Association t/a the Nairobi Hospital (Miscellaneous Application E288 of 2023) [2024] KEELRC 13311 (KLR) (28 November 2024) (Ruling)

Neutral citation: [2024] KEELRC 13311 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E288 OF 2023**

**CN BAARI, J
NOVEMBER 28, 2024**

BETWEEN

FRANCIS KINYUNGU NYAMAI APPLICANT

AND

**KENYA HOSPITAL ASSOCIATION T/A THE NAIROBI
HOSPITAL RESPONDENT**

RULING

1. Before court are two applications lodged by the Applicant herein. In his first Motion dated 30th July, 2024, the Applicant seeks a stay of proceedings in Milimani CMELRC No. E422 of 2023- *Francis Kinyungu Nyamai v. Kenya Hospital Association T/A The Nairobi Hospital*, while in yet another application dated 11th December, 2023 filed under certificate of urgency, he seeks the following reliefs:-
 - i. Spent
 - ii. That this Honourable Court be pleased to grant a Transfer of the MCELRC/E422/2023: *Francis Kinyungu Nyamai v Kenya Hospital Association T/A The Nairobi Hospital* to this Honourable Court;
 - iii. That in the alternative and without prejudice to the above, that this Honourable Court be pleased to grant unto the Applicant leave herein to file suit out of time against the Respondent herein for compensation for unlawful dismissal from employment;
 - iv. That in the alternative to Prayer (iii) hereinabove, the Applicant be at Liberty to file and/or lodge the intended proceedings within 30 days from the date of the order; and
 - v. That costs of this Application be in the cause.
2. The applications are supported by grounds on the face thereof and the affidavits of Francis Kinyungu Nyamai and Ms. Ivytez Mwangi - Counsel for the Applicant. Counsel avers that the Applicant was



employed by the Respondent as a Special Projects Manager on 28th January, 2020 on a consolidated salary of Kshs. 700,000 per month.

3. Counsel states that the Applicant was terminated from his employment by the Respondent on 3rd March, 2020 without any justification or an opportunity to be heard. It is her assertion that the Applicant subsequently engaged the Firm of Kisilu, Wandati & Company Advocates to pursue the claim for compensation for unlawful dismissal against the Respondent, and that the said Firm filed the suit on his behalf at the Milimani Chief Magistrates Court on 2nd March, 2023 instead of this Court.
4. Counsel avers that the suit filed at the Chief Magistrates' Court was erroneous as it was filed in the wrong court which fault could only be attributed to the Counsel and not the Applicant, who was innocent and was not aware.
5. The Applicant further states that the time frame for filing a fresh suit in this Court has since lapsed, and there is need for this Court to extend time for the Applicant to file the claim out of time.
6. She contends that the claim is substantial and has a good case with chances of success. It is further averred that if the Court does not extend the time, the Applicant will suffer irreparable loss and prejudice.
7. The Applicant states that the applications were filed without inordinate delay.
8. The Respondent opposed the application vide grounds of opposition dated 31st January, 2024. It is the Respondent's assertion that the Court lacks jurisdiction to make an order to transfer the suit from the lower Court, the same having been filed without jurisdiction, and the only remedy available to the Applicant is to withdraw the suit and file a fresh suit in a competent forum.
9. The Respondent states that the application to transfer is an abuse of the court process as to have the proceedings commenced in the lower court transferred to this court, is only meant to defeat the limitation period in Section 90 of the Employment Act.
10. The Respondent further contends that the Applicant should not allege the mistake of counsel to explain why the suit was filed in the wrong court, as litigation belongs to a party and not their Counsel.
11. The Respondent claims that the application was only filed to defeat the hearing of the Preliminary Objection filed by the Respondent in the lower court objecting to the jurisdiction of the court to hear the matter.
12. The Respondent states that there will be no prejudice to be suffered by the Applicant if this court does not grant the stay sought as the matter in the Magistrates Court was scheduled for mention on the 23rd October, 2024.
13. It is the Respondent's contention that the application ought to be struck out in limine with costs.
14. Parties canvassed the applications by way of written submissions and submissions were filed for both parties.

The Applicant's Submissions

15. The Applicant submits that Section 18 of the Civil Procedure Act empowers this Court to order the transfer of suits instituted in a subordinate Courts to itself or to other subordinate courts for trial and final disposal. The Applicant contends that this power may be exercised at any stage of the proceedings, even on its own motion. He placed reliance in the case of *David Kabugu-v- Zikarengu & 4 others*, Kampala HCCS No. 36 of 1995 to buttress this position.



16. The Applicant further claims that the cause of action arose in March 2020 when the employment contract was unlawfully terminated, and that the suit at the lower court was filed within the three years' time limit.
17. It is submitted for the Applicant that if the court were to dismiss the instant applications, the Applicant's right to access justice would be compromised as the time for filing a fresh suit has since lapsed.
18. The Applicant submits that the transfer of the suit will not prejudice the Respondent and if the Orders sought are not granted, he will be left with no prospects of being heard against the interest of justice.
19. It is the Applicant's further submission that this court has inherent power to evaluate equitable factors and exercise discretion in determining the timeliness of a claim, especially when circumstances beyond the Applicant's control have hindered his ability to file within the prescribed timeline.
20. The Applicant submits that there is a claim capable of being transferred to this Court contrary to the Respondent's assertions. He seeks to rely on the case of *Kenya Plantation and Agricultural Workers Union -v- Cargill Kenya Limited & Another* [2020] eKLR to buttress this position.
21. The Applicant further placed reliance in the case of *Phillis Chemwolo & Another -v- Augustine Kubede* 1982-88 KLR 103 at 1040 for the holding that blunders will be made from time to time and the court should ensure that justice is served by granting the Applicant an opportunity to have this case heard on merit by allowing the application to transfer the suit to this Court.
22. Further, the Applicant urges that this court be guided by Article 159(2)(d) of the *Constitution* of Kenya, 2010 that encourages courts to exercise judicial co-operation and comity and to discharge their obligation to administer justice fairly without undue regard to technicalities.
23. The Applicant prays that his application be allowed.

The Respondent's Submissions

24. The Respondent submits that Section 18 of the *Civil Procedure Act* does not apply to this case instead, the *Employment and Labour Relations Court (Procedure) Rules* is what applies to this Court. That the *Civil Procedure Rules* can only apply to employment and labour disputes where the *Employment and Labour Relations Court (Procedure) Rules* particularly mandate it such as the execution of the Court's decisions.
25. Further, relying on the cases of *Benedict Ojou Juma & 10 others -v- A.J Pereira & Sons Limited* [2016] eKLR and *Prisca Jepngetich -v- Generation Career Readiness Social Initiative Limited* [2021] eKLR, the Respondent contends that the said Rules and *ELRC Act* do not provide procedures for transfer of suits from the subordinate Courts to the ELRC. It is their assertion that if the drafters intended for the civil procedure rules to apply, they would have expressly provided so.
26. The Respondent further relied on the case of *Vincent Mwatsuma Nguma & Sothers -v- Kilifi Mariakani Water and Sewerage Co Ltd* (KIMAWASCO) [2021] eKLR where the Court exercised judicial restraint and dismissed an application filed under the wrong provisions of the law. The Court held that even though the application was unopposed, this was not a technical issue but a jurisdictional issue.
27. It is the Respondent's case that for reason that the lower court has no jurisdiction to hear and determine the matter before it, this Court cannot then transfer the matter.



28. It is the Respondent's submissions that Section 90 of the *Employment Act* is couched in mandatory terms. It is submitted that the dispute between the parties arose on the 3rd March, 2020 when the Applicant was issued with a termination letter, therefore, the Applicant had until 2nd March, 2020 to institute a suit against the Respondent.
29. The Respondent contends that this court lacks the inherent jurisdiction to extend time for filing a suit arising out of a contract for service. To support this position, the Respondent placed reliance on Part III of the Limitations of Actions Act and the holding in the case of *Denis Ksang Ripko -v- Kenya Commercial Bank Limited* [2016] eKLR.
30. The Respondent contends that Section 18 of the *Civil Procedure Act* provides power to the High Court to withdraw a suit from a subordinate court, and thereafter transfer the matter to another Court or dispose the same. It is contended that this establishes a sequence of actions, first the withdrawal and then the transfer and that this instance case, in case of a withdrawal, there will be nothing left to transfer since the suit would be incompetent by dint of Section 90 of the *Employment Act*.
31. The Respondent argues that to allow the transfer of the suit from the lower Court, would be tantamount to extension of the limitation period under Section 90 of the *Employment Act*.
32. The Respondent further submits that the Applicant is guilty of laches since the application was filed 4 years after the termination of the employment contract.
33. The Respondent relying on the case of *Rajesh Rughani-v- Fifty Investments Limited & Another* [2016] eKLR contends that clients cannot continue to hide behind the failure of the advocates to perform certain required actions on their part.
34. It is submitted that the Applicant has not produced tangible evidence to show that he was vigilant in following up on the matter and the court should not exercise its discretion in his favour. It cited the case of *Rupa Savings & Credit Cooperative Society -v- Violet Shidogo* [2022] eKLR to justify its position.
35. In summary, it is the Respondent's case that the instant Applicant's applications lack merit, are frivolous, mischievous and a waste of court's time and should be dismissed with costs.

Analysis and Determination

36. I have considered the twin applications, the Respondent's Replying Affidavit, the grounds of opposition and the parties' written submissions. The issues for determination are:
 - i. Whether this Court has jurisdiction to transfer a suit filed in a Magistrates Court without pecuniary jurisdiction to a Court with pecuniary jurisdiction for hearing and determination
 - ii. Whether the court has power to extend time to file a suit out of the statutory time lines
 - iii. Whether to stay the proceedings before the lower court related to this matter (Milimani CMELRC No. E422 of 2023- Francis Kinyungu Nyamai v. Kenya Hospital Association T/A The Nairobi Hospital).
37. On matters jurisdiction, the Court in *Owners of Motor Vessel "Lilian S" -v- Caltex Oil (Kenya) Limited* [1989] opined: -

“Jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending



other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

38. The Applicant’s position is that the suit was erroneously filed at the lower Court, instead of the Employment and Labour Relations Court owing to the mistake of counsel which should not be visited upon him. He then seeks to transfer the suit from the Magistrates’ Court where it is currently filed, on account of that court’s lack of pecuniary jurisdiction.
39. As was correctly submitted by the Respondent, the *Employment and Labour Relations Court (Procedure) Rules* and the *ELRC Act* have no provision on transfer of suits. It is however true that where the *ELRC Act* and the Rules developed there under are deficient, the court’s recourse is on the *Civil Procedure Act* and the *Civil Procedure Rules*.
40. It then follows that what the Applicant seeks in respect of this issue, is the court’s exercise of its discretionary power pursuant to Section 18 (1) (b) of the *Civil Procedure Act*. Before allowing a transfer such as that sought in the instant application, the court is under duty to confirm existence of a competent suit. In the case of *Meeli Ole Naisewa –v- Benson Gachuki Kinyanjui* [2016] eKLR the court had this to say on transfer of suits;

“I consider that under the provisions of Section 18, before the procedure and order of transfer is resorted to, the court must satisfy itself whether there is a competent suit in the original court capable of being tried and disposed of. The relevant things to be considered by the court in determining jurisdiction being the facts as deposed in the plaint, affidavit and statement of claim served upon the defendant. The basis of this being that it is the plaintiff who in the determination of his rights invokes the jurisdiction of the court conferred by the *Constitution* and statute. It is important to bear in mind that the issue of my decision is whether the application as it stands has merits to enable me make an order of transfer. The application was therefore to be tested whether the court from which the suit is being transferred had jurisdiction.”

41. Under the *Magistrates’ Act*, the Magistrates pecuniary jurisdiction is limited to handling employment and labour-related cases where the salary of the employee does not exceed Kshs.80,000/=.
42. The Applicant’s salary as at termination, and which figure is not disputed is Kshs. 700,000. This evidently, is way beyond the pecuniary jurisdiction of the court where the suit was filed. In the case of *Equity Bank Limited –v- Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR the Court of Appeal observed thus:-

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow court to transfer an incompetent suit for want of jurisdiction to a competent court, would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the “O2” principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the situation. In the same way, a court of law should not



through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.

43. Similarly, in *Abraham Mwangi Wamigwi -v- Simon Mbiriri Wanjiku & Another* [2012] eKLR, it was held:-

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law.”

44. This position has been reiterated in numerous other cases including the Supreme Court decision in the case of *Albert Chaurembo Mumba and 7 Others -v- Maurice Munyao & 148 Others* [2019] eKLR, *Kagenyi -v- Musiramo & Another* (1968) EALR 43, and *Boniface Waweru Mbiyu -v- Mary Njeri & Another* Nairobi HCCC No. 639 of 2005 just to mention a few.

45. Guided by the foregone decisions, I find and hold that for reason that the Magistrates court did not have pecuniary jurisdiction to handle the matter whose transfer is being sought herein, there is no competent suit for this court to transfer.

46. Accordingly, the Application dated 11th December, 2023 lacks merit and is hereby dismissed with costs.

47. The other issues segregated herein, no doubt fall by the way side.

48. It is so ordered.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS 28TH DAY OF NOVEMBER, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Maina h/b for Mr. Wandati for the Applicant

Ms. Wangong’u for the Respondent

