



**Ojulo v Frodak Kenya Ltd. & another (Miscellaneous Application
E020 of 2022) [2023] KEELRC 488 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 488 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS APPLICATION E020 OF 2022**

JW KELI, J

FEBRUARY 23, 2023

BETWEEN

JOTHAM OJULO CLAIMANT

AND

BUTALI SUGAR CO. LIMITED 1ST RESPONDENT

FRODAK KENYA LTD. 2ND RESPONDENT

RULING

1. The applicant vide notice of motion dated November 15, 2022 and received in court on November 18, 2022 sought the following orders:-
 - (i) That this Honourable court be pleased to order that Nos E7, E8, 90,53, 207, 51, 52, 57, 46, 103, 144, 163, 156, 155, 46, 103, 144, 163, 84, E52, 157, 143, E41, 14, 54, 107, 194, 134, 95, 78, 52, 133,126, 60 /20209/19, 207/19, 208/19, 206/19, 193/19, 64/19, 179/19, 210/19 be and are hereby transferred from the Kakamega Chief Magistrate’s Court, to Butali Law courts for purposes of hearing and determination.
 - (ii) Costs of this application be provided for.
2. The Application is supported by Affidavit of V.A Shibanda and premised on the following grounds:-
 - (a) That these matters were filed in Kakamega Law Courts.
 - (b) That the Respondents Butali Sugar Mills and Frodak are situated at Butali Sugar Mills factory which is near Butali Law Court rather than Kakamega Law Courts.
 - (c) That the Claimants live in Butali area whereas the Respondents also work for gain within Butali area.



- (d) That the said transfer would save the parties travel costs and would be convenient for both parties.
 - (e) It is in the interest of justice that this suit be heard in the Butali Law Court which has jurisdiction.
3. The Application was opposed by 2nd Respondent vide affidavit of Alex Mbeka dated November 25, 2022.
 4. The court gave direction that the application be canvassed by way of written submission. The Applicants submissions dated November 30, 2022 drawn by V A Shibanda Advocates were filed on December 7, 2022.
 5. The 2nd Respondent's submissions by Alex Mbeka Advocates were dated January 12, 2023 and filed in court on the January 12, 2023

Determination

6. The issues for determinations discerned from the submission of both parties was whether the applicant was entitled to orders sought and costs.

Findings by court

7. Replying Affidavit of Alex Mbeka dated November 25, 2022 averred they filed Notice of Preliminary Objection in E7,52,53,78 and 90 all of 2020 various claimants v Frodak Kenya Limited and Butali Sugar Mills Limited (Am 1a-f)
8. That the ruling in objection dated May 5, 2022 in Kakamega E7 of 2020 where the court dismissed the objection ("Am-2"). The Court found Am2 was a ruling of the court in Misc ELRC No 25 of 2020 John Wemali -vs-Frodak Kenya Limited & Butali Sugar Mills Limited. Hon. Eric Malesi in ruling dated August 16, 2022 did not indicate that the said ruling was related to any other suit.
9. The 2nd Respondent further in paragraph 7 of Alex Mbeka affidavit indicated that ruling in preliminary objection dated May 5, 2022 in Kakamega MC ELRC Nos 52,53,78 and 90 all of 2020 Various Claimants v Frodaka Kenya Limited and Butali Sugar Mills Limited were delivered by Hon. Maragia who struck out the suits with costs to the 2nd Defendant for want of territorial jurisdiction (Am – 4).
10. AM 4 was copy of the ruling upon perusal the court found the ruling was in respect of Kakamega MC ELRC No 55 of 2020 – Ezekiel Wakukha Cheto v Frodak Kenya Limited & Butali Sugar Mills Limited. That the Hon. Magistrate did not indicate that the ruling was in respect of any other matter.
11. The court finds and determines that indeed there are appeals pending before court in some of the matters sought to be transferred.
12. The 2nd Respondent submits that if the court is inclined to allow the application the transfer can only be applicable to the other matters listed on the face of the application save for Kakamega MC ELRC Nos 52,53,78 and 90 all of 2020 which suits have since been struck out and Applicant in the instant application filed appeals being Bungoma ELRC A No 52,52,53 and 54 all of 2022 various Appellants v Frodak Kenya Limited & Another.
13. That the Respondents have filed appeal arising out of Kakamega MC ELRC No E7 of 2020 whose appeal being Bungoma ELRC No 24 of 2022 is pending for hearing and determination by court.



14. The Law firm MNO Advocates LLP further filed submissions on behalf of the 2nd Respondent. The further submissions were disregarded as they amount to duplicity. The court did not find on record the referred to affidavit.

Decision of the court

15. Section 17 of the *Civil Procedure Act* provides:-

"17. Power to transfer suits which may be instituted in more than one court Where a suit may be instituted in any one of two or more subordinate courts, and is instituted in one of those courts, any defendant after notice to the other parties, or the court of its own motion, may, at the earliest possible opportunity, apply to the High Court to have the suit transferred to another court; and the High Court after considering the objections, if any, shall determine in which of the several courts having jurisdiction the suit shall proceed."

16. Section 18 of the *Civil procedure Act* gives power of transfer of suits instituted in lower courts on application by parties 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.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn."

17. The Applicant has justified the transfer based on proximity to the respondents. That Butali law courts & Kakamega Law Courts are both situated in Kakamega County. To support their case the applicant further relied on decision of the court in *Kithita Ngeana v Mwaniki Kisume* [2018] eKLR where the judge allowed an application for transfer based on convenience of the parties and proximity of residence of the parties and court. That the court relied on the decision on *Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd* [2012] eKLR where Justice Odunga set out condicytions for transfer of suits to wit ,

"In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the



relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and maintaining the witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.”

This authority was cited by both parties and the court finds it is good law to apply in the instant case. The court finds the reason of proximity to the respondents’ place of business a good ground for transfer of the suits. No prejudice will be suffered by the respondents in such a case.

18. The court finds that it is not prudent to make orders with respect to suits within pending appeals namely 7/2020, 51, 52, 53, and 54 of 2022.

In conclusion, court allows application dated November 15, 2022 in the following terms:-

- (i) That the honourable court hereby orders that Kakamega MC ELRC Nos E 8, 90, 207, 57, 46, 103, 144, 163, 156, 155, 46, 103, 144, 163, 80, 157, 143, e41, 14, 107, 194, 134, 95, 78, 133, 126, 60 of 2020 209 of 2019M 207 of 2019, 208 of 2019, 206 of 2019, 193 of 2019, 64 of 2019, 179 of 2019 and 120 of 2019 be and is hereby transferred from Kakamega Chief Magistrate’s court to Butali Law Courts for purposes of hearing and determination. The order does not affect any struck off or dismissed suit at the lower court.
- (ii) Costs of the application to the respondent.

19. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT ON 23RD DAY OF FEBRUARY, 2023.

JW KELI

JUDGE

In the presence of :-

Court Assistant: Brenda Wesonga

Claimant:-

Respondent:-

