



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Mate v Gibb Afica Limited (Miscellaneous Application E209 of 2021)
[2023] KEELRC 353 (KLR) (10 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 353 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E209 OF 2021**

**B ONGAYA, J
FEBRUARY 10, 2023**

BETWEEN

HENRY NJUKI MATE APPLICANT

AND

GIBB AFICA LIMITED RESPONDENT

RULING

1. The applicant filed the application by the notice of motion dated December 5, 2022 and through Jean M Nyoro & Company Advocates. The application invoked order 51 of the *Civil Procedure Rules*, Section 18(1)(b) and 3A of the *Civil Procedure Act* and all enabling provisions of the law. The applicant prayed for transfer of Milimani Chief Magistrate ELRC No E2127 of 2021 between the applicant as the claimant and the respondent to this Court for hearing and disposal; and, costs be provided for. The ground for the prayer is that the applicant earned Kshs 380, 000.00 per month and the Magistrates' Court lacks jurisdiction to hear and determine the suit – whose jurisdiction is limited to gross salaries of Kshs 80, 000.00 per month. Further the suit had been filed before the Magistrates' Court in error that the Court had jurisdiction. It is therefore in the interests of justice that the suit is transferred to this Court.
2. The respondent opposed the application by filing the replying affidavit of Wanjiku Kariuki Advocate sworn on February 7, 2023 and through Kihara & Wyne Advocates. It is urged that the respondent raised a preliminary objection before the Magistrates' Court that the Court lacked jurisdiction because the pecuniary jurisdiction was wanting, the applicant's monthly salary being Kshs 380,000.00. That contrary to allegations by the applicant, the trial Magistrate never issued directions that the present application be filed. Further the Court lacks jurisdiction to transfer the suit as prayed for per holding of the Supreme Court in *Albert Chaurembo Mumba & 7 Others -v- Maurice Munyao & 148 others* [2019]eKLR. In that case the Supreme Court upheld *Kagenyi v Musiramo & Another* (1968) EALR 43 that an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, in a court which has jurisdiction to try it, and, it is therefore irrelevant



as parties cannot consent to confer jurisdiction to a court or tribunal where it is not provided by law. It was urged that Nduma J applied the decisions in dismissing a similar application in *John Adoyo & 6 Others v De La Rue Currency and Security Print Limited* [2022]EKL.R that a suit filed in a court which lacks jurisdiction is an incompetent suit incapable of being transferred as was held in *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016]eKLR. That such incompetent suit is incapable of being transferred to another Court by the High Court under section 18 of the *Civil Procedure Act*. Further, it was urged for the respondent that in absence of the jurisdiction, invoking the overriding oxygen principle as per Article 159 will not aid the applicant at all. The respondent's case was that as the suit in the lower Court is null and void ab initio, there is no suit to be transferred. The respondent also filed a preliminary objection that the Court lacked jurisdiction and prayed that the application be struck out under the Court's inherent jurisdiction under section 3A of the *Civil Procedure Rules*.

3. The Court has considered the parties' respective cases and submissions. The applicant has offered no submissions or authorities to rebut the respondent's case as supported with the binding decisions of the Supreme Court and the Court of Appeal. The respondent's case is upheld and the application is liable to dismissal with costs.
4. In conclusion, the application filed for the respondent by the notice of motion dated December 5, 2022 is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 10TH FEBRUARY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

