



**Kenya Union of Sugar Plantation & Allied Workers v West Kenya Sugar Company Limited  
(Miscellaneous Case E017 of 2022) [2023] KEELRC 323 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 323 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
MISCELLANEOUS CASE E017 OF 2022**

**JW KELI, J  
FEBRUARY 9, 2023**

**BETWEEN**  
**KENYA UNION OF SUGAR PLANTATION & ALLIED  
WORKERS ..... APPLICANT**  
**AND**  
**WEST KENYA SUGAR COMPANY LIMITED ..... RESPONDENT**

**RULING**

1. The Applicant /Claimant approached the court vide Notice of Motion dated 25<sup>th</sup> October 2022 seeking the following orders:-
  - a. That this Honourable Court be pleased to order for transfer of suit No. Cmel No. 148 Of 2019 from Chief Magistrates Court at Kakamega to the Employment and Labour Relations Court Bungoma.
  - b. Costs of this application be in the cause.
2. The grounds of the application were stated to be :-
  - i. That the Applicant/Claimant herein filed the above suit in the Chief Magistrate’s Court at Kakamega on 22<sup>nd</sup> October 2019.
  - ii. That the matter is in respect to the employment relationship between the respondent employer and three grievant employees who were member so of the applicant union.
  - iii. That the matter has since been tracking slowly due to congestion of cases in the same court.
  - iv. That the matter last came up for mention before the Honourable Magistrate Delphine in the open court 4 on the 1<sup>st</sup> November 2021 where the Applicant orally sought for the file to be transferred to the Employment and Labour Relations Court at Bungoma.



- v. That the Application was not opposed and by consent of parties the court directed that the file be transferred and listed for mention at the Bungoma Employment and Labour Relations Court on the 4<sup>th</sup> November 2021.
  - vi. That the file has since not been transmitted and the matters have since not been prosecuted as the file is said to be missing from the Kakamega Chief Magistrates Registry.
  - vii. That the Applicant has severally visited both registries at the Chief Magistrate's Court in Kakamega and the Employment Court at Bungoma to learn the status of the file all in vain.
  - viii. That the purpose of transfer is to enable the grievants to have timely justice without further days .
  - ix. That this Application has been brought without undue delay.
  - x. That the jurisdiction of this court is hereby admitted and that the respondent stand to suffer no prejudice if the application is allowed.
  - xi. That it will be in the interest of justice that the orders sought be granted.
3. The Application was supported by the affidavit of Jeremiah Ingalia Akhonya sworn on the 25<sup>th</sup> October 2022 reiterating same grounds and annexing copy of the filed claim before the Chief Magistrate Court at Kakamega.
  4. The Respondent did not file response. The court had directed that the application be canvassed by way of written submissions. When the matter came up for confirmation of filing of written submission on the 17<sup>th</sup> January 2023 both parties present, the Respondent's advocate Ms. Kahi informed the court that they were not opposed to the application. The court issued a ruling date nevertheless.

### **Determination**

5. The issue before the court is whether or not the court should grant orders sought to transfer the magistrate court file to this court for determination.
6. The Application was brought under the provisions of Section 3, 4, and 12(3) iii & viii of the *Employment and Labour Relations Court Act*, Rule 17 & 28(1)(d)&(g) *Employment and Labour Relations Court (Procedure)rules* 2016, Article 159(2) and 162(2) of the *Constitution* and all enabling provisions of the law.
7. Section 3 *Employment and Labour Relations Court Act* states:- “ (1) The principal objective of this Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by this Act.
  - (2) The Court shall in the exercise of its powers under this Act or the interpretation of the rights of individuals and parties, seek to give effect to the principle objective in subsection (1).
  - (3) The parties and their representatives, as the case may be, shall assist the Court to further the principal objective and, to that effect, to participate in the proceedings of the Court and to comply with directions and orders of the Court.”
8. Section 4 *Employment and Labour Relations Court Act* provides for the establishment of the Employment and Labour Relations Court to wit: “There is established the Employment and Labour Relations Court pursuant to Article 162(2) of the *Constitution*.”



9. Section 12 of the Act provides for the jurisdiction of the court and in part 3 states, ‘(3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders : (iii) an order for specific performance; (viii) any other appropriate relief as the Court may deem fit to grant.’
10. Rule 17 and 28(1)(d)) & (g) [Employment and Labour Relations Court \(procedure\)rules](#) 2016 provide:- ‘17. (1) An interlocutory application shall be made by notice of motion and shall be heard in open Court. (2) A party shall, after filing a motion, notify all the parties of the motion. (3) The Court may, for good cause, hear an application *ex parte* and make an order upon terms as to costs and subject to such undertaking, if any, as the Court considers just: Provided that a party affected by that order may apply to set it aside. (4) An *ex parte* injunction may be granted only once for not more than fourteen days and shall not be extended thereafter except once by consent of the parties or by the order of the Court for a period not exceeding fourteen days. (5) In a suit where an injunction is sought, a claimant or applicant may at any time in the suit, apply to the Court for an interim or temporary injunction to restrain the respondent from committing a breach of contract or an injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right. (6) Where an application is made to the Court under paragraph (5) for a temporary or interim injunction, the Court may, by order, grant an injunction on such terms as it deems fit. (7) Any order for injunction may be discharged, varied or set aside by the Court on application by any party dissatisfied with such order. (8) A notice of motion shall state in general terms the grounds of the application and where the motion is supported by an affidavit, both the notice of motion and a copy of the affidavit shall be served on the other party. (9) A party may respond to an application by filing grounds of opposition verified by an affidavit. (10) Notwithstanding anything contained in this Rule, the Court shall not grant an *ex parte* order that reinstates into employment an employee whose services have been terminated” and Rule 28. (1) reads, ‘The Court shall, after considering all relevant facts and supporting documents presented to it and in accordance with the procedures set in these Rules—(d) an order for specific performance; (g) any other order to meet the ends of justice.’
11. Article 159(2) states: ‘(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—(a) justice shall be done to all, irrespective of status; (b) justice shall not be delayed; (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3); (d) justice shall be administered without undue regard to procedural technicalities; and (e) the purpose and principles of this Constitution shall be protected and promoted.’
12. Article 162 of the Constitution establishes superior courts in Kenya to wit:- ‘(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2). (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— (a) employment and labour relations; and (b) the environment and the use and occupation of, and title to, land.’
13. The court finds that the cited law is on jurisdiction of the court and promotion of access to justice. No specific provision on transfer of suits was cited by the applicant.
14. The substantive law on transfer of suits under section 18 of the [Civil Procedure Act](#) is as reproduced below:-

Power of High Court to withdraw and transfer case instituted in subordinate court ‘18(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.”

15. The Applicant states that by consent of parties the lower court file was to be transferred to this court. The court finds and determines that the lower court has no authority to transfer a file from itself to a superior court. Only the Court may exercise such a power as stated above under section 18 of the Civil Procedure Act. The Applicant did not produce the said consent order.
16. On the merit of the application. The court finds that the real reason under the application why the transfer was sought was, ‘that the matter has since been tracking slowly due to congestion of cases in the same court.’”
17. The court found no challenge to the jurisdiction of the lower court to determine the claim. The transfer of suits under section 18 of the Civil Procedure Act is a judicial exercise and not administrative. The court holds that Jurisdiction is the only valid reason the court can remove a lower court from the seat over a matter. The court is not aware of any other valid legal reason why it ought to transfer the claim from the lower court to itself.
18. The reason given of the matter tracking slowly due to congestion of the lower court is not isolated. The principle of equality of arms requires the court to treat all parties equally. It is true the court has original jurisdiction in all employer employee claims. The jurisdiction to the lower court was donated *vide* a gazette notice by the Chief Justice albeit to decongest the court and increase access to justice under Article 48 of the Constitution of Kenya. That the said gazette notice has not be found unconstitutional and is thus valid .
19. The court finds that the instant application is tantamount to forum shopping. The court would be breaching the principle of equality of arms thus discriminating against other parties before the magistrates court if it were to allow the transfer. The court takes judicial notice that issues of delay and congestion are historical systematic issues in our courts which are being addressed at all levels. The parties ought to raise their concerns with the court if aggrieved by the delay but not seek to bolt to this court.
20. In the upshot the court finds that the instant application is unmerited and is dismissed.
21. Each party to bear own costs.
22. It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 9<sup>TH</sup> FEBRUARY, 2023.**

**J. W. KELI,**

**JUDGE.**

**In the presence of:**

Court Assistant – Brenda Wesonga

Applicant: Akhonya



Respondent: Absent

**Further Court Order**

The Deputy Registrar is ordered to transmit this ruling to the Chief Magistrate's Court Kakamega for their information.

