



**Mkiwa v Old Mutual Holdings Limited (Miscellaneous Application
E203 of 2022) [2023] KEELRC 715 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 715 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E203 OF 2022**

**B ONGAYA, J
MARCH 24, 2023**

BETWEEN

HALFAN MKIWA APPLICANT

AND

OLD MUTUAL HOLDINGS LIMITED RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th March, 2023)

RULING

1. The applicant filed the notice of motion dated 15.12.2022 through Ochieng’ Ogutu & Company Advocates. The application was under article 50(1) and 159 (2) (d) of *the Constitution*, section 3(1) & (2), 12(1), (2), (3) (iv) & (viii) and 29(1) of the *Employment and Labour Relations Court Act*, sections 1A, 1B, 3A and 18 (1) (b) of the *Civil Procedure Act*, Rule 17(1) & (2) of the *Employment and Labour Relations Court (Procedure) Rules 2016* and all enabling provisions of law. The applicant prayed for orders:
 - a. That the claim filed by the applicant against the respondent at Milimani Chief Magistrates Courts being CMEL Cause No. e1765 of 2022 be and is hereby transferred to this Court for hearing and determination.
 - b. That in alternative the applicant be granted leave to file a fresh claim in the Employment and Labour Relations Court out of time and withdraw CMEL Cause No. e1765 of 2022.
 - c. Costs be provided for.
2. The application was based upon the annexed supporting affidavit of Carlos Ooro and upon the following grounds:
 - a. The applicant’s salary was Kshs. 546, 277.00 which is beyond the pecuniary limits of the magistrate’s court at which the applicant has filed the suit. That suit as was filed cannot be



withdrawn and a fresh suit filed before this court because the statutory period for doing so has since lapsed.

- b. Due to e-filing challenges, the applicant has been unable to file a fresh suit in the court with jurisdiction prior to lapsing of the time of limitation.
 - c. The applicant will suffer irreparable injury if the application is not granted. Justice and fairness require application be allowed.
3. The respondent opposes the application upon a point of law that the suit having been filed in a court without jurisdiction, the court lacks jurisdiction to transfer such incompetent suit. The respondent has cited Supreme Court decision in *Albert Chaurembo Mumba & 7 others-versus- Maurice Munyao & 148 others* [2019]eKLR. The respondent has also cited Court of Appeal decision in *Equity Bank Limited – versus- Bruce Mutie Mutuku t/a Diani Tour & Travel* [2016] eKLR for the holding that an otherwise incompetent suit cannot be sanctified through a transfer. The Court is bound by the cited decisions. The application will therefore fail.
 4. The time of limitation under section 90 of the *Employment Act*, 2007 is mandatory and not amenable to extension. The claimant has not shown the basis to extent the time of limitation by way of leave as prayed for.
 5. The court therefore returns that the application will fail. Considering all circumstances of the case, each party to bear own costs.
 6. In conclusion the application is hereby dismissed with orders each party to bear own costs of the application.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 24TH MARCH, 2023

BYRAM ONGAYA

PRINCIPAL JUDGE

