



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chebuyi v Frodak Kenya Limited & another (Miscellaneous Application  
E024 of 2022) [2023] KEELRC 894 (KLR) (14 April 2023) (Ruling)**

Neutral citation: [2023] KEELRC 894 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA  
MISCELLANEOUS APPLICATION E024 OF 2022**

**JW KELI, J**

**APRIL 14, 2023**

**BETWEEN**

**FRED CHEBUYI ..... PLAINTIFF**

**AND**

**FRODAK KENYA LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**BUTALI SUGAR LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The Applicants vide Notice of Motion dated December 6, 2022 sought for order of transfer Of Butali MCE & LR No 4 of 2020 from Butali Law Courts to Bungoma High court ELRC for hearing and determination.
2. The Application was supported by the affidavit of Vivian Shibanda Advocate dated December 6, 2022 and relied on the ruling of the Magistrate court dated July 9, 2020 which advised matter be transferred to this court.
3. The Application was not opposed and the court allowed the transfer. Later the 1<sup>st</sup> Respondent made application dated January 27, 2023 to set a side the said order of transfer. The court was satisfied with the grounds raised that there was merit in the Application . The application was allowed and the order of transfer dated January 23, 2023 set aside for hearing of the application on merit.
4. The Respondent filed replying affidavit to the application sworn by George Ager on the February 24, 2023 in opposition to the transfer on basis that the trial court had no pecuniary jurisdiction in Butali MIC ELR No 4 of 2018 and advised parties to file suit in High court.
5. That pursuant to the ruling the Claimant filed similar suit No Bungoma ELRC No 49 of 2021 ( formally KSM ELRC No E019 of 2021 ) which suit was dismissed by the court for being subjudice



and statute barred a fact concealed by the Claimant in filing the instant application. That the claimants have suits in various courts on same cause.

6. The 2<sup>nd</sup> Respondent filed replying affidavit sworn by Otieno Njoga on the February 23, 2023 which the court found mirrored on the response by the 1<sup>st</sup> Respondent.
7. The Applicants response to the foregoing replying affidavit was through replying affidavit of Vivian Shibanda Advocate sworn on the March 1, 2023 and inter alia the Applicant denied concealing cause NO 49 of 2021 stating it was a different suit with different parties.

### **Written Submissions**

8. The Application was canvassed by way of written submissions and all parties complied.

### **Decision**

#### **Whether the Application was merited.**

9. The court having considered the submissions and pleadings made the following findings
  1. That in the ruling dated July 9, 2020 by Hon ZJ Nyakundi in Butali MELRC 4/2018 sought to be transferred to this court, the court held the suit was outside its pecuniary jurisdiction and the court had no jurisdiction to hear and determine the matter and downed its tools. The court further advised the claimants to pursue their claim in the High court. The court holds that the Hon Magistrate court did not order transfer of the primary suit to this contrary to averment of Applicants counsel in paragraph 7 of the supporting affidavit. The court advised filing of case in the court.
  2. The court finds that Bungoma ELRC suit No 49 of 21 ( formerly Kisumu ELRC E019 OF 2021 ) was filed . The same was dismissed for being time barred vide ruling of the court dated April 21, 2022. The Applicant vide the Replying affidavit of Vivian Shibanda sworn on the March 1, 2022 urged ELRC 49 of 2021 was a different suit with different parties from Butali PM ELRC 4 of 2018. The court perused the ruling in 49 of 2021 dated April 21, 2022 and found in paragraph 18 of the ruling it was recorded that the claimants in submission had stated there was a ruling in Butali SPMCCC No 4 OF 2018 where the Magistrate made a ruling directing the suit be filed in the high court. The court held that the court was not bound by direction of the magistrate .
10. The court in the circumstances found that the applicants are guilty of material non disclosure of existence of ruling in Bungoma ELRC No 49 of 2021 and that further the court finds that the said suit was pursuant to the ruling of the Magistrate court in the primary suit. The court further finds that the lower court having found it had no pecuniary jurisdiction the suit was incompetent and ought to have been struck off. A suit filed without pecuniary jurisdiction is not available to transfer to this court. The court upholds the decision of the Supreme Court in *Albert Charembo Nyumba & 9 Others v Maurice Munyao & 148 Others* [2019] eKLR where in paragraph [154] it held “ 154 however as it is well elucidated in the case of *Kagenyi v Msiramo & Another* [1968] EALE 43 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 to a court which has jurisdiction to try it.. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a court tribunal where it is not provided by law”. The same holding was made by the court of Appeal in *Equity Bank Limited v Brince Mutie Mutuku T/A Diani Tour Travel* 2016 eKLR where the court held it was illegal to transfer suit under HC powers under section 18 of the *Civil*



Procedure Act filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit.

11. In the upshot the court holds the Application dated December 6, 2022 to have been tainted with material non- disclosure and unmerited for the reason that the court cannot transfer an incompetent suit from a court without jurisdiction to itself exercising powers of transfer under Section 18 of the Civil Procedure Act.
12. The Application is dismissed with costs to the Respondent.
13. It is so ordered.

**DATED, SIGNED DELIVERED AT BUNGOMA IN OPEN COURT THIS 14<sup>TH</sup> APRIL, 2023.**

**JEMIMAH KELI,**

**JUDGE.**

**In the presence of :-**

**Court Clerk: Lucy Macheso**

**Applicant :Shibanda**

**2<sup>nd</sup> Respondent : Murgasia holding brief for Njoga**

**1<sup>ST</sup> Respondent : Absent**

