



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chege v Bank of Baroda (Kenya) Ltd (Cause E015 of 2022)  
[2023] KEELRC 1458 (KLR) (8 June 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1458 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
CAUSE E015 OF 2022  
DN NDERITU, J  
JUNE 8, 2023**

**BETWEEN**

**JOHN GITHERE CHEGE ..... CLAIMANT**

**AND**

**BANK OF BARODA (KENYA) LTD ..... RESPONDENT**

**RULING**

**I. Introduction**

1. In a Statement of claim dated May 6, 2022 and filed in court on May 19, 2022, through Kubai Musyoka & Co Advocates, the Claimant (the Respondent in the application) filed this claim against the Respondent (the applicant in the application) praying for the following –
  - i. The summary dismissal of the claimant from employment was substantively and procedurally unlawful and unfair.
  - ii. The Claimant be compensated twelve (12) month's gross salary compensation for unfair/unlawful dismissal from employment at Kes 5,324,703/=.
  - iii. The Claimant be paid all underpayment of basic salary at Kes 2,313,420/=.
  - iv. The Claimant be paid underpayment of transfer disturbance allowance at Kes 121,922/=.
  - v. The Claimant paid air ticket and taxi costs amount at 6,860/=
  - vi. The Claimant be paid personal transport/air ticket and goods amount at Kes55,385/=.
  - vii. The Claimant be paid underpayment of the uncashed annual leave days (28) at Kes 32,073/=.



- viii. The Claimant be paid three(3) months' pay in lieu of notice at Kes 1,331,100/ =.
  - ix. The Claimant be paid twenty one (21 years gratuity at Kes 8,337,756.
  - x. The total claim is Kes 17,523,217.
2. In the descriptive parts of the claim the Claimant describes the Respondent as a commercial bank duly incorporated in Kenya and whose address for service is care of the managing director, Post Office Box 30033-00100, Nairobi.
  3. He pleads that he worked for the Respondent between April, 1993 and October, 2021, serving in various positions and branches of the Respondent but his last work station was Nyali branch, Mombasa County. It is while serving in this work station that the Claimant was dismissed on October 29, 2021.
  4. It is that dismissal that the Claimant is challenging in this cause and seeking compensation in the terms of the prayers set out above.
  5. The Respondent filed a response to the Claim dated June 15, 2022 on even date, through Ondati Mogaka & Associates Advocates. In its response the Respondent prays that the Claimant's cause be dismissed with costs for want of merits.
  6. On November 3, 2022 the Respondent filed a notice of motion dated October 21, 2022 seeking that –
    1. This Honourable Court be pleased to transfer this suit to the Employment and Labour Relations Court at Mombasa for trial and disposal
    2. Cost of this application be provided for.
  7. The said application is expressed to be brought under the provisions of Section 29(1) of the *Employment and Labour Relations Court Act*, Rule 17(1) of the *Employment and Labour Relations Court Rules* 2016, Order 51 Rule 1 of the *Civil Procedure Rules* 2010, and all other enabling provisions of the law. It is based on the grounds on the face of it and supported with the affidavit of Martin Karanu, the legal manager of the Respondent, sworn on October 21, 2022 with one annexure thereto.
  8. In response to the application, the Claimant filed a replying affidavit on March 13, 2023 purportedly sworn by the Claimant John Githera Chege. However, although the said affidavit is purportedly signed by the Claimant and by Ja Guserwa, Advocate and commissioner for oaths, the jurat thereof does not indicate where at the affidavit was sworn and the date thereof. Counsel for the Respondent has submitted at length to the effect that the said document as filed by the Claimant does not amount to a replying affidavit and as such there is no formal response to the application. Counsel for the Respondent has prayed that the said affidavit be struck out.

## II. The Respondent's Case

9. The gist of the application is that the cause of action arose at Mombasa, the Claimant's last work station was at Nyali, Mombasa County, and that the bulk of witnesses for the Respondent who are to testify are based at Mombasa, and as such the cause ought to have been filed in the Employment and Labour Relations Court (ELRC) at Mombasa.
10. In the supporting affidavit, the Respondent argues that other than that the Claimant resides at Nakuru and or prefers ELRC Nakuru to hear and determine the cause, there is no other legal or plausible reason



why this cause was filed at Nakuru. The Respondent argues that the Claimant should not have a free hand in choosing and determining the court that shall hear and determine his cause.

11. The Respondent argues that the cause of action arose at Mombasa where the Claimant was working and from where he was dismissed and where the Respondent has witnesses to the cause. It is argued that the Respondent should not be made to suffer in the hands of the Claimant by this court allowing him to have a free hand in the choice of the place of filing his cause.
12. It is on the basis of the foregoing that the Respondent is seeking that the application be allowed. The submissions by counsel for the Respondent, Mr Ondati, shall be considered in the succeeding parts of this ruling alongside those by counsel for the Claimant, Miss Kubai.

### III. The Claimant's Response

13. As noted above, the replying affidavit by the Claimant in response to the application is neither dated nor indicating of the place where it was sworn. Without prejudice, as the court shall deal with the foregoing aspect in a moment, the Claimant argues that this court has countrywide jurisdiction and should entertain, hear, and determine causes from all parts of the country.
14. The Claimant argues that in the era of virtual court proceedings the parties do not incur extra cost in terms of transport and hence the Respondent does not need to move the witnesses from one location to another. He argues that he is currently jobless and that he has no means of commuting to Mombasa from Nakuru in case the cause was to be heard physically at ELRC Mombasa. He argues that no prejudice shall be occasioned to the Respondent if the cause proceeds to hearing and determination in this court.
15. It is on the basis of the foregoing that the Claimant pleads that the application by the Respondent be dismissed with costs. The submissions by his counsel shall be considered in the succeeding parts of this ruling alongside those by counsel for the Respondent.

### IV. Determination

16. Upon careful consideration and analysis of the evidence and submissions from both sides, it is evident that there is only one main issue for determination by this court – Should this court order the transfer of this cause from ELRC Nakuru to ELRC Mombasa for hearing and determination?
17. Before dealing with the above issue, I wish to deal with the issue raised about the replying affidavit filed by the Claimant. It is a fact that in the jurat it is neither indicated where the affidavit was sworn nor the date thereof.
18. Counsel for the Respondent has passionately submitted that the said affidavit should be struck out for non-compliance with the mandatory provisions of Section 5 of the [Oaths and Statutory Declarations Act](#) which provides that the jurat in every affidavit or statement on oath must state the date and place of the oath or affirmation. Counsel has cited a multitude of cases on this issue including [Mulusiab Land Consultants & Another V Industrial Development Bank & 2 Others](#) (2005) eKLR, [Talewa Road Contractors Limited V Kenya National Highways Authority](#) (2014) eKLR, and [Gideon Sitelu Konchellah V Julius Lekakeny Ole Sunkuli & 2 Others](#) (2018) eKLR, among many others.
19. This court is in concurrence with counsel for the Respondent on this issue. A purported affidavit that is not properly executed is of no evidential value and amounts to just another paper on record. It cannot gain the traction and value of admissible evidence adduced on oath. It is for this same reason that a statement filed by a witness is not admissible as evidence. What is admitted as evidence is what the witness states in court on oath, albeit based on the filed witness statement.



20. For the foregoing reasons, the purported replying affidavit by the Claimant is hereby struck out for being improperly executed and the same is deemed of no value or consequence and as such the court shall proceed to consider and determine the application without any reference to the same.
21. On the merits of the application, counsel for the Respondent has submitted that the Claimant was based at Nyali, Mombasa County, as at the time of dismissal. This is not in dispute. He has submitted, and this is also in the supporting affidavit, that all the witnesses that the Respondent will be calling as witnesses were also based at Mombasa at the material time. He submits that the testimony for the Respondent shall be lengthy requiring a lot of time for all the witnesses to testify. This presupposes a physical court hearing.
22. For all intents and purposes, counsel submits that the cause of action arose at Mombasa from where the Claimant was dismissed. He submits that the Claimant should not be allowed to freely choose his court of preference without consideration of the law and the plight of the Respondent who is equally protected by the law and entitled to fairness and justice. He further argues that the primary consideration of the place of filing a cause is the locus where the cause of action arose and secondly the location of the business of the Respondent.
23. While it is still debatable as to whether the Civil Procedure Rules apply to proceedings before ELRC, it should not be debatable that the Civil Procedure Act applies to this court just like all other statutes apply, save and except where the law otherwise provides. In fact, this court is of the school of thought that except where the Employment and Labour Relations Court (Procedure) Rules make specific provisions on a certain aspect of the applicable procedure, the Civil Procedure Rules come in handy in filling-in such gaps as may exist for the ends of justice. To this extent, this court agrees with Kitiku J. in Michael Adib Azzam V Zakhem Construction (K) Limited (2022) eKLR and Marete J. in Francis Kimutai Bii V Kaisungu (K) Limited (2016) eKLR, that where the rules of this court fail to provide for the procedure to be applied, the provisions of the Civil Procedure Rules shall apply.
24. Sections 11 to 15 of the Civil Procedure Act make provisions on where to file a suit or cause. My understanding of that law is that there are two major determinants on where a suit or cause is filed. The first factor is where the cause of action arose and the second one is the location where the Defendant (Respondent) ordinarily resides or operates its business.
25. The Claimant was based at Mombasa, in the Nyali branch of the Respondent, at the time of dismissal. The disciplinary action and proceedings that led to the dismissal were carried out at Mombasa. While the Respondent carries on business across Kenya, and it has its headquarters at Nairobi, it is manifestly clear that the cause of action arose at Mombasa.
26. While the Respondent carries on business across the country, its headquarters is at Nairobi and one can assume then that the presumed domicile for the Respondent is in Nairobi.
27. Going by the two factors enlisted above for consideration, this court is of the view that this cause ought to have been filed at Mombasa. First and foremost, that is place where the cause of action arose. Even if this court was to consider the second tier factor of location of the Respondent, the Respondent is domiciled at Nairobi where it has its headquarters. Bar the first consideration, this cause should then have been filed at Nairobi. However, the Respondent lawfully operates a branch at Nyali, Mombasa County where the cause of action arose. That is where this cause ought to have been filed.
28. Why then did the Claimant file this cause at Nakuru? The only reason that this court can discern is that the Claimant resides at Nakuru and he alleges that he has no means of commuting and prosecuting the matter at ELRC Mombasa. I have carefully gone through the submissions by counsel for the Claimant and there is no reason based on law that is disclosed as to why this cause was filed at Nakuru other than



the foregoing. If the law intended that the residence or location of the Claimant be the major or the most important factor in determining where a cause is to be filed, nothing would have been easier than for it to be stated so. The other issue raised is the inability of the Claimant to attend the hearing at Mombasa considering that he is unemployed with no means. This again is not a factor provided for in the law.

29. While this court has countrywide jurisdiction in employment and labour relations matters, it is important to appreciate and understand that the courts spread across the country are intended to serve those regions for efficient, economical, and expeditious disposal of the matters. Also, if parties were given a free hand in choosing where to file their causes, this could easily create a forum through which parties window-shop for courts that they consider favourable and or sympathetic to their causes. Courts should be impartial and temples of justice and any perception or real bias should be eliminated by parties sticking to the rules and procedures as provided for in the law.
30. While the Claimant may be having real or perceived difficulties in pursuing his claim due to financial difficulties, this court must be careful not to appear to favour any of the parties in any given cause. It is the duty and indeed an obligation of this court to at all times do justice to all and sundry who come before it without fear or favour. It is the duty of this court to remain neutral and impartial and to ensure that parties follow the procedure and the law as provided for, at all times.
31. For all the foregoing reasons, this court is of the considered view that this cause ought to have been filed at ELRC Mombasa as the cause of action arose at Mombasa. The Respondent has its headquarters at Nairobi and hence there is no reason whatsoever why this cause may be heard at Nakuru. It is not enough to argue that the Claimant resides at Nakuru as that is not the major factor for consideration in determining the place of filing a cause.
32. While this court would otherwise have the jurisdiction to hear and determine this cause were it not for all the reasons stated above, Sections 3 and 29 of the *[Employment and Labour Relations Court Act](#)* are intended to enable all parties to access justice in an efficient and expeditious manner to facilitate just and proportionate disposal of the matters that come to court. These provisions of the law apply to both claimants and respondents.
33. For all the foregoing reasons and in the interest of justice and fairness, this court is of the considered view that this cause shall be transferred to ELRC Mombasa for the hearing and disposal. It is hereby so ordered.

## **V. Orders**

34. Flowing from the foregoing the following orders issue –
  - a. That the notice of motion dated October 21, 2022 by the Respondent be and is hereby allowed and hence this cause be and is hereby transferred to ELRC Mombasa for the hearing and determination.
  - b. That the costs of the application be in the cause.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 8<sup>TH</sup> DAY OF JUNE, 2023**

.....

**DAVID NDERITU**

**JUDGE**

