



REPUBLIC OF KENYA



KENYA LAW
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**Gachiri v Thika Water & Sewerage Co. Limited; Kenya Union
of Commercial Food & Allied Workers (Interested Party) (Cause
E174 of 2023) [2023] KEELRC 2147 (KLR) (21 September 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2147 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E174 OF 2023
NZIOKI WA MAKAU, J
SEPTEMBER 21, 2023**

BETWEEN

JANE NJERI GACHIRI CLAIMANT

AND

THIKA WATER & SEWERAGE CO. LIMITED RESPONDENT

AND

**KENYA UNION OF COMMERCIAL FOOD & ALLIED
WORKERS INTERESTED PARTY**

RULING

1. The Respondent/Applicant filed a Notice of Motion Application dated May 16, 2023 seeking to be heard for Orders that this Court be pleased to transfer this case – Nairobi Employment and Labour Relations Cause No E174 of 2023 to Thika Chief Magistrates Court for trial and final determination. Further, that costs be provided for.
2. The Application was supported by the Affidavit of the Applicant's Advocate, Emily Nafula Nyongesa and was based on the following grounds:
 - a. That this matter has been filed in this Honourable Court herein, however the Thika Chief Magistrates Court where the Defendant/Respondent is located is competent to hear and determine the matter.
 - b. That by dint of section 29(3) of the *Employment and Labour Relations Court Act*, the Chief Justice issued Gazette Notice No 6024 dated June 10, 2018.
 - c. That the Chief Justice appointed magistrates of the rank of Senior Resident Magistrates and above, to hear employment matters within their respective areas of jurisdiction limited to



pecuniary jurisdiction not exceeding Kshs 80,000/- and which amounts are within the gross monthly salary of the Claimant.

- d. That from the evidence, the Claimant's gross monthly salary did not exceed Kshs 80,000/-.
 - e. That now the Nairobi Senior Resident Magistrates Court is competent thus the suit to be transferred in the right jurisdiction.
3. In response, the Claimant/Respondent filed a Replying Affidavit sworn on May 19, 2023 averring that the instant Motion is incompetent, frivolous, vexatious, an abuse of the court process and lacks merit under Rule 5 of the Employment and Labour Relations Court (Procedure) Rules, 2016 on the process of conciliation between parties. That section 73(1) of the *Labour Relations Act* further provides that, 'If a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court.' It was the Claimant's averment that therefore the Employment and Labour Relations Court (ELRC) has jurisdiction to hear this matter as opposed to the subordinate court, since the matter had already been conciliated and finalised by a competent Conciliator. She prayed for the Application herein to be dismissed with costs.

Respondent/Applicant's Submissions

4. It was the Respondent/Applicant's view that the main issues for determination are: whether this suit filed in the ELRC at Nairobi is capable of being transferred to Thika Magistrates Court and whether the court has powers to so transfer the said suit; and costs of the suit.
5. The Respondent/ Applicant submitted that the Claimant opted to file the suit herein despite the practice directions set out by the Chief Justice through Legal Notice No 6024 of June 10, 2018. That seeking to file the said suit at the Chief Magistrates is aimed at instilling order in the filing of court cases and Thika Chief Magistrate's Court has jurisdiction to hear the case at the 1st instance since the cause of action arose at Thika and the Applicant is located in Thika. In addition, a cursory look at the Claimant's documents produced in Court (the August 2021 pay slip and the Claimant's Witness Statement dated February 28, 2023 at page 41, paragraph 72(b) in which she states that her monthly salary is Kshs 73,787/-), demonstrates that she earned a gross salary of less than Kshs 80,000/-. The Applicant's position was that the proper court to determine the matter ought to be Thika Chief Magistrates Court that was given jurisdiction under section 9(b) of the *Magistrates Court Act* as read together with section 29 of the *Employment and Labour Relations Court Act*.
6. It was the Applicant's submission that this Court has discretion to grant the orders sought, and it relied on the decision in the case of *Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR* in which the Court held that:

'...It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit...'



7. Further, that transfer of a suit from the ELRC at Nairobi to the subordinate court in Thika is not an issue of jurisdiction but a procedural function, which position was asserted by the Court in the case of [*John Mwangi Karanja v Alfred Ndiangui \[2011\] eKLR*](#) as follows:

' It appears to me that transfer of suits from one court to another is essentially a procedural issue that has been elevated to the status of jurisdiction. If a suit finds itself in the wrong court, surely it is in the interests of justice and in the interests of all concerned that the suit be forwarded to the appropriate court with jurisdiction so that the issues in dispute can be properly and finally adjudicated. What prejudice would any party suffer in that event? After all, the overriding objective of the [*Civil Procedure Act*](#) and Rules is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act (section 1A (1)). The court itself is enjoined by subsection (2) of that section to seek to give effect to the said overriding objective in exercise of its powers under the Act or the interpretation of any of its provisions.

8. In its final submission, the Applicant requested the Court to consider the foregoing and award the cost of the Application to the Respondent/ Applicant as costs follow the event.

Claimant/Respondent's Submissions

9. The Claimant/Respondent submitted that it is worth noting that from the provisions of section 73(1) of Labour Relation Act, 2007 and Rule 5 of the Employment and Labour Relations Court (Procedure) Rule 2016, there is a clear procedure laid down in the law for resolving trade disputes upon a disagreement during conciliation stage and that procedure must be followed. That section 73 of the Labour Relation Act, 2007 thus ousts the Chief Magistrates Court's jurisdiction to deal with this dispute, the same having been dealt with by the Conciliator who provided that the dispute be referred to the ELRC for determination. She relied on the case of [*Spedag Interfreight Kenya Limited v Labour & Social Relations & 2 others \[2019\] eKLR*](#) in which the Court cited with authority the case of Speaker of National Assembly v Karume [2008] 1 KLR where it was held that where there is a clear procedure for the redress of any particular grievance prescribed by the [*Constitution*](#) or an Act of Parliament, the procedure should be strictly followed. The Claimant's submission was that this court has jurisdiction to hear and determine this matter and that the Respondent's Application dated May 16, 2023 should thus be dismissed with costs.
10. The Claimant sued the Respondent and in the process the matter was referred to the Cabinet Secretary, Ministry of Labour and Social Protection under section 62 of the [*Labour Relations Act*](#), 2007. Mr Amedeo Nyaga of the Thika Labour Office was appointed vide a letter dated May 4, 2022 to conciliate the dispute. Under the [*Labour Relations Act*](#), section 73(1) thereof provides that if a trade dispute is not resolved after conciliation, a party to the dispute may refer it to the Industrial Court in accordance with the rules of the Industrial Court. The nomenclature of the Court has not been changed yet to reflect the provisions of Article 162(2) of the [*Constitution*](#). However, a clear reading of the Act and especially the impacted sections in relation to conciliation, the Court to which a matter can be referred to after conciliation is this Court, not the Magistrate's Court notwithstanding the Gazette Notice donating some aspects of jurisdiction to the Magistracy. This is one of the cases that the Magistrate's Court cannot handle despite the amount being under the pecuniary threshold that demarcates cases that can be filed before the Magistrate's Court or those that are now meant for this Court. In my considered view, the claim is in the right place and will not be transferred to Thika. Application dismissed with costs to the Claimant.

It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023

NZIOKI WA MAKAU

JUDGE

