



**Nyambane & another v Kenya County Government Workers Union;  
Kenya County Government Workers Union (Client); Leonard K. Mbuvi t/  
a Katunga Mbuvi & Co. Advocates (Advocate) (Miscellaneous Application  
E247 of 2021) [2023] KEELRC 2956 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2956 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
MISCELLANEOUS APPLICATION E247 OF 2021**

**JK GAKERI, J**

**NOVEMBER 20, 2023**

**BETWEEN**

**ZEPHANIA O NYAMBANE ..... 1<sup>ST</sup> CLAIMANT**

**FRANCIS N MAKOKHA ..... 2<sup>ND</sup> CLAIMANT**

**AND**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... RESPONDENT**

**AND**

**KENYA COUNTY GOVERNMENT WORKERS UNION ..... CLIENT**

**AND**

**LEONARD K. MBUVI T/A KATUNGA MBUVI & CO.**

**ADVOCATES ..... ADVOCATE**

**RULING**

1. Before the court for determination is a Notice of Motion Application by the Respondent dated 19<sup>th</sup> June, 2023 brought pursuant to Section 3A and 18 of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil procedure Rules* 2010, Section 20 of the *Employment and Labour Relations Court* seeking Orders That:-

1. That the application be certified urgent and services be dispensed with in the first instance.



2. That this matter Miscellaneous Application Number 247 of 2021 be transferred to the Deputy Registrar Nakuru ELRC court for taxation.
2. The grounds in support of the application are detailed on the face of the application and in an Affidavit sworn by Leonard Katunga Mbuvi on 19<sup>th</sup> June, 2023.
3. The affiant avers that he was instructed by the Respondent- Kenya County Government Workers Union to file a suit on behalf of its members Mr. Zephania O. Nyambane and Francis N. Makokha against Nakuru Water & Sanitation Services Company Limited for wrongful termination.
4. The applicant filed a suit being Industrial Cause No. 912 of 2011 Nairobi which was later transferred to Nakuru upon establishment of Employment and Labour Relations Court at Nakuru and given a case number Industrial Cause No. 12 of 2013 where the matter was heard and determined in favour of the claimants.
5. The Applicant states that there was an agreement between himself and the Respondent on how the legal fees would be settled which the Respondent failed to honour forcing the Applicant to file an Advocate-Client Bill of Cost dated 16<sup>th</sup> December, 2021 for taxation.
6. The bill was taxed and a ruling was delivered by the Honourable Taxing Officer, Hon. Noelle Ky'anya on 31<sup>st</sup> May, 2022 at Kshs.3,624,829/=.
7. The Respondent being aggrieved by the said ruling filed a reference which was heard determined and by this Court on 13<sup>th</sup> March, 2023 and an order issued directing the Bill of costs dated 16<sup>th</sup> December, 2021 be referred to another taxing officer for fresh taxation of instruction fees.
8. The Applicant avers that the Bill of costs was erroneously filed in Employment and Labour Relations Court in Nairobi instead of Employment and labour Relations Court in Nakuru therefore seeks that the file be transferred to Deputy Registrar at the Employment and Labour Relations Court Nakuru for Re taxation.

### **Respondent's case**

9. In response to the application the Respondent filed a Replying Affidavit sworn by Roba Sharu Duba, the General Secretary of the Kenya County Government Workers Union who deposes that the current application is an afterthought that was prompted by the Advocates letter dated 24<sup>th</sup> May, 2023 complaining that the parent file subject of the Bill of Cost is fictitious, non- existence and a creation of the Advocate.
10. The affiant avers that the Applicant is trying to deceive the Court that the parent file originated from Nakuru and the Bill of Costs should be transferred to Nakuru.
11. The affiant further avers that the purported Nakuru file referred to by the applicant has different parties Zephania O Nyambane & Francis v Nakuru Water & Sanitation whereas the Bill of costs emanates from Zephania O. Nyambane & Francis v County Government Workers Union.
12. The affiant avers that the Respondent is not a party to the Nakuru file and urges the court that it would be imprudent to transfer the file.
13. The affiant urges the applicant to withdraw the Bill of costs premised on a fictitious file and file a new Bill of costs on the purported file at Nakuru.
14. He further deposes that the Respondent has filed an application and intended appeal challenging the decision remitting the file back to the taxing master as the parent file is fictitious.



15. The affiant further avers that the current application is a ploy to defeat the Respondents application and the intended appeal pending before the Court of Appeal.
16. The affiant avers that the bill having been filed in the wrong court is fatally incompetent, invalid, null and void as such the court has nothing to transfer as such and urges the court to dismiss the application with costs.

### **Re joinder**

17. In a rejoinder, the Applicant filed a supplementary affidavit sworn on the 20<sup>th</sup> July, 2023.
18. The Applicant states that he filed a Bill of costs against his client, the respondent, who had instructed him to represent the union members and reached an arrangement on how the legal fees would be settled.
19. The Applicant states that the appeal that the Respondent was referring to is yet to be admitted and no stay orders had been issued and urges the court to allow the application to transfer the bill of cost for a fast and expeditious disposal in line with the ruling directing the advocates bill of costs be placed before another taxing officer for fresh taxation of instruction fees.
20. The applicant stated that no prejudice will be occasioned to the Respondent should the file be transferred and urges the court to allow the application.

### **Applicant's submissions**

21. Counsel for the Applicant relied on Section 18 of the *Civil Procedure Act* that bestows upon the High Court power to transfer suits of a civil nature.
22. Counsel invited the court to find that since the parent file, Industrial Case No. 12 of 2013 was finalized in Nakuru, the Bill of Costs ought to be taxed by the Deputy Registrar, Employment and Labour Relations Court at Nakuru who would understand the issues and expeditiously tax the Bill of Costs.
23. Counsel submitted that transfer of a suit was not a jurisdictional issue but a procedural function and relied on the holding in *Ali Jarso Waki & Another v Ministry of Interior & Coordination of National Government & 5 others* (2020) eKLR where the court stated;  

“Transfer or referring cases to the court with the proper jurisdiction is an administrative matter which is aimed at facilitating the speedy disposition of the case at hand. It has nothing to do with jurisdiction.”
24. Counsel submitted that the Respondents enjoyed sound legal services and it was only fair that the file be transferred to Nakuru for taxation and urged the court to allow the application as prayed.

### **Respondents submissions**

25. The Respondent's Counsel submitted that the Court lacked jurisdiction to transfer the Bill of Costs as Section 18 of the *Civil Procedure Act* refers to the High Court which does not have similar jurisdiction with the Employment and Labour Relations Court.
26. Counsel relied in the holding in *Republic v Karisa Chengo & 2 others* where the Supreme Court in agreeing with the judges in the Court of Appeal held that;  

“....At the end of the day ELRC and ELC are not the High Court and vice versa. However it needs to be emphasized that status is not the same thing as jurisdiction..... to us it simply



means that ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialized jurisdiction but they are not the High court.

Following from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of courts operation. Courts can therefore be of the same status but exercise different jurisdictions . . .”

27. Counsel submitted that if it was true that the Industrial Cause Number 12 of 2013 was determined in Nakuru, then the Bill of Costs ought to have been filed at Nakuru but the applicant filed it in Nairobi.
28. Counsel submitted that the suit originated by way of Advocates Bill of Costs dated 16<sup>th</sup> December, 2021 that was incompetently filed, therefore cannot be transferred but should be withdrawn with costs.
29. Counsel relied on the sentiments of the court in *Albert Chaurembo Mumba & 7 others v Maurice Munyao & 148 others* (2019) eKLR as follows;

“...as it was well elucidated in the case of *Kagenyi v Musiramo and Another* (1968) EALR an order for transfer of a suit from one court to the other cannot be made unless the suit has been brought in the first instance to a court with jurisdiction to try it....”
30. Counsel further submitted that jurisdiction is central to proceedings and is a well settled principal in law. Counsel urged that a court acting without jurisdiction acts in vain as the celebrated words of Nyarangi JA in *Owners of Motor Vessel Lillian ‘S’ v Caltex Oil (Kenya) Limited* (1989) exemplifies.

“Jurisdiction is everything. Without it, the court has no power to make one more step . . .”
31. Counsel submitted that the Respondent stood to suffer great prejudice if the matter was transferred as it had expended its resources defending an incompetent suit.
32. Counsel urged the court to dismiss the application with costs to the respondent.

### **Analysis and determination**

33. Having considered the application, response and rival submissions, the issue for determination is; whether the Notice of Motion dated 19<sup>th</sup> June, 2023 is merited.
34. It is common ground that the Applicant filed an Advocates Bill of Cost dated 16<sup>th</sup> December, 2021 seeking taxation, the Respondent filed a notice of preliminary objection dated 2<sup>nd</sup> March, 2022 pleading lack of jurisdiction which was determined on the 31<sup>st</sup> May, 2022 and taxation proceeded.
35. The Respondent filed a reference by way of Chamber Summons dated 14<sup>th</sup> June, 2022 seeking the review/setting aside of the decision made on the 22<sup>nd</sup> June, 2022 referring the bill of costs to another taxing officer for fresh taxation of instruction fees.
36. Needless to emphasize, the Employment and Labour Relations Court is a superior court of record with the status of the High Court therefore has jurisdiction to transfer suits.
37. According to the Applicant’s averments, he was instructed by the Respondent to represent its members in Industrial Case Number 912 of 2011, which was later transferred to Nakuru and registered as Industrial Cause No.12 of 2013 where it was finalized.
38. It is unclear to the court why then the Applicant filed the Misc. Application No. E247 of 2021 in Nairobi if the original file was at Nakuru and now seeks to use the argument the directions given by the court should be acted on by the Deputy Registrar at the Nakuru Law Courts.



39. While the Court in agreement with the sentiments of the court in *Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties)* (*Supra*), that;

“Transfer or referring cases to the court with proper jurisdiction is an administrative matter which is aimed at facilitating the speedy disposition of the case...”, it is not satisfied that the Applicant has made a sustainable case for the transfer of the file to the Nakuru Law Courts.

40. Needless to gainsay, the Court entered a ruling on the 13<sup>th</sup> March, 2023 directing that the Bill of Cost be referred to another Taxing Officer for re-taxation of the instruction fees and the instant Application was made more than 3 months later, if expediency was the primary consideration.

41. Although the Respondent has not demonstrated the specific prejudice it stands to suffer should the application be allowed, the Taxing Officer in Nairobi will be different from the officer who initially taxed the Bill of Costs. The Court is unpersuaded that it would be expedient to have the bill re-taxed by the Deputy Registrar, Employment and Labour Relations Court, Nakuru where accessibility of the parent file will be easy.

42. Having brought the Respondent to Nairobi from Nakuru where the Miscellaneous Application ought to have been filed in the first place, and the Respondent has already filed an Application before the Court of Appeal at Nairobi seeking various orders, it is in the court’s view inopportune for the Applicant to insist that the matter transferred to Nakuru for re-taxation of the instruction fees only.

43. For the above stated reasons, the court is not persuaded that the Notice of Motion dated 19<sup>th</sup> June, 2023 is unmerited and it is accordingly dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20<sup>TH</sup> DAY OF NOVEMBER 2023**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

