



Juma v Peter Wachira t/a Club Xcape Nakuru & another (Miscellaneous Application E045 of 2023) [2023] KEELRC 3312 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEELRC 3312 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E045 OF 2023
HS WASILWA, J
DECEMBER 20, 2023**

BETWEEN

JAMES JEFF JUMA APPLICANT

AND

PETER WACHIRA T/A CLUB XCAPE NAKURU 1ST RESPONDENT

PE & BE INVESTEMENT LIMITED 2ND RESPONDENT

RULING

1. This Ruling is in respect of the Applicant's Notice of motion dated 12th June, 2023, brought pursuant to section 1A, 1B & 3A and 18 of the Civil Procedure Act, Sections 3 & 12(3) (viii) of the ELRC Act and Order 51 Rule 1 of the Civil Procedure Rules seeking for the following orders;-
 - a. That this Honourable Court be pleased to Order transfer of Nakuru CMELRC No. E130 of 2022- James Jeff Juma V Peter Wachira T/A Club Xcape Nakuru and PE & BE Investment Limited from the Chief Magistrate's Court to the Employment and Labour Relations Court.
 - b. That the costs of this Application be provided for.
2. The Application is based on the grounds on the face of the Application and the supporting affidavit of Applicant, sworn on 12th June, 2023.
3. The Applicant states that he was the claimant in the subordinate Court suit CMELRC No. E130 of 2022, which was filed on 4th August, 2022, seeking compensation for the unfair termination.
4. It is his case that he was employed by the Respondents, earning a monthly gross salary of Kshs. 100,000 at the time of termination of his employment.



5. That after filling the suit at the Chief Magistrates' Court, it was determined that the Claimant therein earned above the monetary jurisdiction limit for the Chief Magistrates Courts which only handles employment matters in respect of employees whose monthly gross salary is below Kshs.80,000.
6. Consequently, on 25th April, 2023, the subordinate court, Hon. Soita, gave directions to the Applicant to make an application to this Court before 5th September, 2023, to transfer the suit to the Employment and Labour Relations Court or the suit would stand dismissed. This necessitated the instant application.
7. He stated that the filing of the case at the Chief Magistrate Court was an error and inadvertent oversight by the Claimant's counsel, which inadvertence ought not to visit injustice upon the Applicant.
8. He avers that the legal doctrines of precedence and stare decisis provide' that where a subordinate court lacks jurisdiction, then this Court is empowered by dint of Section 18 of the Civil Procedure Act to transfer the suit in its entirety to a court that is competent to try and dispose of the matter.
9. That the continuance of the matter at the Chief Magistrates Court constitutes proceedings in vain as the said court is incompetent and legally barred from handling the suit for want of jurisdiction.
10. Therefore, that the instant application is meant to obviate delay and inconvenience and have the matter transferred to the proper Court for its judicious hearing and final determination.
11. He stated that he stands to suffer great prejudice unless the entire suit, Nakuru CMELRC No. E130 of 2022, is transferred to this Court for hearing and determination.
12. He contends that the Respondents will not suffer any prejudice if this suit is transferred, because they will be afforded an opportunity to present and fully canvass the defence.
13. On that basis, he stated that it is in the interest of justice and convenience of the parties and the Court to have this matter transferred to this Court for final and judicious determination on merit.
14. He stated that this Court is espoused with wide and unfettered discretion to allow the application herein and hence prayed for the application to be allowed as prayed.
15. The Application is opposed by the Respondent who filed grounds of Opposition dated 31st July, 2023 based on the following Grounds:
 1. That Nakuru CM ELRC No. E130 of 2023 is a nullity in law for being filed in a court with no jurisdiction.
 2. That this Honourable court has no jurisdiction to transfer a matter from a court of no jurisdiction to a court of competent jurisdiction.
 3. That the applicant has the option to withdraw the suit before the magistrate court and file it in the proper forum.
 4. That the application is a non-starter, incompetent, fatally defective and an abuse of the Court process.
16. Direction were taken for the application to be canvassed by written submissions, with the Applicant filling on the 6th October, 2023 and the Respondents on the 25th October, 2023.



Applicant's Submissions.

17. The Applicant submitted that the main issue for determination is whether the applicant has demonstrated sufficient cause for the court to exercise discretion. Accordingly, that Applicant herein was directed by Honourable Soita in the Subordinate Court to move this Honourable Court for a transfer of the suit for reasons that the Applicant was earning a salary of Kshs. 100,000, that was above the pecuniary jurisdiction of the Magistrates Court.

18. He argued that the filing of the case at the Chief Magistrate Court was in error and by inadvertent oversight by the Claimant's counsel, which inadvertence ought not to visit injustice upon the Applicant. To support this argument, the Applicant cited the case of *Belinda Murai & others v Amos Wainaina* 978 KLR 278 where Madan JA held:

“A mistake is a mistake. It is no less a mistake because it is committed by Senior Counsel. Though in the case of junior counsel the court might feel compassionate more readily. If a blunder on a point of law can be a mistake, the door to justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought to certainly to do whatever is necessary to rectify it if the interests of justice so dictate...It is well known that courts of law themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of legal point of view which courts of appeal sometimes Overrule.”

19. He also relied on the case of *Phillis Chemwolo & Another v Augustine Kubede* 1982-88 KLR 103 at 1040, where Apallo JA (as he then was) stated thus:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made, a party should suffer the penalty of having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court as is often said, exists for the purpose of deciding the rights of parties and not for purpose of imposing discipline.”

20. On that basis, it was submitted that the general principle is that an applicant should not suffer due to a mistake of its Counsel. This was affirmed by the Court of Appeal in *Martha Wangari Karua v IEBC*, Nyeri Civil Appeal No.1 Of 2017 where the Court held that:

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be...”

21. Based on the above argument, the Applicant urged this court to consider that indeed blunders will be made from time to time and ensure justice is served by granting the Applicant an opportunity to have his case heard on merit by transferring the suit to the ELRC for hearing and determination.

22. The Applicant reiterated on the powers of this Court to transfer the subordinate court suit to this Court and stated that this Court is empowered by dint of Section 18 of the *Civil Procedure Act* to transfer the suit in its entirety to a court that is competent to try and dispose of the matter. In this he relied on the case of *John Mwangi Karanja v Alfred Ndiangui* [2011] eKLR where the Court held that:

“With the enactment of sections 1A and 1B of the *Civil Procedure Act*, the time has perhaps now come for this matter of transfer of suits to be looked at afresh...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 an 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.”

23. It was argued that as it stands, the ELRC is a more convenient forum for administration of justice to both parties. In any event that the magistrate Court did not dismiss the suit but merely directed the Applicant to file an application before this Court seeking transfer of the suit to this Court. He added that this has been the case in the ELRC Court as was done by Rika J in Kenya Plantation and Agricultural Workers Union v Cargill Kenya Limited & Another [2020] eKLR when allowing an application for transfer of a suit from the Magistrates court to Employment Labour Relation Court stated:

“There is in existence a Claim in the Magistrate’s Court, Cause No. 85 of 2018. It was filed, but in the wrong platform. The Claimant paid court fees upon filing. It is not helpful to argue that there is no Claim capable of being transferred. The Hon. Chief Magistrate directed Parties to apply for transfer of an existing Claim. If there was no Claim the Trial Court would have simply declined jurisdiction and advised Parties, there is no Claim to be transferred. Instead, the Parties were advised to apply for transfer in the relevant Court.”

24. It was submitted further that the issue of jurisdiction in this case does not arise because jurisdiction is only limited to the handling of the suit but not in transferring of the same since the mandate to transfer a suit is only an administrative function of this court that has nothing to do with jurisdiction as was held by Justice Chitembwe in Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others: Public Service Commission & 5 others Interested Parties 2020 where it was held:

“In my view lack of jurisdiction is limited to the handling of the dispute at hand substantially. 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. All what the Court will be saying is that “you have come to the wrong forum, please take your file to the correct forum”. I don’t think such an order needs jurisdiction or can be held as null and void. This is my honest view. Further, I do opine that the contrary view will be running against the provisions of Article 159 of the Constitution in relation to procedural technicalities. Justice should not be made expensive to litigants. Striking out the matter would lead to the filing of a fresh suit before the Court with proper jurisdiction. This entails the typing of fresh pleadings, filing the same in Court and paying Court fees afresh. Thereafter service has to be effected upon all the Respondents and interested parties. On the other hand, when the matter is referred to the proper Court, the proceedings will start afresh and the file will be allocated a fresh Court file number. I believe such process saves litigants time and money and is in line with the spirit of the Constitution.”

25. This position was further buttressed in Henry Kigen & 6 others v Baringo County Governor & 2 others [2020] eKLR where Muriithi J cited with approval the case of Pamoja Women Development



Programme & 3 Others v Jackson Kibumbu Wangombe & another [2016] eKLR, where the Court stated;

“Kenya’s objective was not to set up Judicial booby traps for unsuspecting litigants who after filing timeously their pleadings, their pleadings would have to undergo a technical game of Jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenya did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits. This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit. I see no useful purpose that is served by this other than punishing a party that acted in good faith.”

26. In the bid to live by the Overriding objectives of the Court and while deciding on an application for transfer to this Court, Maureen Onyango J in the case of Francis Kibugi Wanjohi v Kenya Railways Corporation [2021] eKLR held that:-

“In view of the above, it is my finding that adopting the proposal by the Respondent would go against the above provisions. The Applicant would be forced to file new pleadings that would force him to pay court fees again. He would then incur costs of serving the Respondent again. It could get worse if the claim is now time-barred the Claimant’s case will have been dismissed without him having his day in court even though he had approached the Court timeously. This, in my view, goes against the above provisions and the emerging jurisprudence that cases ought to be heard and determined on the merits. The upshot is that the instant application succeeds.”

27. Based on the above case law, the Applicant submitted that it is in the spirit of Article 159 of the Constitution and the need to make litigation expeditious, just and inexpensive that he seeks to transfer the matter from the Magistrate’s Court to the ELRC.

28. In conclusion, it was argued that it is in the interest of justice that the suit be transferred from the Magistrate’s Court to this Court for hearing and determination.

Respondent’s Submissions.

29. The Respondent submitted on one issue; whether this Court has jurisdiction to transfer a case filed in a Court without Jurisdiction to one of Competent Jurisdiction. Accordingly, that the Magistrate’s court lack jurisdiction pursuant to Gazette Notice No. 6024 of 2018 which limited its pecuniary jurisdiction to Kshs 80,000/=.

30. The Respondent cited the celebrated case of Owners of Motor vessel Lillian ‘S’ v Caltex Kenya Limited [1989] KLR where Nyarangi J.A held that;

“Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.... Where a court takes it upon itself to



exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”

31. The Respondent further cited the Supreme Court case of *Albert Chaurembo Mumba and 7 Others v Maurice Munyao & 148 Others* [2019] eKLR where it held that;

“However, as it was well elucidated in the case of *Kagenyi v Musiramo & Another* (1968) EALR 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’s therefore irrelevant as parties cannot consent to confer jurisdiction to a Court tribunal where it is not provided by law.”

32. The Respondent submitted that even though the applicant alleged to have filed the suit in the magistrates’ court due to error and mistake of counsel, jurisdiction cannot be conferred to a court based on sympathy for a purported human error.

33. He argued that jurisdiction is well set out in legislation and the ‘rules of natural justice’ or the overriding objective under Section 3 of the ELRC Act cannot be invoked to confer jurisdiction as was held in the Court of Appeal case of *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel* [2016] eKLR where it viewed as follows:

“In numerous decided cases, courts, including this Court have held that it would be illegal for the High Court in exercise of its powers under Section 18 of the *Civil Procedure Act* to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction and therefore sanctify an incompetent suit. This is because no competent suit exists that is capable of being transferred. Jurisdiction is a weighty fundamental matter and to allow a court to transfer an incompetent suit for want of jurisdiction to a competent Court would be to muddle up the waters and allow confusion to reign. It is settled that parties cannot, even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where the Court lacks jurisdiction parties cannot even seek refuge under the O2 principle or the overriding objective under the *Civil Procedure Act* the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same....”

34. Further that the Court of Appeal in the case of *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] Eklr stated that;

“We are not persuaded that that proposition by the respondent is correct in law. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer Jurisdiction to itself...it is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. Civil Appeal No. 6 of 2018 Phoenix East Africa Assuranceco.LTD VY, S.M. Thiga t/a Newspaper Services is therefore a nullity as it was based on a nullity. We have said enough to demonstrate that this appeal has merit. We allow it with costs to the appellants.”



35. Similarly, that in the circumstances, no injustice is bound to be suffered by the applicant if this application is dismissed, however allowing such an application will be akin to sanitizing a nullity. In any event that nothing stops the Applicant from withdrawing the suit at the magistrate's court and filing a fresh one before this Court. Ultimately, the Respondent urged this Court to be guided by the words of Lord Denning in the case of *Macfoy v United Africa Co LTD* [1961] 3 All ER, 1169 where the Judge stated that:

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse...”

36. Based on the foregoing, the Respondent urged this Court to find the application an abuse of the Court process and dismiss it with costs.

37. I have examined the averments and submissions of the parties herein.

38. The applicant seeks orders of this court to transfer NKR CMELRC No. 130/2022 to this court.

39. In considering whether to allow this application or not, I have considered that the claim was filed in the wrong court by counsel which mistake should not be used against the applicant.

40. There is indeed a claim before the CM's court which the Hon. Magistrate directed parties to apply to transfer to this court.

41. That being the position and in exercise of my discretion, I see no prejudice that the respondents stand to suffer.

42. I find the application has merit and I allow it and order transfer of Nakuru CMELRC 130/2022 to this court for further directions and hearing.

43. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 20TH DAY OF DECEMBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Towett holding brief for Mwangi for Respondent – present

Court Assistant - Fred

