



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. E105 OF 2021

JOHN ADOYO.....1ST CLAIMANT/APPLICANT
ROSE NYAMU.....2ND CLAIMANT/APPLICANT
STEPHEN OCHIENG.....3RD CLAIMANT/APPLICANT
JOEL KABURU..... 4TH CLAIMANT/APPLICANT
EDWARD WEKESA..... 5TH CLAIMANT/APPLICANT
ABRAHAM AKOL.....6TH CLAIMANT/APPLICANT
JEFFERSON MWAKERA.....7TH CLAIMANT/APPLICANT

VERSUS

DE LA RUE CURRENCY AND SECURITY PRINT LIMITED....RESPONDENT

RULING

1. The Seven (7) claimants filed CMEL Cause No. 2434 of 2019 before the Chief Magistrates' Court Milimani. The claimants were all employees of the respondent and worked until August, 2019 when their employment was terminated.

2. It is not in dispute that all the claimants earned a gross monthly salary of more than eighty thousand Kenya Shillings (80,000/=) at the time of termination.

3. The claimants have brought the notice of motion application dated 17th June, 2020 praying for an order in the following terms:-

1. That this Honourable Court be pleased to order transfer of CMEL Cause No. 2434 of 2019 from Chief Magistrates' Court at Milimani to the Employment and Labour Relations Court Nairobi.

2. That Costs of this application be in the Cause.

4. The application is premised on grounds set out on the face of the application and buttressed in the affidavit of Namada Simani Counsel for the applicants to wit that after filing the suit at the Chief Magistrates' Court, it was discovered that the claimants earned above the monetary jurisdiction limit for the Chief Magistrates Courts which Court handles employment and Labour matters in respect of employees whose monthly gross salary is below Kshs.80,000.

5. That the case was filed at the Chief Magistrate Court in error and by inadvertent oversight by counsel for the claimants.

6. That the application is meant to obviate delay and inconvenience and have the matter transferred to the proper Court.

7. The respondent filed notice of Preliminary Objection to the application for transfer dated 20th July, 2021 to wit:-

1. This Honourable Court lacks jurisdiction to transfer an incompetent suit from the lower Court under the provisions of

Section 18 of the Civil Procedure Act.

2. There is no competent suit in existence that is capable of being transferred to this Honourable Court, as the suit filed in the subordinate Court, to wit; CMEL Cause No. 2434 of 2019, is a nullity ab initio.

8. The respondent filed written submissions dated 27th September, 2021 in which is submitted that it is an established principle of law that in applications such as the instant one for transfer of a suit from one Court to another, the onus rests with the applicant to provide strong persuasion to the Court, why such transfer is not only necessary but possible in law.

9. That the applicants have failed to demonstrate how an incompetent suit filed in a Court that lacked pecuniary jurisdiction to hear and determine it may be transferred to another Court when the suit was a nullity *ab initio* and therefore there was nothing to transfer to Employment and Labour Relations Court.

10. That Section 29(3) of the Employment and Labour Relations Court Act, (Cap 234 B) empowers the Chief Justice, by way of Gazette Notice, to appoint specific magistrates to preside over employment matters.

11. That by dint of the said section, the Chief Justice issued Gazette Notice No. 6024 dated 10th June, 2018, in which 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 gross monthly salary of the claimant.

12. That in **Prisca Jepngetich –vs- Generation Careers Readiness Social Initiative Limited [2021] eKLR** Hon. Rika) held:-

“The Employment and Labour Relations Court does not exercise transfer jurisdiction under the Civil Procedure Act. Matters before Employment and Labour Relations Court both at the Chief Magistrates’ Court and the Employment and Labour Relations Court are both regulated by the Employment and Labour Relations Court Act and the Employment and Labour Relations Court (Procedure) Rules, 2016.”

13. That the primordial nature of jurisdiction is that a Court must have jurisdiction to hear and determine a suit before it from the very beginning. That the magistrates’ Court however lacks pecuniary jurisdiction and the applicant has no option but to forthwith withdraw the suit for being irredeemably incompetent.

14. That the null nature of this suit results from the legal principle established in the locus classicus case **of Owners of Motor Vessel “Lilians” –vs- Caltex Oil (Kenya) Limited 1989]** where the Court held thus:-

“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.”

15. The respondent further cited **Miscellaneous Cause No. 39 – Kagenyi –vs- Musiramo & Another (1967)** where it was held that an incompetent suit cannot be transferred.

16. That the instant application is therefore incapable of being granted.

17. That the Supreme Court of Kenya addressed itself on the issue of transfer of suits which are filed, incompetently, in a Court lacking pecuniary or other terms of jurisdiction in **Albert Chaurembo Mumba and 7 Others –vs- Maurice Munyao & 148 Others [2019] eKLR** as follows:-

“[153] in that context, the purposive reading and interpretation of Article 162 together with Article 165(5) of the Constitution leaves no doubt that the original and appellate jurisdiction over disputes related to Employment and Labour Relations was transferred from the High Court to the Employment and Labour Relations Court. Prima facie that meant that any dispute subject to any other statutory or constitutional limitations emanating from the dispute contemplated under Article 162(2) supra must be determined by the Employment and Labour Relations Court. This is what may have informed the consent by parties through respective counsel to transfer the matter from the High Court to the Employment and Labour Relations Court.

[154] However, as it was well elucidated in the case of *Kagenyi –vs- Musiramo and 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 is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.”

18. The Supreme Court made this decision citing a legion of cases decided by superior Courts on the matter of transfer of cases. The Court of Appeal in **Equity Bank Limited –vs- Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR** stated:-

“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 it lacks a party cannot even seek refuge under the 02 Principal or the overriding objective under the Civil Procedure Act, the Appellate jurisdiction Act or even Article 159 of the Constitution to remedy the same.”

19. The applicant in its submissions relied on the Court of Appeal decision in **Phoenix of E.A. Assurance Co. Limited –vs- S.M. Thiga T/A Newspaper Service, Civil Appeal No. 244 of 2010 [2019] eKLR.**

20. The Court of Appeal as per Karanja, Gatembu and Sichale JJA, affirmed the plethora of cases including Equity Bank case, **Joseph Muthee Kamau and Another –vs- David Mwangi Gichure and Another (2013) eKLR and Kegenyi vs Masirambo (1968) E.A. 43 in** restating the Principle of law that “a Court should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer.”

21. Reliance on the aforesaid case by the applicant does not support at all the application before Court and one wonders to what purport the applicant cited this authority.

22. Considering all the circumstances of this case, the application lacks merit and is dismissed.

23. The circumstances of this case must however be distinguished from instances where a suit is filed in a Court with concurrent jurisdiction with another, in respect of which an application for transfer is made by the claimant.

24. For example a suit filed at Employment and Labour Relations Court in which the claimant is earning a gross monthly salary of less than Kshs.80,000, may be transferred *meromotu* and/or upon application by the Employment and Labour Relations Court to a Magistrate Court with jurisdiction to hear and determine the matter. This is because the Employment and Labour Relations Court has concurrent jurisdiction with the Magistrates Courts over matters filed at Employment and Labour Relations Court by claimants who earn a gross monthly salary of less than Kshs.80,000.

25. Equally, the Court distinguishes the current case with mixed grill cases filed either at the Employment and Labour Relations Court or the High Court. These were the circumstances addressed by the High Court in the **United States International University (USIU) -vs- Attorney General [2012] eKLR** which was cited with approval by the Court of Appeal in the matter of **Professor Daniel N. Mugendi –vs- Kenyatta University and Others – Civil Appeal No. 6. Of 2012. [2013] eKLR** per Nambuye, Mwera and Kiage, JJA. The Court of Appeal stated:-

“Believing as we do that the approach taken by Majanja J, is the correct one, and in end endeavoring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertains to industrial and Labour Relations matters. And in order to do justice, in the event where the High Court, the Industrial Court or Environment and Labour Relations Courts comes across a matter that ought to be litigated in any of the other Courts, it should be prudent to have matters transferred to that Court for hearing and determination.”

26. The aforesaid is the concise distinction between cases filed in Courts with concurrent jurisdiction and the incompetent cases that are filed in Courts that lack jurisdiction to hear and determine the case at the outset as in the present case.

27. The Court notes that the cause of action in the present suit arose in August, 2019 and three (3) years period has not elapsed since the cause of action arose. The applicant should move with haste to withdraw the suit pending before the Chief Magistrate Court and file a fresh suit before the Employment and Labour Relations Court.

28. The application is dismissed with costs.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 20TH DAY OF JANUARY, 2022

MATHEWS N. NDUMA

JUDGE

Appearances

Daly and Inamdar Advocates for Respondent

Namada and Co. Advocates for the Applicant

Ekale – Court Assistant