



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

MISCELLANEOUS APPLICATION NO. E144 OF 2021

(Before Hon. Lady Justice Maureen Onyango)

HARUN KIPTARUS TANUL.....CLAIMANT

VERSUS

EAST AFRICAN PORTLAND CEMENT PLC.....RESPONDENT

RULING

1. Vide an application dated 11th August 2021, the Applicant seeks the following orders:

*(i) THAT the proceedings in **Mavoko CMEL No. E037/2021; Harun Kiptanui Tarus vs. East African Portland Cement** be stayed pending the hearing and determination of this Application.*

*(ii) THAT the suit filed by the Applicant against the Respondent being **Mavoko CMEL No. E037/2021; Harun Kiptanui Tarus versus East African Portland Cement PLC** be transferred therefrom to the Employment and Labour Relations Court in Nairobi for hearing and determination.*

(iii) THAT the costs of the Application be provided for.

2. The grounds in support of the application as set out on the face of the application and the supporting affidavit of PAMELA NJIRU Esq. Counsel for the Applicant sworn on even date is that the suit was inadvertently filed in the Chief Magistrates Court, Nairobi by error of Counsel which should not be visited upon the client.

3. It is further Counsel's position that the Respondent has filed a notice of preliminary objection seeking the dismissal of the suit by the Chief Magistrates for want of jurisdiction and if the instant application is not granted the Applicant stands to suffer great injustice.

4. Counsel further pleads that this Court has jurisdiction to transfer the suit and that no prejudice would be occasioned to the Respondent by the transfer of the suit.

5. In the submissions in support of the application, the Applicant submits that under Section 18(1)(b) of the Civil Procedure Rules this Court has jurisdiction to transfer a suit from the Magistrates Court. That transfer of suits is further guided by the overriding objectives under Sections 1A and 1B of the Civil Procedure Act which call upon the courts to facilitate just, expeditious, efficient and proportionate resolution of disputes. That similar objectives are echoed in Section 3(i) of the Employment and Labour Relations Court Act.

6. The Applicant submits that the Court has discretion to grant the orders sought, relying on the decision in the case of **Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR** where 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. The Applicant further submits that the Employment and Labour Relations Court Act and Rules do not provide for all situations and where there are gaps the Court invokes its inherent powers as observed by Mativo J. in **Wachira Karani v Bildad Wachira [2016] eKLR** where he quoted the literary works of Sir Dinshah Mulla in **The Code of Civil Procedure** as follows:

"The Code of Civil Procedure is not exhaustive, the simple reason being that the legislature is incapable of contemplating all the possible circumstances, which may arise, in future litigation, and consequently, for providing the procedure for them. The principle is well established that when the Code of Civil Procedure is silent regarding a procedural aspect, the inherent power of the court can come to its aid to act ex debito justitiae for doing real and substantial justice between the parties. The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act ex debito justitiae, and to do real and substantial justice for the administration, for which alone, it exists. However, the power, under this section, relates to matters of procedure. If ordinary rules of procedure result in injustice, and there is no other remedy, they can be broken in order to achieve the ends of justice."

8. It is further the Applicant's submission that transfer of a suit from the subordinate court to the High Court is not an issue of jurisdiction but a procedural function. That this position was held in the case of **John Mwangi Karanja v Alfred Ndiangui [2011] eKLR** where the Court stated that:

"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."

9. The Applicant submits that jurisdiction is limited to the hearing and determination of suits and that nothing stops a Court from transferring a case filed in the wrong court to the right court, relying on the decision in **Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) [2020] eKLR** where the Court held as follows:

"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."

10. The Applicant submits that the filing of the suit in the Chief Magistrates Court, Mavoko was an honest mistake of Counsel that he should not be punished for relying on the decision in **Patriotic Guards Ltd v James Kipchirchir Sambu (supra)** where the Court held:

"The appellant has also argued that mistakes of counsel should not be visited on an innocent litigant. In the Tana case (supra) the Court observed as follows;

"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."

11. The Applicant further relies on the decision in **Belinda Murai & Others v Amos Wainaina [1978] eKLR** quoted in the case of **Gold Lida Limited v Nic Bank Limited & 2 others [2018] eKLR**, where at paragraph 10, the court set out the approach to be adopted when dealing with the question as to whether or not a party should be completely locked out of the seat of justice on account of a mistake;

"The door of 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 certainly to do whatever is necessary to rectify it if the interests of justice so dictate. It is known that courts of justice themselves make mistake which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometimes overrule ..."

12. The Applicant submit that justice will best be served in this case if the Applicant's suit before the subordinate court is transferred to this court for hearing and determination. We rely on the case of **Kenya Medical Research Institute v Davy Kiprotich Koeh [2018] eKLR** in which the Court of Appeal held as follows:

*"In the case of **Kagenyi vs Musiramo & Another [1968] EA 43** and a long line of cases after it, it was held that before a transfer can be effected, the court effecting the transfer must have the jurisdiction to order such transfer. But in view of the overriding objectives of the courts as read together with Article 159 (2) of the Constitution which entreat them to perform their duties in a just, expeditious, proportionate and affordable way and without undue regard to procedural technicalities, recent cases have adopted a different approach to dealing with cases concerning the courts of equal status, that is the High Court, the ELRC and the Environment and Land Court... As such, in the interest of justice, we would accept that this would be the correct approach to adopt in this case, and we would order that the suit be transferred to the Employment and Labour Relations Court for hearing and*

determination. In that event, we do not see that any prejudice would be visited on the appellant.”

13. The Respondent opposes the application through the replying affidavit of **SIMON PETER**, the Respondent’s Legal Officer who states that upon being served with summons to enter appearance, the Respondent instructed its Advocates to defend the suit. That the Advocates filed a preliminary objection dated 25th June 2021 challenging the jurisdiction of the lower Court, but before the hearing of the preliminary objection, the Claimant filed the instant application in a bid to defeat the hearing of the preliminary objection that is still pending in the lower court.

14. He states that the Civil Procedure Act is not applicable to matters before the Employment and Labour Relations Court except to the extent permitted under the Employment and Labour Relations Court (Procedure) Rules, 2016. That the Employment and Labour Relations Court does not exercise transfer jurisdiction under the Civil Procedure Rules.

15. The Affiant states that this Court does not have jurisdiction to transfer a suit in the lower court which is incompetent for want of jurisdiction. That the Applicant having admitted that the Court in which the suit was filed lacks jurisdiction, should not be allowed to use backdoor manoeuvres to revive the suit by way of this application.

16. In the submissions the Respondent submits that it is trite law that jurisdiction is everything and without it a Court must down its tools; that it is the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. It determines whether a Court can adjudicate a matter and as such must be raised at the earliest of opportunities. Reliance is made on the decision in **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989]**, eKLR the locus classicus case on jurisdiction, where Nyarangi JA held as follows

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

17. The Respondent further submits that the Supreme Court in the case **In the Matter of Interim Independent Electoral Commission [2011]** eKLR while using the case of **Lillian S (supra)** as a point of departure in the discourse restated the reasoning and added that it must be confined to the law and the limitations therein. The Supreme Court held as follows:

“The Lillian ‘S’ case [1989] KLR I establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity.”

18. The Respondent submits that this Court exercises transfer jurisdiction under Section 12(3)(viii) as read with Section 3(1) of the Employment and Labour Relations Court Act and Rule 17 of the Employment and Labour Relations Court (Procedure) Rules, 2016 as it was stated in the case of **Prisca Jepnetich v Generation Career Readiness Social Initiative Limited [2021]** eKLR;

“In transfer of Claims from the Magistrate’s Court to the E&LRC, the appropriate enabling law would be Section 12(3)(viii) as read with Section 3(1) of the E&LRC Act, and Rule 17 of the E&LRC (Procedure) Rules, 2016.”

19. That this Court does not have the jurisdiction to entertain the Application filed by the Applicant. The suit that the Applicant seeks to be transferred to this Court, that is, **Mavoko CMEL E037 OF 2021** is incompetent for want of jurisdiction and as such a nullity in law and there is nothing for this Court to transfer.

20. The Respondent further relies on the decision in **Meeli Ole Naisewa v Benson Gachuki Kinyanjui [2016]** eKLR where the Court opined;

“I consider that under the provisions of Section 18 before the procedure and order of transfer is resorted to, the court must satisfy itself whether there is a competent suit in the original court capable of being tried and disposed of. The relevant things to be considered by the court in determining jurisdiction being the facts as deposed in the plaint, affidavit and statement of claim served upon the defendant. The basis of this being that it is the plaintiff who in the determination of his rights invokes the jurisdiction of the court conferred by the constitution and statute. It is important to bear in mind that the issue of my decision is whether the application as it stands has merits to enable me make an order of transfer. The application was therefore to be tested whether the court from which the suit is being transferred had jurisdiction.”

21. The Respondent further relied on **Gaikia Kimani Kiarie v Peter Kimani Kiramba [2020]** eKLR the Court held;

“Since the Applicant is seeking to transfer the suit based on the fact that the subordinate Court has no jurisdiction, then the Court finds that the Application is not merited as already held above by the Court. The suit is to be transferred from a Court with no jurisdiction, then it means it is not only an incompetent suit, but also a nullity in law and thus there is nothing to transfer. Consequently, the Court holds and finds that the Applicant has not satisfied this Court that it warrants the grant of the orders sought and therefore he is not entitled to the prayers sought.”

22. It is subtitled that the Applicant having admitted that it filed in a Court without jurisdiction, the suit must fail. For emphasis the

Respondent relies on the decision in **Abraham Mwangi Wamigwi v Simon Mbiriri Wanjiku & Another [2012] eKLR** where the Court held as follows:

“It is therefore trite that where a suit is instituted before a tribunal having no jurisdiction, such a suit cannot be transferred under section 18 aforesaid to a tribunal where it ought to have been properly instituted. The reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing and therefore the court cannot Purport to transfer nothing and mould it into something through a procedure known as “transfer”. In other words, courts can only transfer a cause whose existence is recognised by law. It is now settled law that where a Court finds that it has no jurisdiction, it must immediately down its tools and proceed no further.”

23. The Respondent further relies on the Court of Appeal decision in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR** where the Court opined:

“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 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, parties cannot even seek refuge under the “02” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even Article 159 of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”

24. The Respondent submits that the case of **John Mwangi Karanja v Alfred Ndiangui [2011] eKLR** which the Applicant relies on is distinguishable from the instant suit as the application in the case was for transfer from one Resident Magistrates Court to another on grounds of geographical jurisdiction.

25. Further that the case of **Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) [2020] eKLR** is also distinguishable as it was for transfer between courts of con-current jurisdiction being the High Court and the Employment and Labour Relations Court.

Analysis and Determination

26. Having considered the pleadings and the rival submissions of the parties, the issues for determination are whether the suit filed in the Magistrates Court is capable of being transferred to this Court and if the prayers sought are merited.

27. This case is on all fours the application in **Francis Kibugi Wanjohi v Kenya Railways Corporation [2021] eKLR** where I observed that jurisprudence is divided on the issue whether a matter filed in a Magistrates Court without pecuniary jurisdiction can be transferred to a Court with pecuniary jurisdiction for hearing and determination.

28. In the decision I observed that in **Ruth Muthoni Mwangi v Kenya Meat Commission and Prisca Jepng’etich v Generation Career Rabidness Social Initiative Limited [2021] eKLR** the court dismissed a similar application while in **Kenya Plantation and Agricultural Union v Cargill Kenya Limited & Another [2020] eKLR** and **Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) [2020] eKLR**, the courts held that a suit filed in a court without jurisdiction can be transferred to a court with jurisdiction.

29. In the said suit, I held that this court can transfer such a suit by virtue of Article 159 of the Constitution, and Section 3 and 12(3)(vii) of the Employment and Labour Relations Court Act.

30. I have again considered the conflicting decisions. In my view none of the decisions of the higher courts, that is the Court of Appeal and the Supreme Court, have dealt with the specific issue whether a suit filed in the Magistrates Court without **pecuniary** jurisdiction would be incapable of being transferred by this Court to itself for hearing and determination.

31. I am inclined to agree with the reasoning in **Pamoja Women Development Program & 3 Others v Jackson Kihimbu Wangombe & another [2016] eKLR**, as quoted with approval by Muriithi J. in **Henry Kigen & 6 others v Baringo County Governor & 2 others [2020] eKLR** as follows –

“14. Kenyans desired specialised courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts.

...

15. Kenyans’ objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be

struck out. While Kenyans 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. This would be an appropriate course of action where it can be shown that the Plaintiff acted in bad faith in suing in the wrong court but not where the Plaintiff acted in good faith.”

32. In deed in **Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR**, the Supreme Court remitted a suit filed in the High Court and thereafter transferred to the Employment and Labour Relations Court to the CEO of the Retirement Benefits Authority which under the Act had original jurisdiction to hear the disputes after finding that both the High Court and Employment and Labour Relations Court had no jurisdiction to hear the matter. The decision in my view settles the issue.

33. For the foregoing reasons, the application succeeds and I make the following orders –

(i) THAT the proceedings in Mavoko CMEL No. E037/2021; Harun Kiptanui Tarus versus East African Portland Cement be and are hereby stayed pending the hearing and determination of this Application.

(ii) THAT the suit filed by the Applicant against the Respondent being Mavoko CMEL No. E037/2021; Harun Kiptanui Tarus versus East African Portland Cement PLC be and is hereby transferred to the Employment and Labour Relations Court in Nairobi for hearing and determination.

(iii) The Respondent shall have costs of this application in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MARCH 2022

MAUREEN ONYANGO

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 15th March 2020 and subsequent directions of 21st 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.

MAUREEN ONYANGO

JUDGE