



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR REALTIONS COURT**

**AT MOMBASA**

**CAUSE NO. E39 OF 2021**

**MICHAEL ADIB AZZAM.....CLAIMANT**

**VERSUS**

**ZAKHEM CONSTRUCTION [K] LIMITED.....RESPONDENT**

**RULING**

1. The application before me is the Respondent's Notice of Motion dated 7<sup>th</sup> October 2021. The Respondent/Applicant is seeking the following orders:-

**a. that the suit herein be transferred to the Employment and Labour Relations Court at Nairobi for trial and disposal.**

**b. that costs of the application be in the cause.**

2. The application is supported by the affidavit of Ibrahim Adnan Annous, a director of the Respondent/Applicant Company, sworn on 7<sup>th</sup> October 2021. It is deponed on behalf of Respondent/Applicant:-

a. that the jurisdiction of this Court is contested under paragraph 3 of the Respondent's Statement of Response to the Claim dated 24<sup>th</sup> August 2021.

b. that the Respondent Company has its place of business in Nairobi and carries out largely all its operations in the said location, a fact of which the Claimant is aware.

c. that the suit ought to have been filed in Nairobi where it (the Respondent) is situate, and not in Mombasa.

d. that the Respondent's location is the main consideration in selecting a place to sue.

e. that the Respondent will be occasioned great prejudice as to Court attendances and availing of witnesses in case the matter proceeds in Mombasa without taking notice of the Respondent's location.

3. The application is opposed by the Claimant, MICHAEL ADIB AZZAM, who on 15<sup>th</sup> November 2021 filed a Replying Affidavit sworn by himself on 12<sup>th</sup> November 2021. The Claimant/Respondent deponed, *inter alia*:-

a. that he (the Claimant) was employed by the Respondent/Applicant as a Foreman/Supervisor sometimes in September 1976, and retained continuous employment in Mombasa branch until he was constructively terminated in March 2019,

b. that the Respondent Company has several branches within the Republic of Kenya including Mariakani, from which it conducts coastal operations todate.

c. that during his tenure, the Respondent worked in several branches across the country.

d. that the Respondent will suffer no prejudice if the matter is prosecuted in Mombasa, having already established offices in the coastal region with daily operations.

e. that the claimant is sickly and has been advised by his doctors to avoid travelling, and transferring the suit to Nairobi will also be

prejudicial to him as he is currently unemployed and the expenses will be untenable.

f. that the application is only aimed at forum shopping to suit the Respondent's ends, and should be dismissed.

4. On 18<sup>th</sup> November 2021, I directed parties herein to file and to exchange submissions on the applications, which they eventually did.

5. The Respondent/Applicant alleged in its supporting affidavit that it had contested this Court's jurisdiction over the suit herein at paragraph 3 of its Statement of Response dated 24<sup>th</sup> August 2021. Paragraphs 3 of the Respondent's Statement of Response reads as follows:-

**“The Respondent avers that this suit ought to have been filed in Nairobi where it is situate and not in Mombasa given that the Respondent's location is the main consideration in selecting a place to sue. The Respondent will at the opportune time file an application to have the suit transferred to Nairobi for trial and disposal.”**

6. On 20<sup>th</sup> September 2021, the Claimant/Respondent filed a reply to the Memorandum of Response, dated 13<sup>th</sup> September 2021, and at paragraph 3 thereof pleaded as follows:-

**“In response to the contents of paragraph 3 of the Memorandum of Response, the Claimant reiterates the entire contents of the Memorandum of claim and avers that the correct audience of this suit is in the Employment and Labour Relations Court at Mombasa where the Claimant resides and where the cause of action arose.”**

7. It is clear from the foregoing pleadings that the only issue for determination in the application before me is whether or not the suit herein should be transferred to the Employment and Labour Relations Court at Nairobi. I must add that this Court's jurisdiction on employment and labour relations matters is territorial and that matters of where to sue and whether or not to transfer an already filed suit from one Court station to another are purely procedural.

8. The Employment and Labour Relations Court (Procedure) Rules 2016 are silent on where to sue. I cite with approval the Court's decision in the case of Rift Valley Railways Workers Union –vs- Rift Valley Railways (Kenya) Limited & Another [2014] eKLR where the Court (Ndolo J.) stated as follows:-

**6...first, there is the question of whether, the 2<sup>nd</sup> Respondent's application is competent by virtue of it having been brought under the civil procedure rules.**

**7. The Claimant's submission on this score is informed by the position of this Court as a specialized Court established to deal with labour and employment matters. While the specialized nature of the Industrial Court is not in doubt, it is also true that the Industrial Court (Procedure) Rules do not provide for all procedural matters that come before the Court.**

**8. In this regard, the practice adopted by the Court has been to resort to the Civil Procedure Rules in cases where there is a lacuna in the specific rules of this Court. I therefore agree with the submission by the 2<sup>nd</sup> Respondent that since the Industrial Court Act and the Industrial Court (Procedure) Rules do not provide for stay of proceedings; then the Civil Procedure Rules are properly applicable.”**

9. The Civil Procedure Rules are an offspring of the Civil Procedure Act and elaborately mimic and/or amplify the Civil Procedure Act. On the applicability of the Civil Procedure Act to proceedings in this Court, the Court in the case of FRANCIS KIMUTAI BII –VS- KAISUNGU [K] LIMITED [2016] eKLR (D.K. Njagi Marete, J) had the following to say, with which I agree:-

**“The application of the Civil Procedure Act in the practice of this Court is a gray area. It is not expressly provided for in any statute applicable in the practice of the Court or even other law. There have been arguments for and against the application of the civil Procedure Act in our practices. So what is the actual position on this in the practices of this Court. “What has been the practice in the past.” Previous practice of the employment & Labour Relations Court has borrowed from the High Court of Kenya by incorporating the Civil Procedure Act and Rules in its practice where necessary. This I believe is obviously to take care of any lacuna created by the lapses of the Industrial Court (Procedure) Rules, 2010 and even statute. I agree with the submissions by the Respondent that the Industrial Court Act, 2011 and the Rules of this Court do not address the issue of stay of execution or even leave to appeal. I however, do not agree that in the absence of this provision, this Court would be left hanging on the subject. Nature abhors a vacuum and therefore the establishment of precedent and a practice where these issues can be addressed as and when they arise and fall due like in the present case.”**

10. Section 15 of the Civil Procedure Act addresses the issue of where to file suits, and provides as follows:-

**“subject to the limitations aforesaid, every suit shall be instituted in a Curt within the local limits of whose jurisdiction:-**

**a. The defendant or each of the defendants (where there are more than one) at the time of the commencement of the suit, actually and voluntarily resides or carries on business, or personally works for gain, or**

**b. Any of the defendants (where there are more than one) at the time of the commencement of the suit actually and voluntarily resides or carries on business, or personally works for gain, provided either the leave of the Court is given, or the defendants who do not reside or carry on business or personally work for gain, as aforesaid acquiesce in such institution; or**

**c. The cause of action, wholly or in part, arises.**

11. It is clear from the foregoing provisions of Section 15 of the Civil Procedure Act that in selecting where to institute a suit, the Respondent's location should be a main consideration. It was held in the case of SWISS DELI TRADE (PANAMA) INC –VS- PRIVAMMUNUTS EPZ KENYA LIMITED [2020] eKLR as follows:-

**“14. Amongst the objectives for the provisions on the place of suing is to ensure that suits are filed in as much as possible where the cause of action arose or where the subject matter is situate or in some instances where the Defendant arises. Suits should not be instituted in places that causes unnecessary hardship to the Defendant and which may hinder access to justice. Again suits should not be lumped in one station when they could be heard elsewhere as this may lead to clogging up of some Courts in a way that flies in the face of equitable access to justice.**

**15. The provisions of section 15 which restricts the institution of suits within the local limits of High Court Stations should be viewed in that light so that**

**“territory jurisdiction” placed by Section 15 does not mean that the “wrong” High Court does not have subjective jurisdiction in respect of the matter.”**

12. As pleaded by the Claimant/Respondent, the Respondent/Applicant is a Limited Liability Company. A *persona juridica*. The claimant did not, however, plead and/or state the Respondent/Applicant's physical and mailing address in his Memorandum of Claim as per the mandatory requirements of Rule 4(1) (b) of the Employment and Labour Relations Court (Procedure) Rules 2016. On its part, the Respondent pleaded that it is situate in Nairobi. It had also been deponed on behalf of the Respondent/Applicant that the Respondent has its place of business in Nairobi and carries out largely all its operations in the said location.

13. The Claimant has not pleaded and/or demonstrated that the Respondent's registered offices and principal place of business is not in Nairobi.

14. The Claimant has not come out clearly on where the cause of action arose. The Memorandum of Claim is silent on the issue. The Replying Affidavit filed herein does not make the situation any better. The Claimant has contradicted himself on this crucial issue at paragraphs 3 and 4 of the Replying Affidavit where he depones:-

**“ 3. THAT sometimes in September, 1976 I was employed by the Respondent herein as a foreman/Supervisor on permanent and retained continuous employment in Mombasa branch/office until my constructive termination in March 2019.**

**4. THAT during the tenure of my work with the Respondent, I worked in several branches across the country.”**

15. In view of all the foregoing, and having considered rival submissions presented by counsel for both parties herein, it is my finding that the suit herein ought to have been filed in the Employment and Labour Relations Court at Nairobi. Consequently, the Notice of Motion dated 7th October 2021 is hereby allowed in the following terms:-

- a. The suit herein is hereby transferred to the Employment and Labour Relations Court at Nairobi for hearing and disposal.
- b. Costs of the application will be in the cause.

16. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> DAY OF MARCH, 2022**

**AGNES KITIKU NZEI**

**JUDGE**

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

**AGNES KITIKU NZEI**

**JUDGE**

Appearance:

Abaja for Omwenga for Claimant

Mr. Ondati for Respondent

