



REPUBLIC OF KENYA



KENYA LAW

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**Mesa v Gusii Mwalimu Sacco Ltd (Miscellaneous Application E023 of 2022)
[2022] KEELRC 12732 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELRC 12732 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
MISCELLANEOUS APPLICATION E023 OF 2022
CN BAARI, J
SEPTEMBER 29, 2022**

BETWEEN

COLLINS CHUMA MESA APPLICANT

AND

GUSII MWALIMU SACCO LTD RESPONDENT

RULING

1. The applicant by a motion dated February 28, 2022 and filed in court on March 3, 2022, seeks to withdraw Kisii ELRC Cause No 1 of 2022 filed and pending before the Chief Magistrates Court at Kisii, and transfer the suit to this court for hearing and determination.
2. The basis of the application is that the applicant's salary at the time of termination was more than Kshs 80,000/- and is beyond the pecuniary jurisdiction of the magistrates court.
3. The application is supported by the grounds on the face thereof and the affidavit sworn by one Joyce Nyandoro on February 28, 2022. The applicant contend that the main claim was inadvertently filed in the magistrates court.
4. Counsel argues that the applicant's salary is Kshs 188,456/- per month and hence above the pecuniary jurisdiction of the magistrates court where it has been filed.
5. The application is opposed *vide* a replying affidavit sworn by Evans Atei Masira on June 10, 2022. The respondent asserts that the application is the applicant's attempt at forum shopping as he has not provided evidence in support of his application.
6. The respondent further contends that the affidavit in support was sworn by a non-party to the suit and urged that the affidavit be expunged from the court record. He sought to rely on the holding in *Moiyo Mataiwa Ole Keiwa v Chief Justice* (2008) eKLR for the holding that affidavits sworn by persons



who are not parties to proceedings before court are incompetent and ought to be discharged from the court record.

Determination

7. I have considered the motion, the grounds, supporting affidavit, replying affidavit and the oral submissions by both counsels. The issue for determination is whether the suit subject of this application meets the threshold for transfer to this court.

8. The court in *Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited* 1989] had this to say on jurisdiction: -

“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.”

9. The applicant by his application has admitted that the court where the suit sought to be transferred is filed, has no jurisdiction to hear and determine the suit and hence the application to transfer. This position is confirmation that Kisii ELRC Cause No 1 of 2022, is incompetent.

10. The Court of Appeal in *Equity Bank Limited v 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.....”

11. The Supreme Court addressed the issue of transfer of suits in *Albert Chaurembo Mumba and 7 Others v Maurice Munyao & 148 Others* [2019] eKLR in the following words: -

“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.

However, as it was well elucidated in the case of *Kagenyi v 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.”



12. Although the applicant sought to rely on Article 159(2)(d), it is now settled that jurisdiction is so fundamental that where it lacks a party cannot seek refuge under Article 159 of the Constitution to remedy the same.

13. I find and hold that the application lacks merit and is dismissed with costs.

14. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 29TH DAY OF SEPTEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Nyaenya Present for the Applicant

N/A for the Respondent

Christine: Court Assistant

