



REPUBLIC OF KENYA



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**Chikamai v Frodak Kenya Ltd & another (Miscellaneous Case
E009 of 2022) [2022] KEELRC 13368 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13368 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
MISCELLANEOUS CASE E009 OF 2022**

**JW KELI, J
DECEMBER 2, 2022**

BETWEEN

ISAAH CHIKAMAI APPLICANT

AND

FRODAK KENYA LTD 1ST RESPONDENT

BUTALI SUGAR COMPANY LIMITED 2ND RESPONDENT

RULING

1. The Applicant filed Notice of Motion dated 5th day of August, 2022 18(1) (b) and 3 A of the [Civil procedure Act](#) and Order L of the Civil Procedure Rules seeking the following orders:-
 - a. That the Honourable court be pleased to order that Kakamega E&LRC Nos :-
5, 145, 56, 59, 27, 136, 468, 82, 96, 110, 77,73,50,165,
121,26,137,66,69,79,74,91,117,28,141,89,162,101,154,153,111,25,163,122,84,108,126,133,75,144,21,61,143
of 2020 be and is hereby transferred from Kakamega Chief Magistrates Court to Butali Law
courts for purposes of hearing and determination.
 - b. Costs of the Application be provided for.
2. The Applications premised on the grounds that the matters were filed in Kakamega Law courts while the Respondents are situated at Butali Sugar Mills factory which is near Butali Law courts rather than Kakamega Law Courts and it is in the interest of justice the matters be heard in Butali Law court which has jurisdiction. The Application is supported by affidavit of Vivian Shibanda of even date restating same grounds.
3. The Application is opposed.



The 2nd Respondent's case

4. by the 2nd Respondent vide replying affidavit of Alex Mbeka Advocate for the 2nd Respondent that they have appeals pending in Kakamega MC ELR NOS. 9 25,31,45,65,79,82,88 and 93 all of 2020 by various claimants against the Respondents on ruling dismissing their preliminary objection on territorial jurisdiction delivered by that trial court 16th August, 2022 (AM – 2)
5. That they prepared memorandum of appeals dated September 1, 2022 and have requested for typed proceedings to file record of appeals.
6. That the said appeals being Bungoma ELRC Nos. 15,16,17,18,19,20,21,22 and 23 all of 2022 Butali Sugar Mills vs various respondents arising from Kakamega CMC ELRC Nos 9, 25,31,45,65,79,82,88 and 93 between various claimants -vs- Respondents are pending for hearing and determination.
7. That the instant application was served on them on September 20, 2022 at 16:4 hours EAT via email by applicant's counsel 18 days after they had lodged the appeals. That at the time of filing appeals they had not been served with instant application hence no knowledge of its existence and that should not defeat their appeal or be visited on the Respondents who exercised right of appeal within the timelines of filing appeals. That if application is allowed they stand to suffer great prejudice as their appeals are pending.
8. The 2nd Respondent filed further affidavit of Sylvia Kedogo . The Counsel averred that the 2nd Respondent was always situated near Butali Law Courts and the Applicant knew that.
9. That suits in Kakamega CMELRC Nos. 145,117,154,1010,159,156.138,148,150,128,147,143,126,129,127,163,135,132,118, and 49 have already been struck out by the trial court for lack of territorial jurisdiction and a transfer of these suits will greatly prejudice the 2nd Respondent. (SK 1 (a) and (b) are copies of the ruling.) That they are in the process of filing appeals at Bungoma ELRC for the determination of their preliminary objection on territorial jurisdiction and Limitation of time in Kakamega CMELRC Nos. 114,155,120,109,144,115,105, 119,51,72,81,99,104,106,140,&103, of 2020. (S 2(a) and (b) copies of rulings).
10. That they have filed Preliminary Objections on territorial jurisdiction and Limitation of time in Kakamega CM ELRC Cause Nos.10,111,116,121,124,125,130,131,134,136,137,139,141,142,156,102,108,152,157,161,162,21,160,153,96,61 and 91 of 2020 whose mentions and hearings have been scheduled for its determination. That the instant miscellaneous application is an afterthought and abuse of court process.

The 1st Respondent's case

11. The 1st Respondent *vide* replying affidavit of George Onyango Ager which was undated but signed urged that the cause of action arose on May 2, 2017 and pursuant to section 90 of the [Employment Act](#) Kakamega MIC E&LR Nos. 101, 117, 148, 150, 128, 147, 154, 150, 159, 127, 163, 129, 148, 118, are time barred following ruling of Hon J Ndururi on 4th August, 2022 and Hon J N Maragia on June 24, 2022 as they were dismissed for want of jurisdiction (GOA 001 and 002).
12. That the Applicant is forum shopping after issuance of Orders dismissing their various matters for want of territorial jurisdiction more than 2 years after were filed at Kakamega Law Courts.



13. That the trial court at Kakamega CM C ELR NO 5, 9, 25, 31,45,51,65,72,79,81,82,93 99,103,104,106,114,115,119,120,144,and 115 rulings delivered on 30th August 2022 and 6th September 2022 found they were properly seized of the matters and are set for hearings.
14. The Claimants and their advocates always knew the location of the Respondents and this delay is causing anxiety to the Respondents as matters 5 years since dismissal remain pending .
15. The court gave directions for the Application to be canvassed by way of written submissions.
16. The 1st Respondent, 2nd Respondents and the Applicant complied.

Determination

17. The parties are in agreement that this court has jurisdiction and powers to transfer suits filed in the magistrates courts to other courts. Under Section 18 (1) (b) of the *Civil Procedure Act* the court is granted general powers to transfer all suits and this power may be exercised at any stage of the proceedings suo moto by the court without application by any party. This power was restated in *Aberdares investments vs Bernard Wachira & 5 others*.
18. All the parties cited cases where the courts have defined the factors to be considered in exercising the powers to transfer suit. They applicant and the 1st Respondent relied on the decision In Hangzhou Agro Chemicals Industrials Ltd -vs- Panda Flowers Ltd (2012) eKLR on factors for consideration in application for transfer of suits where the court stated the factors to be:- factors such as notice, character of proceedings, nature of relief sought, interests of the litigants and more convenient administration of Justice, expenses of witnesses, interest of justice and possibility of hardship.
19. The 2nd Respondent submits that litigation must come to an end and the application is meant to take it into circles and cause anxiety and the courts have jurisdiction and have pronounced themselves on same see County Council of Nandi v Ezekiel Kibet Rutto & 6 others (2013) Eklr where court dismissed Application for being frivolous , vexatious and scandalous.
20. The 2nd Respondents submit that the Applicant is forum shopping due to issuance of orders by various courts dismissing various suits for lack of territorial functional and limitation of time against the 2nd Respondent.

Findings of court

21. The Respondents evidence discloses appeals in 9,25,31,45,65,79,82,88 and 93 various Claimants Vs Respondents were lodged in court onSeptember 2, 2022challenging order of Hon Malesi of Kakamega Law Courts dismissing their preliminary objection on the territorial jurisdiction of the court.
22. There was no evidence of stay of the said order.
23. The court finds the instant application was filed before the appeal. It thus takes precedence despite having been served on the Respondents 18 days upon their filing of the said Memorandum of appeal.
24. The court found evidence of the following cases having been struck out, Kakamega ELRC NOs 145 of 2020 (SK 1 (a)) and Kakamega Misc ELR Cause No 103 of 2020. There was no evidence of other struck out suits.
25. The court did not find evidence of any struck out suits listed among those sought to be transferred contrary to averments of Sylvia Kedogo in Paragraph 7 of her replying affidavit dated 28th September 2022. The court found the trial court vide order of Hon E Malesi (PM) dated 6th September 2022



dismissed preliminary objections challenging Jurisdiction by the Respondent and held court had territorial jurisdiction in Kakamega CMC ELRC NO 155 of 2020 which decision was to apply in Nos 120,105, 109 114, 115 and 119 of 2020 between various claimants and the Respondents.

26. The Respondents allege they are process of filing appeals in these matters against decision of Hon. Malesi (PM) (supra). The Respondents also stated they have filed Preliminary Objection in other matters (supra) at Kakamega Law Courts pending hearing and determination hence the application afterthought and an abuse of the court process.

Decision

27. The court finds that Under section 11 of the *Civil Procedure Act*, a suit may be instituted at lowest grade subordinate court in the County to try the matter and may also be moved within the County.
28. Section 11 of the *civil procedure Act* reads:- ‘Every suit shall be instituted in the court of the lowest grade competent to try it, except that where there are more subordinate courts than one with jurisdiction in the same district competent to try it, a suit may, if the party instituting the suit or his advocate certifies that he believes that a point of law is involved or that any other good and sufficient reason exists, be instituted in any one of such subordinate courts: Provided that— (i) if a suit is instituted in a court other than a court of the lowest grade competent to try it, the magistrate holding such court shall return the plaint for presentation in the court of the lowest grade competent to try it if in his opinion there is no point of law involved or no other good and sufficient reason for instituting the suit in his court; and (ii) nothing in this section shall limit or affect the power of the High Court to direct the distribution of business where there is more than one subordinate court in the same district.’
29. The applicant has invoked the jurisdiction of the court to exercise its powers under section 18 of the *Civil Procedure Act*. The said law reads: ‘18. Power of High Court to withdraw and transfer case instituted in subordinate court (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage— (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter— (i) try or dispose of the same; or (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same.’
30. The physical address of the Respondents in this case was not disputed to be near Butali Law Courts.
31. The Claimants wishes to be heard at Butali law courts. The 1st Respondent argues that the matters have been hanging over their heads causing anxiety and that the Kakamega Law courts has already found it has jurisdiction and matters are being settled for hearing addressing my mind to the issue in *Hanzhou Agrochemicals Industries Ltd vs Panda Followers Ltd* (2012) eKLR the court finds as follows:-
32. The Claims sought to be transferred are in nature of employer employee relations being claims of unfair termination, the Claimants wish to transfer the cases, the Respondents are opposed on reasons of prejudicing their pending objections of jurisdictions, appeals in process of being filed, on admitted Memorandum of appeals lodged after the instant Application and that the Kakamega Law Courts vide Hon. Malesi already held he had jurisdiction.
33. The court determines no prejudice will be suffered on transfer of the suits to court of competent jurisdiction and nearest to the Respondents which is a good, and proper administration decision to balance the work of the subordinate courts and not overwhelm one court in the county. Further the transfer will enhance access to justice for the parties as distant to court will be reduced.



34. The court finds no stay has been granted on the intended appeals .
35. The court finds that priority must be given to this application over appeals lodged when the application was pending before court.
36. The court finds the 1st Respondent's concern of the delay in conclusion of the disputes valid as justice delayed is justice denied. The transfer will address their anxiety as the Butali Law Courts is one nearest to them and ideally handling matters in their area unlike Kakamega Law Courts.
37. Considering the foregoing the court allows the application dated August 5, 2022 and hereby Orders that Kakamega E&LRC Nos-5, 145, 56, 59, 27, 136, 468, 82, 96, 110, 77,73,50,165, 121,26,137,66,69,79,74,91,117,28,141,89,162,101,154,153,111,25,163,122,84,108,126,133,75,144,21,61,143,68,159 of 2020 suits pending before Kakamega Chief Magistrates Court be and are hereby withdrawn from that court and ordered for transfer to Butali Law Courts for disposal.
38. Costs of the application to the Respondents.
39. It is so ordered.

DATED, SIGNED AND DELIVERED AT BUNGOMA IN OPEN COURT THIS 2ND DAY OF DECEMBER, 2022.

J W KELI,

JUDGE.

IN THE PRESENCE OF :-

Court Assistant: Brenda Wesonga

Applicant : Vivian Shibanda Advocate

1st Respondent: Ms. Achieng Advocate

2nd Respondent: Mbeka together with Kedogo Advocates

