



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. E051 OF 2021

ANDREW KIMANI MWANGI.....APPLICANT

VERSUS

G4S SECURITY SERVICES KENYA LIMITED.....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application dated 17th March 2021 seeking to be heard for Orders:

1. Spent.

2. *THAT this Honourable Court be pleased to grant an Order Staying any proceeding whatsoever in Milimani Chief Magistrates' Court Commercial Suit No. 1141 of 2018 - Andrew Kimani Mwangi -v- G4S Security Services Ltd pending the hearing and determination of this Application.*

3. *THAT this Honourable Court be pleased to retransfer and/or recall Milimani Chief Magistrates' Court Commercial Suit No. 1141 of 2018 - Andrew Kimani Mwangi -v- G4S Security Services Ltd, to this Honourable Court, where it had originally been filed, for trial and/or appropriate disposal in any befitting manner thereof.*

4. *THAT Costs of this Application be provided for.*

2. The Application is premised on the grounds that in February 2017 the Applicant filed ELRC Cause Number 399 of 2017 - Andrew Kimani Mwangi Mwangi v G4S Security Services Ltd and by an Order made by Hellen Wasilwa J. on 1st February 2018, the said suit was referred to the Chief Magistrates Court and registered as Milimani Chief Magistrates Civil Case No. 1141 of 2018 - Andrew Kimani Mwangi Mwangi v G4S Security Services Ltd. The motion asserts that following the decision of the Supreme Court in **Nairobi Civil Appeal No. 133 of 2011 – Attorney General v Law Society of Kenya & Another [2017] eKLR**, the Defendant has proceeded to file a Notice of Preliminary Objection challenging the jurisdiction of the Chief Magistrates Court. The Applicant asserts that the Magistrates Courts having been divested of jurisdiction to entertain work injury claims, it is highly likely that the said Milimani Chief Magistrates Civil Case No. 1141 of 2018 will either be referred back to the Registry indefinitely or be dismissed. That notably when the Applicant filed suit in 2017, the law in place allowed him to file the same by dint of the judgment in High Court Petition No. 15 of 2008. Further, that the Plaintiff continues to suffer emotionally, psychologically and financially as a result of the loss of his right eyesight which was occasioned by reason of the negligence and/or breach of statutory duty and/or breach of the terms of his terms employment on the part of the Defendant, their servants and/or agents. That it is therefore prudent and in the interest of justice that this Honourable Court recalls this matter for further directions, as the same was initially filed here, the Applicant having had legitimate expectations that justice would be served. The Application is supported by an affidavit sworn by the Applicant's Advocate, Donald Muyundo who deposes that ever since the matter was transferred to the Chief Magistrates Courts, the Applicant herein has made several attempts to have it heard and determined on merit, including seeking directions from the court on disposal of the same on 5th May 2015, but bore no fruit. He avers that the Defendant will neither be prejudiced nor suffer any injustice should this Application be allowed as the same only seeks to ensure that justice is served and seen to have been served.

3. The Respondent filed Grounds of Opposition dated 13th April 2021 opposing the Application herein on grounds that the same is an abuse of court process as nothing will be achieved by the transfer of the matter back to this court. Further, that the objection as to jurisdiction is fundamental and will not be cured by the transfer of the file to this court and that the Claimant is not without remedy as the claim can still be determined under the Work Injury Benefits Act. When the matter was before this Honourable Court on 14th April 2021, the Applicant's counsel prayed for grant of Prayer 2 of Notice of Motion which prayer counsel for the Respondent opposed arguing that proceedings in CM's Court were stayed pending this Motion. The Court declined to grant the prayer at that time.

4. The Applicant submits that the power bestowed upon the High Court to transfer suits of a civil nature is provided for in Section 18 of the Civil Procedure Act, Cap 21 Laws of Kenya, with Section 18(1)(b) of the Act particularly providing that the High Court may at any stage

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; or
- iii. retransfer the same for trial or disposal to the court from which it was withdrawn.

5. The Applicant asserts that the Employment and Labour Relations Court which has the status of the High Court by dint of Article 162(2)(a) of the Constitution of Kenya 2010, is therefore clothed with the jurisdiction envisaged under Section 18 of the Civil Procedure Act. Further, that in the case of **Aberdare Investments v Bernard Wachira & 5 Others [2014] eKLR**, Nyamweya J. stated that the court with jurisdiction to transfer a suit from or to a subordinate court is the High Court, or courts of similar status and that Subordinate Courts have no such jurisdiction either upon application, or of their own motion. The Applicant also cites the case of **Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd [2012] eKLR** where the Court addressed the conditions to be considered in determining whether or not to grant an order transferring a suit as follows:

“...In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case.” [Emphasis theirs]

6. It is the Applicant’s submission that the balance of convenience is in his favour because the Respondent admitted to him being its employee and that his irreversible blindness arising from the course of his employment is also not in contention. Secondly, that it will only be in the interest of justice that this matter is determined before this Honourable Court, or should this Honourable Court so direct, the same be dealt with at the Chief Magistrates Court where it was transferred to. Further, that if this matter was to be dismissed, the expenses he has incurred would not be recoverable in entirety considering he already lives with irreversible blindness of the right eye. He further submits that he is aware that want of jurisdiction of the Court from which the transfer is sought is no ground for ordering transfer but contends the same was occasioned by the transfer of the claim to the Chief Magistrates Courts by an Order of this Honourable Court. That he is also aware that this Court only enjoys Appellate jurisdiction as was held in **Supreme Court Petition No. 4 of 2019, Law Society of Kenya v Attorney General & Another [2019] eKLR** which upheld, among others, the constitutional validity of Sections 16 and 52 of the Work Injury Benefits Act No. 13 of 2007. The Applicant submits that it is prudent that the issue of the jurisdiction of this Honourable Court as well as the Chief Magistrates Courts be dealt with in view of the circumstances on which it is premised, so as to arrive at a just and fair determination. The Applicant submitted that **In the Matter of Interim Independent Electoral Commission [2011] eKLR**, the Supreme Court observed that:

“The Lillian ‘S’ case 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...”

7. The Applicant implores the Court to be inclined consider the provisions of Sections 1A and 3A of the Civil Procedure Act which provide for the just, expeditious, proportionate and affordable resolution of civil disputes. That this Court ought to ultimately interrogate whether the Applicant rightfully filed his claim before this Court and whether it is just for the same to be dismissed owing to the determination in **Nairobi Civil Appeal No. 133 of 2011, Attorney General v Law Society of Kenya & Another (supra)** which decision was upheld by the Supreme Court in **Petition No. 4 of 2019, Law Society of Kenya v Attorney General & Another (supra)**. He relied on the case of **West Kenya Sugar Co. Ltd v Tito Lucheli Tangale [2021] eKLR** where Radido J. observed that the key to unravelling the uncertainty on jurisdiction can be resolved on three broad grounds, namely, State of the law from 22nd May 2008 to 3rd December 2019, Access to justice and Legitimate expectation and that the High Court’s declaration of inconsistency would naturally raise the question of the status and or validity of judgment made or judge declared law. The Applicant asserts that Hon. Radido J. held that litigants who filed their disputes with the Courts from 22nd May 2008 to 3rd December 2019 on the firm belief that the judge declared law was the valid law in place then, are entitled to successfully assert legitimate expectation in having the claims heard to a conclusion before the Courts where they had been lodged. The Applicant further urges this Court to be persuaded by the ruling delivered on 27th May 2021 by Wasilwa J. in **Nakuru ELRC No. 131 of 2017, Mulaku Chekata Luke v Timsales Ltd** (unreported) ordering that the matter proceed before the said Court, the case having been filed before the decisions in the Court of Appeal and the Supreme Court were rendered and with legitimate expectation that the same would proceed to its determination. The Applicant further submits that the five-judge High Court bench in the case of **Kalpana H. Rawal v Judicial Service Commission & 4 Others [2015] eKLR** exhaustively discussed the doctrine of legitimate expectation and various judicial decisions on the doctrine and which decision was affirmed by the Court of Appeal. In summary, that the said bench observed that the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded. He submits that the Supreme Court in addressing the issue of legitimate expectation in its judgment in **Petition No. 4 of 2019, Law Society of Kenya v Attorney General & Another [2019] eKLR** agreed with the Appellate Court that a party has the legitimate expectation to have a dispute resolved under the invoked legal regime. The Supreme Court went on to hold that there was nothing unconstitutional in WIBA being applied in a manner that is consistent with its provisions but taking into account the invoked legal regime. The Applicant seeks to apply the provisions of Section 23 of the Interpretation and General Provisions Act Cap 2 Laws of Kenya that where a written law partially or wholly repeals another written law, unless a contrary intention appears, the repeal cannot revive anything not in force or existing before the repeal or affect the previous operation of a repealed law in relation to interests, rights and or obligations enshrined under such law. It is further the Applicant’s submission that the judgment delivered in **High Court Petition No. 185 of 2008, Law Society of Kenya v Attorney General & Another [2009] eKLR** was valid and binding in all respects, and a party relying on it has legitimate expectation that their reliance on it will not later be challenged. He further relies on the case of **Cyrus Ombuna Machina v Safaricom Limited [2020] eKLR** where the Court refused to strike out the claim and referred the dispute to the Director under WIBA to hear and determine it under the relevant provisions of WIBA. He implores this Court to make a similar order as a remedy of last resort

should the Court find that it lacks jurisdiction.

8. The Respondent submits that the Applicant has not made a strong case for the transfer and it is not proper to transfer the suit in the circumstances of the case. The Respondent asserts that the Court in the case of **Nicholas Kihungi Kimari & 3 Others v Kimari Maina & 3 Others [2020] eKLR** observed that the burden is on the party seeking to transfer a suit to make a strong case for the transfer and that while the Applicant concedes on one hand that the lower court is divested of jurisdiction to entertain his work injury claim, he argues on the other hand that courts (including the lower court) have jurisdiction to entertain work injury claims (including his claim) filed between 22nd May 2008 and 3rd December 2019. The Respondent asserts that the Applicant taking such conflicting positions weakens any case for a transfer because he admits that this Court only has appellate jurisdiction on work injury claims and has also conceded that this Court has no jurisdiction to hear and determine the suit. The Respondent cited the case of **Hangzhou Agrochemicals Industries Ltd v Panda Flowers Ltd [2012] eKLR**, as cited by the Applicant, where the Court held that the power to transfer a suit is discretionary and in considering whether to exercise it, “*if the Court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused.*” It submitted that if the Applicant is of the view that courts have jurisdiction to determine his suit, the same views should be presented before the lower court which is competent to make a determination on the issue and that his views should not be allowed to support a case for transfer. That it has demonstrated that the Applicant has not made a strong case for the transfer and that this Court ought to dismiss the Application herein with costs to the Respondent.

9. The issue for determination is whether the Applicant’s case pending before the Magistrates Court is fit for transfer to this Court. He argues that as held by Radido J. in the case of **West Kenya Sugar Co. Ltd v Tito Lucheli Tangale (supra)**, this Court has jurisdiction to transfer the case as there is authority to hear and determine the cases filed before the reversal by the Court of Appeal in **Nairobi Civil Appeal No. 133 of 2011, Attorney General v Law Society of Kenya & Another (supra)**. He asserts the law in relation to the work injury benefits ought to be viewed in the prism offered in the decision by my brother Radido J. the Respondent on its part asserts the transfer ought not be allowed as the Applicant on one hand concedes that the Subordinate Court below is divested of power to hear the case but asserts this Court has power to do so yet in fact this Court has only the power to hear an appeal from the Director of Occupational Safety and Health. The law is clear in as far as where the cases filed during the pendency of the High Court decision by Ojwang’ J. (as he then was) lie. These cases were filed when there was authority to deal with work injury claims by the Subordinate Court or indeed the Industrial Court at the time the precursor to this Court. The Respondent is correct in its surmise that this Court is not the primary forum for work injury claims but would only entertain these on the terms provided for under Section 52(2) of Part VIII of the Work Injury Benefits Act. As such, the Court being the appellate forum cannot invite the parties to a hearing before it. The transfer is declined on this basis as there would be a breach of the decision of the Supreme Court and Court of Appeal which Courts have declared the Sections impugned in the first WIBA case at the High Court as constitutional. In view of the fact that the matter is still before the Magistrates Court, I will make no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 15th day of July 2021.

Nzioki wa Makau

JUDGE