



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**MISCELLANEOUS APPLICATION NO E0012 OF 2021**

**PETER NDAMBUKI KASIU.....APPLICANT**

**VS**

**MOMBASA CEMENT LIMITED.....RESPONDENT**

**RULING**

1. By his Notice of Motion dated 16<sup>th</sup> February 2021 and filed in court on 17<sup>th</sup> February 2021, the Applicant seeks transfer of *Mombasa CMELR No 133 of 2020: Peter Ndambuki Kasu v Mombasa Cement Limited* from the Chief Magistrate's Court at Mombasa to this Court for hearing and disposal.

2. The Motion is supported by an affidavit sworn by the Applicant's Counsel, Lucy Ngigi and is based on the following grounds:

- a) The suit was erroneously filed in the Magistrate's Civil Registry when it was intended to be launched before the Employment and Labour Relations Court;
- b) Filing of the suit in the lower court was an inadvertent mistake by the Advocate's clerk and therefore the Applicant should not suffer due to the Advocate's mistake;
- c) On realising that the filing was done in the wrong court, the Applicant's Counsel prompted the court without undue delay vide a letter dated 3<sup>rd</sup> December 2020, addressed to the Chief Magistrate, seeking to have the file assigned to the proper court;
- d) The Chief Magistrate thereafter reverted by directing the Applicant to make a formal application before this Court seeking transfer of the file to the correct forum for determination;
- e) It is within the public domain that vide Gazette Notice dated 22<sup>nd</sup> June 2018, the subordinate courts starting with Senior Resident Magistrates were appointed as special magistrates to hear and determine disputes arising from contracts of employment where the employee's gross monthly pay does not exceed Kshs. 80,000;
- f) The Magistrate's Court lacks the jurisdiction to hear the suit for the reason that the Applicant's gross monthly salary immediately before the termination of his employment contract was Kshs. 87,291;
- g) This Court is therefore the competent court with jurisdiction to hear and dispose of the subject suit and it is in the interest of justice that the orders sought are granted.

3. The Respondent opposes the Applicant's Motion by way of a Replying Affidavit sworn by its Counsel, Cyprian Onyony on 25<sup>th</sup> February 2021.

4. Counsel for the Respondent states that the Applicant's Motion is an abuse of the court process because Counsel for the Applicant was well aware that the estimated value of the claim was beyond the pecuniary jurisdiction of the Magistrate's Court where she chose to file the Applicant's claim.

5. Counsel further states that given that the Magistrate's Court has no jurisdiction to entertain the suit by the Applicant, the suit is a nullity *ab initio* and cannot be transferred to this Court.

6. Counsel takes the view that it would be illegal for this Court in exercise of its powers, to transfer a suit filed in a court lacking jurisdiction as it would amount to sanctifying an incompetent suit.

7. The Respondent further filed a notice of Preliminary Objection of the same date citing the following grounds:

- a) That it is illegal for the Employment and Labour Relations Court in exercise of its powers under Section 12 of the Employment and Labour Relations Court Act, to transfer a suit filed in a court lacking jurisdiction to a court with jurisdiction;
- b) That the Applicant's application is incompetent and incurably defective as the incompetent *Cause No E133 of 2020* filed in the Magistrate's Court offends the provisions of Gazette Notice No. 6024 dated 22<sup>nd</sup> June 2018;
- c) That *Cause No E133 of 2020* is a nullity *ab initio* and is not transferable to another court.

8. In response to the Respondent's replying affidavit and Preliminary Objection, the Applicant's Counsel filed a further affidavit sworn on 28<sup>th</sup> April 2021.

9. In pursuing its argument that the subject cause is not transferable, the Respondent relied on two decisions of the Court of Appeal being; *Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour & Travel [2016] eKLR* and *Phoenix of E.A Assurance Company Limited v S.S Thiga t/a Newspaper Service [2019] eKLR*. The gist of these decisions is that a matter filed in a court without jurisdiction is a nullity and is therefore not transferable.

10. In the *Diani Tour Travel Case* (supra) the Court of Appeal 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 S.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. 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 same.”***

11. There is nothing more to say on this issue. The suit which the Applicant seeks to transfer, having been filed in a court without jurisdiction, is a nullity and there is therefore nothing to transfer.

12. What the Applicant should have done was to withdraw the suit filed in the lower court in order to pave way for filing of a fresh suit in this Court. As it stands, the only order to make is to dismiss the present application.

13. Each party will bear their own costs.

14. It is so ordered.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 15<sup>TH</sup> DAY JULY 2021**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in 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.

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Ngigi for the Applicant

Mr. Onyony for the Respondent