



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

MISCELLANEOUS APPLICATION NO. E072 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

FRANCIS KIBUGI WANJOHI.....CLAIMANT

VERSUS

KENYA RAILWAYS CORPORATION.....RESPONDENT

RULING

1. Vide a Notice of Motion dated 7th December 2020; the Applicant seeks the following orders:

(i) *Spent*

(ii) *This Court be pleased to transfer the file MCELRC/E993/2020 Francis Kibugi Wanjohi v Kenya Railways Corporation from the Chief Magistrates Court to the Employment and Labour Relations Court for hearing and determination of the matter.*

(iii) *Costs of this Application be in the cause.*

2. This Application is premised on the grounds on the face of the application and the supporting affidavit of JAMES MAHINDA WAIROTO.

3. The gist of the application is that the Claimant's Advocate on record inadvertently filed a Memorandum of Claim (**Court MCELRC/E993/2020**) dated 13th October 2020 in the Chief Magistrates Court as opposed to the Employment and Labour Relations Court. That the advocate based the claim on the pecuniary limit of the Chief Magistrates Court as opposed to the gross salary of the Claimant. Further that the claimant is apprehensive that the claim is likely to be dismissed for want of jurisdiction.

4. The affiant further avers that in accordance with Article 159(2)(d) of the Constitution of Kenya, 2010, courts must continue to exercise judicial co-operation and comity, and discharge their obligation to administer justice fairly, without undue regard to technicalities. That the Advocate's mistake should thus not be visited upon the innocent Claimant who is seeking redress and justice from the Court.

5. The applicant therefore requests this Court to exercise its discretion and transfer the file (**MCELRC/E993/2020**) to the Employment and Labour Relations Court.

6. The instant Application was opposed via the Respondent's replying Affidavit dated 17th May 2021.

7. The Respondent in the said Replying Affidavit avers that the instant application was filed with the sole aim of circumventing the hearing of a Preliminary Objection that is pending before the Chief Magistrates Court. The Respondent avers that the prayers sought herein should be declined for the following reasons:

a) The suit having been filed in the court without jurisdiction, as dully admitted by the claimant, is *void ab initio* and cannot be transferred.

- b) It is improper and unlawful for the claimant to move to transfer the said suit to this court while the preliminary Objection is pending hearing and determination by the subordinate court.
- c) The proposed orders sought herein are intended to evade the outcome of the preliminary Objection, the merits of which have already been admitted by the Claimant.
- d) The said orders are intended to undermine the subordinate court's competency to hear and determine the Preliminary Objection.
- e) The proper cause of action to be taken by the Claimant is to withdraw the ongoing suit in the subordinate court then institute a fresh suit before this Court if he wishes to do so.
- f) The present application is frivolous, vexatious and an abuse of the court process as it is designed to prevent the respondent from prosecuting the preliminary Objection.
8. The Application was disposed of by way of written submissions.

Applicant's Submissions

9. Applicant's counsel submits that this court has jurisdiction to order the transfer of matters. He relied on the following authorities:
10. In the case of **David Kabungu v Zikarenga & 4 others, Kampala HCCS NO. 36 of 1995** the court held that "*Section 18(1) (b) of the Civil Procedure Act gives the court the general power to transfer all suits and this power may be exercised at any stage of the proceedings even suo moto by the court without application by any party...*".
11. In the case of **Kenya Plantation and Agricultural Workers Union v Cargill Kenya Limited & another [2020] eKLR** the court found that "*There is no express provision of the law, on transfer of cases from the High Court to the Employment and Labour Relations Court, from the Employment and Labour Relations Court to the High Court or from the Chief Magistrate's Court to the Employment and Labour Relations Court and vice versa... Courts must however continue to exercise judicial co-operation and comity, and discharge their obligation to administer justice fairly, without undue regard to technicalities, as commanded by Article 159 of the Constitution. Transfer of matters, ought to be a jurisdiction conferred even on the Chief Magistrate's Court, as it is only meant to facilitate Parties in access to justice... The Employment and Labour Relations Court has relied on Section 3 of the Employment and Labour Relations Court Act in transfer of cases. It is the mandate of the Employment and Labour Relations Court to facilitate the just, expeditious and proportionate resolution of employment disputes. Reliance has also been made on Section 12 (3) (viii), which enables the Court to make any other appropriate relief the Court deems fit to grant.*"
12. Counsel further submits that in considering whether to grant the orders to transfer the file, the Court ought to look at the injustice which may occur if the file is not transferred. He invites the Court to consider the import of Article 159 (2) (d) of the Constitution of Kenya, 2010 which directs the courts to administer justice without undue regard to procedural technicalities.

Respondent's Submissions

13. The respondent's learned counsel submits that the suit as filed in the subordinate court is a nullity not capable of being transferred to the ELRC. He relies on the Court of Appeal's decision in **Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR**, where the appellate court held that;

"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.... In the same way through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through transfer"

14. Counsel also relies on the Court of Appeal in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga T/A Newspaper Service [2019] eKLR** where it was held

"It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void."

15. Accordingly, counsel submits that the application should be dismissed with costs.

Analysis and Determination

16. After careful consideration of the application, affidavits and the submissions by the parties, the single issue for determination is whether the Applicant is entitled to the orders sought.

Whether the Applicant is entitled to the orders sought.

17. There is no consensus on the issue of transfer of suits from a court that lacks jurisdiction to the correct forum. Different courts have arrived at distinct verdicts as highlighted in the following cases.

18. In **Ruth Muthoni Mwangi v Kenya Meat Commission [2020] eKLR**, Mbaru J. while dismissing an application for transfer of a file from the subordinate court to ELRC cited with approval the case of **Boniface Waweru Mbiyu v Mary Njeri & another [2005] eKLR** where the court held that;

*I will, in agreement with the decision in **Kagenyi v. Musiramo**, state here that the High Court will decline to assume jurisdiction in relation to any matter which has been filed before a Court or tribunal lacking jurisdiction. Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court.*

19. In **Prisca Jepngétich v Generation Career Readiness Social Initiative Limited [2021] eKLR** Rika J. in while dismissing an application seeking the transfer of transfer of a matter from the Subordinate court to the Employment and Labour Relations Court stated:

“17. This Court does not think that the Respondent should be denied the right to be heard, before the Chief Magistrate’s Court, on its preliminary objection. There are other aspects of the dispute to be dealt with by that Court, such as costs sustained in responding to the Claim.

18. The Claimant would be in a position to file a fresh Claim at the right forum, if her matter is dismissed for want of jurisdiction, assuming she is still within the time allowed under Section 90 of the Employment Act 2007. As pointed out by the Respondent, if the Chief Magistrate’s Court upholds the preliminary objection, the result would be that the Claim is deemed a nullity, as good as if it was never filed, and would not therefore, impact the Claimant’s ability to relaunch her bid, at the correct forum.

19. This Court does not think it is proper to interfere with the work of other Courts. The Chief Magistrate’s Court should be allowed to complete the work assigned to it by the Parties, without the interference of this Court.”

20. In **Kenya Plantation and Agricultural Workers Union v Cargill Kenya Limited & another [2020] eKLR** Rika J. when allowing an application for transfer of a suit from the Magistrates court to Employment Labour Relation Court stated:

“There is in existence a Claim in the Magistrate’s Court, Cause No. 85 of 2018. It was filed, but in the wrong platform. The Claimant paid court fees upon filing. It is not helpful to argue that there is no Claim capable of being transferred. The Hon. Chief Magistrate directed Parties to apply for transfer of an existing Claim. If there was no Claim, the Trial Court would have simply declined jurisdiction, and advised Parties there is no Claim to be transferred. Instead, the Parties were advised to apply for transfer in the relevant Court.”

21. In **Ali Jarso Wako & Another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) [2020] eKLR** Chitembwe J. **acknowledged that** two contrary views have emanated from two different findings of the Court of Appeal on the issue of transfer of files. Whereas in the case of **Equity Bank Ltd v Bruce Mutie T/A Diani Tour & Travel (Supra)** the Court of Appeal (Asike Makhandia, W. Ouko and K. M’Inoti) held that the Court without jurisdiction cannot transfer a matter to another Court, the same Court of Appeal in the case of **Daniel N. Mugendi v Kenyatta University & 3 Others (2013) eKLR** held that the court without jurisdiction should transfer the file to the court with jurisdiction to entertain the matter. In the said case (**Ali Jarso Wako & another v Ministry of Interior & Coordination of National Government & 5 others; Public Service Commission & 5 others (Interested Parties) [2020]** Chitembwe J. added:

*“In my view lack of jurisdiction is limited to the handling of the dispute at hand substantially. Transfer or referring cases to the Court with the proper jurisdiction is an administrative matter which is aimed at facilitating the speedy disposition of the case at hand. It has nothing to do with jurisdiction. All what the Court will be saying is that “**you have come to the wrong forum, please take your file to the correct forum**”. I don’t think such an order needs jurisdiction or can be held as null and void. This is my honest view. Further, I do opine that the contrary view will be running against the provisions of Article 159 of the Constitution in relation to procedural technicalities. Justice should not be made expensive to litigants. Striking out the matter would lead to the filing of a fresh suit before the Court with proper jurisdiction. This entails the typing of fresh pleadings, filing the same in Court and paying Court fees afresh. Thereafter service has to be effected upon all the respondents and interested parties. On the other hand, when the matter is referred to the proper Court, the proceedings will start afresh and the file will be allocated a fresh Court file number. I believe such process saves litigants time and money and is in line with the spirit of the Constitution.”*

22. In **Henry Kigen & 6 others v Baringo County Governor & 2 others [2020] eKLR** Muriithi J. cited with approval the case of

Pamoja Women Development Programme & 3 others v Jackson Kihumbu Wangombe & another [2016] eKLR, where the Court admirably considered the issue whether the High Court can transfer a suit to the Environment and Land Court, and held as follows:

“14. Kenyans desired specialised courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenyans bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenyans bargained for in creating Article 162(2) Equal Status Courts.

...15. Kenyans’ objectives was not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenyans did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits. This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit. I see no useful purpose that is served by this other than punishing a party that acted in good faith. This would be an appropriate course of action where it can be shown that the Plaintiff acted in bad faith in suing in the wrong court but not where the Plaintiff acted in good faith.”

23. From the above cases, it is evident that courts have arrived at different verdicts on the same issue. It is however evident that in all cases, courts must consider whether the suit was filed in the court lacking jurisdiction in good faith.

24. In the instant suit, the applicant has explained that the matter was filed at the Magistrates court following an inadvertent mistake by the claimant’s counsel who considered the pecuniary jurisdiction instead of the salary earned by the litigant. It is also not in dispute that the claimant has an employment Relations issues that is yet to be determined on merit. Indeed the Respondent’s counsel proposes that the claimant should withdraw the claim filed in the wrong forum and file it in the Employment and Labour Relations Court. She clearly has no issue with filing of the claim save that it was filed in the wrong forum. On the issue of the pending Preliminary Objection, both parties have conceded that the Chief Magistrate’s Court has no jurisdiction to determine the dispute.

25. In their operations, courts are guided by Article 159 of the Constitution which requires them to administer justice fairly without undue regard to technicalities. Further, Section 3 of the Employment and Labour Relations Court Act mandates the Employment and Labour Relations Court to facilitate the just, expeditious and proportionate resolution of employment disputes while Section 12(3) (viii) enables the Court to make any other appropriate relief the Court deems fit to grant.

26. In view of the above, it is my finding that adopting the proposal by the Respondent would go against the above provisions. The Applicant would be forced to file new pleadings. This would force him to pay court fees again. He would then incur costs of serving the Respondent again. It could get worse. If the claim is now time-barred, the Claimant’s case will have been dismissed without him having his day in court even though he approached the Court timeously. This, in my view, goes against the above provisions and the emerging jurisprudence that cases ought to be heard and determined on the merits. The upshot is that the instant application succeeds.

27. On the issue of costs, the Applicant herein has made Respondent incur costs in defending the instant application. Accordingly the Applicant herein is condemned to pay the costs of the instant application.

28. In conclusion, the Court makes the following orders:-

- a) The Chief Magistrates Court matter, Milimani MCELRC/E993/2020 is transferred to the Employment and Labour Relations Court at Nairobi for hearing and determination.**
- b) Parties shall move the Employment and Labour Relations Court for pre-trial conferencing, upon the arrival of the file from the Chief Magistrates Court.**
- c) The Respondent is awarded costs of this application.**

29. It so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered

through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE