



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO 3 OF 2019

IN THE MATTER OF MALINDI CM'S COURT EMPLOYMENT AND LABOUR RELATIONS

CAUSES NO. 39, 40, 41, 44, 52 AND 53 OF 2019

IN THE MATTER OF WITHDRAWAL AND TRANSFER OF SUITS TO ANOTHER COURT

BETWEEN

1. VINCENT MWATSUMA NGUMA

2. NASSORO MUZUNGU KITOLE

3. CHANGAWA KARISA MDZOMBA

4. JOSPHAT MWAGANDI KAZANI

5. PATRICK BAYA NYUNDO

6. STANLEY CHAI CHILUMO.....APPLICANTS

AND

KILIFI MARIKANI WATER & SEWERAGE CO LTD (KIMAWASCO).....RESPONDENT

RULING

1. The Applicants were allegedly employees of the Respondent until their alleged unfair termination on diverse dates between 2014 and 2019. Following these alleged terminations, the Applicants filed individual Claims before the Chief Magistrate's Court, Malindi seeking compensation. The matters are still pending resolution.

2. By this application, the Applicants now seek to have these matters withdrawn from the Malindi Court and transferred to Kilifi Chief Magistrate's Court for hearing and determination. The Respondent has not filed a response to the Motion.

3. The application is expressed to be brought under section 18 (b) of the Civil Procedure Act as read with section 9(2) of the Magistrates' Court Act. Section 9(2) of the Magistrates' Court Act empowers Magistrates' courts to entertain employment and labour relations disputes so long as such disputes fall within the pecuniary jurisdiction as set by the law. On the other hand section 18 (b) of the Civil Procedure Act empowers the High Court to, inter alia, transfer a suit from one subordinate court to another or to itself for disposal.

4. The Employment and Labour Relations Court (ELRC) is a creature of section 4 of the Employment and Labour Relations Court Act, 2007 as read with article 162 of the Constitution of Kenya 2010. While the law recognizes this Court as one of equal status with the High Court of Kenya, it is nevertheless clear that the two courts are not synonymous.

5. In section 2 of the Civil Procedure Act, the term "High Court" is not defined. However, the term "court" is defined to mean the High Court or a subordinate court, acting in the exercise of its civil jurisdiction. This definition does not include courts sanctioned under article 162 of the Constitution. The Act is yet to be amended to accommodate this recent constitutional change.

6. In the Interpretations and General Provisions Act Cap 2 Laws of Kenya, the term "High Court" is indicated to mean the High Court as

established by the Constitution. Just like the Civil Procedure Act, this Act is yet to be reviewed to include the definition of courts established under article 162 (2) of the Constitution, 2010.

7. The closest the law comes to defining these courts is in the Constitution itself. It describes them as courts of the same status as the High Court.

8. This to my mind denotes the fact that the High Court of Kenya and the article 162 (2) courts exercise similar jurisdiction but only in respect of matters that fall within their respective provinces. Therefore, these courts are obligated to entertain specific proceedings that would otherwise fall within the mandate of the High Court but for the bar raised by the Constitution 2010.

9. Article 162 (2) sets out these specific matters as disputes relating to employment and labour relations and the environment and use, occupation and title to land. From August 2010 when the Constitution 2010 was promulgated it, by dint of article 165 (5) deprived the High Court of the jurisdiction to entertain matters reserved for the exclusive jurisdiction of these new courts.

10. The significant question in respect of the current application is whether this court, not being a High Court, can assume jurisdiction over applications for transfer of suits either from one subordinate court to another or to itself where such matters fall within its jurisdiction in terms of article 162 of the Constitution as read with section 12 of the ELRC Act.

11. Section 18 (b) of the Civil Procedure Act specifically grants the High Court jurisdiction to entertain such applications. However, this section does not contemplate article 162 (2) courts.

12. Under section 27 of the ELRC Act, the Chief Justice is required to make regulations to guide the conduct of the court's business. Pursuant to these powers, the Employment and Labour Relations Court (Procedure) Rules, 2016 were promulgated. It is these rules that were to address all procedural issues regarding the operations of the Court as does the Civil Procedure Act and Rules for the subordinate and High courts exercising their civil jurisdiction. Unfortunately, the rules are not as comprehensive and have left numerous issues unaddressed.

13. This has sometimes left the court groping in the dark when confronted with questions of procedure on what I would call grey areas. While some judges hold the view that the court can fall back to the provisions of the Civil Procedure Act to fill in the gaps others are of the firm view that this should not be the case.

14. For instance Rika J in *Prisca Jepngétich v Generation Career Readiness Social Initiative Limited [2021] eKLR*, while dealing with an application for transfer of a suit was clear that the ELRC is a court of special jurisdiction with its own rules. In *Benedict Ojou Juma & 10 others v A. J. Pereira & Sons Limited [2016] eKLR*, the learned Judge observed that the Civil Procedure Rules will only apply where the ELRC Rules permit. Outside this, the Civil Procedure Act and Rules do not apply to proceedings before the ELRC.

15. On the other hand Marete J in *Francis Kimutai Bii v Kaisugu (K) Ltd [2016] eKLR* holds the view that lacunas in the ELRC Rules are resolvable by borrowing from the Civil Procedure Act and Rules. He says as follows on the subject: -

“The application of the Civil Procedure Act in the practice of this court is a gray area. It is not expressly provided for in any statutes applicable in the practice of the court or even other law. There have been arguments for and against the application of the Civil Procedure Act in our practices. So what is the actual position on this in the practice of this court? What has been the practice in the past? Previous practice of the Employment & Labour Relations Court has borrowed from the High Court of Kenya by incorporating the Civil Procedure Act and Rules in its practice where necessary. This I believe is obviously to take care of any lacuna created by the lapses of the Industrial Court (Procedure) Rules, 2010 and even statute.”

16. Addressing a near similar predicament but arising from gaps in Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Mutunga rules), Makau J in *Kitty Njiru v Nature & Style Fun Day Events & another; Rebecca Muriuki t/a Kahaari (Proposed third Party) [2020] eKLR* observed as follows: -

“From the authorities relied upon by the Petitioner and the provisions of the Constitution as well as the Mutunga Rules, referred herein above, I find that there is ample jurisprudence allowing importation of the Civil Procedure Rules to fill any lacuna in the Mutunga Rules. I find the provisions of Civil Procedure Rules are applicable to Constitutional Petitions where such provisions gives Court inherent power to make such orders as may be necessary for ends of justice. Rule 3 (8) of the Mutunga Rules provides that nothing in the rules shall limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. This Court finds that the litigants have the right to use the Civil Procedure Rules to fill any lacuna in the Mutunga Rules to seek leave to issue Third Party notice and to seek Third Party directions from the Court.”

17. What is notable however is that rule 3(8) of the Mutunga Rules saves the court's inherent power to issue orders that are intended to meet the ends of justice in much the same way as section 3 A of the Civil Procedure Act. It is to be noted however that the ELRC Rules do not have a similar provision. Consequently, while the High Court may revert to its inherent jurisdiction to adopt a procedure under the Civil Procedure Act and Rules that ensures just outcomes for proceedings commenced under the Mutunga rules where there is a lacuna, it is contestable whether the ELRC can do the same when faced with a similar scenario under the ELRC Rules.

18. In the case of *Republic v Karisa Chengo & 2 others [2017] eKLR*, the Supreme Court borrowing from John Beecroft Saunders defines the term “jurisdiction” as follows: -

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission

under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognisance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.... Where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given”.

19. Simply put jurisdiction is the power granted to a court to entertain a dispute before it. Where this power is not conferred on the court, its decision on the dispute amounts to a nullity.

20. This power can only be granted by some law: the Constitution and or statute law and or subsidiary legislation made pursuant to the power granted under a statute. Where the law does not grant the power to the court, it is futile to arrogate oneself such power.

21. While the High Court and article 162(2) courts enjoy sameness of status, the position at least as expressed in the **Karisa Chengo** case is that they are distinct. And sameness of status must not be confused for sameness of jurisdiction over matters generally.

22. Consequently, to the extent that section 27 of the ELRC Act contemplates that the Chief Justice is to make rules to guide the operations of the ELRC and to the extent that such rules have in fact been promulgated, it is to be appreciated that only these rules will be resorted to in determining how to proceed before the court. And a party can only resort to the Civil Procedure Act and Rules where the ELRC rules sanction it.

23. It is unfortunate that the ELRC Rules are very scanty and fail to address a number of situations that may arise before the court. This presents a case for their urgent review. However and for the moment, one is advised to rely on the omnibus provisions under section 3(1) as read with Section 12 [3] [viii] of the ELRC Act, and Rule 17 of the ELRC [Procedure] Rules, 2016 as pointed out by Rika J in the **Prisca Jepngétich v Generation Career Readiness Social Initiative Limited** case above.

24. It is in this context that the provisions of section 18 of the Civil Procedure Act should be understood. They focus on the “High Court” which though of same status as the article 162(2) courts exercises distinct jurisdiction from these other courts. It cannot be assumed that just because these two courts are of the same status, section 18 of the Civil Procedure Act can be invoked to transfer suits by the ELRC. This is particularly so that the ELRC Rules do not sanction this.

25. Although the current application is not opposed, the court’s jurisdiction to entertain it has been wrongly invoked in so far as the wrong provisions of law are cited. This, in my view, is not a technical but jurisdictional issue. I will therefore decline to grant the orders sought. The parties are therefore advised to move the court appropriately.

26. There is no order as to costs.

DATED, SIGNED AND DELIVERED ON THE 6TH DAY OF OCTOBER, 2021

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B O M MANANI

JUDGE