



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**ELRC CAUSE NO. 23 OF 2021**

**MARY WAKARIMA MAINA.....CLAIMANT**

**VERSUS**

**SUADA SHEIKH AHMED, DANIEL MURITHI MURIUGI & NASARA**

**SHEIKH AHMED T/A SHEIKH AND COMPNAY.....RESPONDENT**

**RULING**

1. The Claimant instituted this claim on the 2<sup>nd</sup> June, 2021, claiming to have been unfairly terminated by the Respondent vide a redundancy Notice dated 30<sup>th</sup> July, 2020. The claimant averred that she was employed on the 1<sup>st</sup> February, 2014 with a salary of Kshs 35,000 which rose up to Kshs 120,000 net salary at the time of her termination. She contended that the redundancy procedure was not adhered to and she was not paid her terminal dues.

2. The Respondent entered Appearance and filed a response to the claim then raised a preliminary objection on the 25<sup>th</sup> June, 2021, which comes out as follows;

**That the Respondent shall raise preliminary objection on the jurisdiction of this Court to hear the Memorandum of claim dated 27<sup>th</sup> May, 202, on the grounds that the suit offends section 9(b) of the Magistrates Court Act as read together with section 7 of the Magistrates Court Act, section 29(4) of the Employment and Labour Relations Act and Article 169(2) of the Constitution of Kenya, for the reason that the magistrates Court has jurisdiction to hear the purported employment dispute.**

3. The preliminary objection was canvassed by way of written submissions with the Respondent filing on the 7<sup>th</sup> October, 2021 while the claimant filed hers on 7<sup>th</sup> October, 2021.

**Respondent's Submissions.**

4. The Respondent submitted in support of its Preliminary Objection that, the claimant's earned a gross salary of Kshs. 62,948 and net salary of Kshs. 50,000, therefore this Court is devoid of jurisdiction to hear and determine this claim and that the proper court ought to be Chief Magistrates Court which was given jurisdiction under section 9(b) of the Magistrates Court Act as read together with section 29 of the Employment and Labour Relations Court Act.

5. It was further submitted that the Magistrates Court, particularly the magistrates in the rank of senior resident magistrate were granted power under gazette Notice number 6024 to adjudicate on employment claim of all employee whose gross salary is Kshs 80,000 and below.

6. They then submitted that the preliminary objection has been raised on pure point of law as envisaged in *Mukisa Biscuits* case. It was argued that the claimant earned a gross salary less than Kshs 80,000, therefore the claim herein ought to have been filed at the chief magistrates Court and not this Court. To reinforce their argument, the Respondent cited the case of **Rajiv Shem Sabisa V Limuru Water and Sewerage Company limited** where the Court faced with a similar Objection upheld it and transferred the matter for hearing and determination to the chief magistrate Court.

7. The Respondent further submitted that, a suit where a court finds itself in a want of jurisdiction, is not transferrable, as a matter filed without jurisdiction is a nullity and incurable at law. To buttress their argument, they cited the court of Appeal decision in **Equity Bank Limited V Bruce Mutie Mutuku T/A Diani Tour and Travel [2016] eKLR** where the 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 **Section 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 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 “O2” principle or the overriding objective under the Civil Procedure Act, the Appellate Jurisdiction Act or even **Article 159** of the Constitution to remedy the situation. In the same way, a court of law should not through what can be termed as judicial craftsmanship sanctify an otherwise incompetent suit through a transfer.”

8. Accordingly, it was submitted that this Court does not have jurisdiction either to prosecute this matter or to transfer the same to the chief magistrates and prayed that the Preliminary Objection be upheld.

#### **Claimants Submissions**

9. The claimant on the other hand submitted that the preliminary objection as filed does not raise issues on pure point of law as held in the locus classicus case of **Mukisa Biscuits Manufacturing Co. limited V West End Distributors Limited [1969] EA 696**. It was argued that the issue of whether the claimant was paid Kshs 120,000 or Kshs 50,000 as alleged by the Respondent is an issue of fact that parties will need to adduce evidence to ascertain. In this they cited the case of **Oraro V Mbaja [2005] 1 KLR 141** and the Court of Appeal case of **Eunice Karimi Kibunja Vs- Mwirigi M’Ringera Kibunja, Civil Appeal No. 103 of 1996 [1996] LLR 4896 CAK** where the Court held that a preliminary point of law cannot be raised if any of the facts is to be ascertained.

10. Accordingly, it was submitted that the Preliminary objection has not meet the threshold and prayed for the same to be dismissed.

11. I have considered the averments of the parties herein. The contention in this preliminary objection is about the claimant’s salary.

12. In my view this is a factual matter which can only be resolved upon hearing the parties herein.

13. In the circumstances the preliminary objection raised is beyond the perview of **Mukua Biscuit Case** and I find it not merited.

14. I dismiss the preliminary objection accordingly and order the case to proceed for hearing.

15. Costs in the cause.

**RULING DELIVERED VIRTUALLY THIS 23RD DAY OF NOVEMBER, 2021.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:-**

Muchiri for claimant – present

Chebet holding brief for Adano for Respondent

Court Assistant - Fred