



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION 25 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 9th July, 2020)

ENOS AMBOGO.....APPLICANT

VERSUS

SAMEER AGRICULTURE & LIVESTOCK LIMITED.....RESPONDENT

RULING

1. Before this Court, is the Applicant's Notice of Motion application dated 17th February 2020 seeking the following orders-

a. THAT the suit to wit Milimani CMEL No. 504 of 2019; Enos Ambogo vs. Sameer Agriculture & Livestock Limited be transferred to the Employment and Labour Relations Court at Nairobi for hearing and determination of the matter.

b. THAT costs of this application be in the cause.

2. The application is based on the grounds set out in the motion and the supporting affidavit of Ben Musundi sworn on 17th February 2020.

3. The Applicant avers that his claim was filed in the lower court on his justifiable belief and the directions of the civil registry that the same could be filed there. However, after his advocate reviewed the case and upon the Court's directions that the matter be placed before a Court of competent jurisdiction, he is of the view that the suit ought to be tried in this Court.

4. The Applicant avers that failure to grant the orders sought, will occasion him an injustice on account of procedural technicalities as he will be unable to recover his terminal dues. It is further averred that the orders sought will not prejudice the Respondent and it is in the interest of justice that they be granted.

5. The Respondent has opposed the application vide the Replying Affidavit of Maina Karanja sworn on 28th February 2020. It is averred that the Applicant's claim was filed in a Court devoid of jurisdiction to hear the same hence was dead upon arrival. Further, no competent suit exists to warrant a transfer hence transferring the same will amount to its sanctification.

6. It is the Respondent's position that the only remedy for CMEL 504 of 2019 is dismissal for want of jurisdiction with orders as to cost. Further, that it is just and fair for the application to be dismissed with costs as it is a waste of courts time.

7. Parties opted to dispense with the application by way of written submissions. However, there is no record of the Respondent's submissions in the Court file.

8. The Applicant submits that the Respondent has not shown any prejudice it will suffer if the orders sought are granted. However, he submits that if the orders sought are not granted, the cause of action may become time barred as he has less than a year to file a fresh suit; bearing in mind the current harsh economic times.

9. The Applicant further submits that the transfer of suits from one Court to another is a procedural issue that has only been elevated to the status of jurisdiction, as such, this Court has the discretion to withdraw a matter pending before a subordinate Court and transfer it to itself or Court of competent jurisdiction even where the subordinate Court lacks jurisdiction, as it would be in the interest of justice. This will ensure the proper and final adjudication of the dispute.

10. I have considered the averments of the Parties herein. Section 18(1) (b) of the Civil Procedure Act 2010 provides as follows:-

1. “On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage:- b) 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.

11. Under this law, the High Court has power to transfer a case from one subordinate Court to another if the circumstances of the case warrant the transfer.

12. The law on transfer of cases has been exemplified in Kagenyi vs Musiraamo & Another (1968) E.A 43 where it was held that Section 18 of the Uganda Civil Procedure Act (an equivalent of the Kenyan Section 18 of the Civil Procedure Act grants power of transfer of suits to the High Court even suo moto but the transfer cannot be made unless the suit has been in the first instance brought to a Court which has jurisdiction to try it.

13. This principle has been followed by other Courts – see Ibrahim J (as he then was) in Rob De Jong & Another vs Charles Mureithi Wachira (2012) eKLR. However Waweru J in Alal Ochieng & Another vs Moses Maina and Another (2007) eKLR made a departure from this principle which was echoed by my senior Learned Sister Justice Mary Kasango in Miscellaneous Civil Application 159 of 2013 (Mombasa) Wycliffe Mwangaza vs Grainbulk Handlers Limited.

14. The 2 Learned Judges extremely considered the overriding principle of Section 1A and 1B of the Civil Procedure Act and rendered himself thus:-

“With the enactment of Section 1A and 1B of the Civil Procedure Act, the time has perhaps now come for this matter of transfer of suits to be looked at afresh. These Sections provide as follows:-

“1A. Objective of Act

1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court

1. For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims:-

a. the just determination of the proceedings;

b. the efficient disposal of the business of the Court;

c. the efficient use of the available judicial and administrative resources;

d. the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and (e) the use of suitable technology”.

15. It appears to me that transfer of suits from one Court to another is essentially a procedural issue that has been elevated to the status of jurisdiction.

16. If a suit finds itself in the wrong Court, surely it is in the interest of justice and in the interest of all concerned that the suit be forwarded to the appropriate Court with jurisdiction so that the issues in dispute can be properly and finally adjudicated what prejudice would any party suffer in that case?. After all, the overriding objective of the Civil Procedure Act and Rules is to facilitate the fact, expeditious, proportionate and affordable resolution of the civil dispute governed by the Act (Section 1A(1).....”.

17. The above principle is worth adopting as indeed the overriding principle of the law is justice for the Parties. This claim having been filed

in the lower Court which did not have jurisdiction, in the 1st instance, the Applicant's position is to bring it for trial in the relevant Court.

18. I find no prejudice would be suffered by either party if the application is allowed. I therefore allow this application and direct that CMEL Milimani Case No. 504/2019 be transferred to the Employment and Labour Relations Court Nairobi for hearing and disposal.

19. Costs in the cause.

Dated and delivered in Chambers via zoom this **9th day of July, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Sirma holding brief Musundi for Applicant – Present

Maina

for

Respondent

–

Present