



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 65 OF 2020

(Before Hon. Justice Hellen S. Wasilwa on 20th August, 2020)

JOHN GITONGA NJERU.....APPLICANT

VERSUS

TEACHERS SERVICE COMMISSION

COUNTY DIRECTOR THARAKA NITHI.....1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

RULING

1. Pending for determination before me is the Notice of Motion Application dated 6th July, 2020. The same is filed under Certificate of Urgency and under the provisions of Sections 3A and 18 (1) (b) of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and seeks the following Orders that:-

1. *THAT the application be certified urgent and the same be heard ex parte and interim orders sought be granted in the first instance. (Spent).*
2. *Pending hearing and determination of this application inter partes an order do issue transferring Meru CMC-ELRC Cause No. 5 of 2020 John Gitonga Njeru -VS—TSC County Director- Tharaka Nithi and Teachers Service Commission to the Employment and Labour Relations Court at Nairobi.*
3. *Pending hearing and determination of this application inter partes an order do issue restraining the 1st Respondent, its servants, agents or any other person acting on its behalf from terminating services of the Applicant.*
4. *The matter be mentioned within 14 days for directions.*
5. *The Honourable Court be pleased to make any other orders within its inherent jurisdiction.*
6. *The costs of this Application be provided for.*

2. The Application is premised on the grounds that:-

- a) *The Applicant in this case is an employee of the 1st Respondent and is due to retire next month on 31st August 2020 after attaining the mandatory retirement age of 60 years and as shown in the pay slip attached to his supporting affidavit.*
- b) *Even though the 1st Respondent is aware that the Applicant is supposed to retire by 31st August 2020 as shown in the pay slip attached to the supporting affidavit, he has deliberately failed to issue the Applicant with a compulsory Retirement Notice as required under Rule 161(3) of the Teachers Service Commission Code of Regulations for Teachers, 2015.*
- c) *The Gazette Notice No. 6024 of 22nd June, 2018 has limited the jurisdiction of the Chief Magistrates Court to Claimants whose salary is not more than Kshs.80,000/= however, the Applicant's previous advocate erroneously filed a case at Meru Chief Magistrates Court ELRC Cause No. 5 of 2020 John Gitonga Njeru -VS—TSC County Director- Tharaka Nithi and Teachers*

Service Commission yet his salary is Kshs. 141,607/= per month.

d) We would want the suit transferred to the employment court in Nairobi which has the jurisdiction, secondly the main Respondent in this case the Teachers Service Commission are based here in Nairobi and our offices are also based at Thika and therefore it will be more convenient for all the parties involved in this case.

e) The Applicant has reliably been informed that the 1st Respondent is in the process of terminating his services in order to defeat the mischief of not issuing a retirement notice within the given time and as a result of the intended termination the applicant may lose his terminal benefits.

f) The courts will soon be going for the August recess and unless the Honourable Court grants the applicant Orders that the Applicant is seeking he shall suffer irreparable loss and damage and this application thereby shall be rendered nugatory.

3. The Application is further supported by the Affidavit of **JOHN GITONGA NJERU**, the Applicant herein, sworn on 6th July, 2020 in which he reiterates the averments made on the face of the Motion.

4. In response to the Respondents' filed a Replying Affidavit deponed by **LUCY NYAMWANGE**, the Assistant Director in charge of Field Services Directorate with the 2nd Respondent herein, on 17th July, 2020, in which she avers that the instant Application is *sub judice* as the subject matter is pending before the **Meru Chief Magistrate's Court in ELR Cause No. 5 of 2020: John Gitonga Njeru Vs Teachers Service Commission & TSC County Director, Tharaka Nithi.**

5. She further contended that by filing multiple suits in different courts on the same subject matter and against the same parties is an abuse to the Court process and grossly violates the provisions of Article 47 of the Constitution of Kenya, 2010.

6. The Respondents maintain that the instant Application has been commenced through un-procedural means and is fatally defective as there is no suit properly filed for determination before this Court.

7. The affiant further avers that the Applicant was terminated from service on 7/7/2020 following reports that he had sexually harassed BM a student at Karigini Mixed Day Secondary School and following investigations into the issue was interdicted on 15/11/2019 and a disciplinary hearing conducted on 16/6/2020.

8. It is on this basis that the Respondents maintain that the relief the Applicant seeks to bar his termination is therefore overtaken by events and can therefore not be issued.

9. The Respondents further averred that the allegation that he has not been issued with a retirement notice is baseless and untrue as he sought clarification on the issue vide his letter dated 24/6/2019 which communication was responded to on 26/7/2019 and was informed of his scheduled retirement on 1/9/2020.

10. It is on this basis that the Respondents maintained that the Applicant is not entitled to the reliefs sought in the instant Application therefore urging this Court to dismiss it with costs to the Respondents.

11. The Parties agreed to dispose of the Application by way of written submissions.

Submissions by the Parties

12. The Applicant in his submissions maintains that the filing of his case at the Meru Chief Magistrate's Court was erroneous as his salary was Kshs. 141,607/- per month, which amount is above the pecuniary jurisdiction of the said court thus necessitating filing of the instant Application seeking to transfer the suit to this Honourable Court.

13. He further submitted that his Application is not *sub judice* as the Meru Chief Magistrates Court is not clothed with jurisdiction to entertain and the determine the suit or the instant Application. It is on this basis that he submitted that the doctrine of *sub-judice* does not apply in the circumstances.

14. The Applicant urged this Court to allow his Application in terms of the orders sought therein.

Respondents' Submissions

15. The Respondents on the other hand submitted that the instant Application is not anchored on any suit and is therefore unknown to law, is fatally defective and urged this Court to accordingly dismiss it with costs to the Respondents.

16. It is further submitted that Applicant seeks substantive and fundamental orders that require in depth analysis of law and fact that cannot be done in absence of a substantive suit.

17. The Respondents argued that prayers 2 and 3 of the instant Application cannot be canvassed in a miscellaneous Application. It is further argued that the Applicant has not approached this Court in the correct manner as provided under Section 4 of the Employment and Labour Relations Court (Procedure) Rules, 2016. For emphasis, the Respondents cited and relied on the case of **Fidelity Bank Limited Vs John Joel Kanyali (2014) eKLR** where the Court in allowing a Preliminary Objection raised by the Respondent held that a Notice of Motion is not a manner prescribed for instituting a suit.

18. The Respondents argued that the instant Application is sub judice by dint of Meru CMCC No. 5 of 2020 and therefore urged this Court to dismiss the Application as filed on account of duplicity.

19. The Respondents maintain the instant Application as filed is an abuse to the Court process and relied on the findings in the case of **Satya Bhama Gandhi Vs Director of Public Prosecutions & 3 Others (2018) eKLR** where the Court held that instituting two separate matters on the same subject matter, against the same opponent on the same issues is tantamount to an abuse of the Court process.

20. The Respondents further maintain that the Applicant is guilty of material non disclosure of facts when he failed to elaborate to the Court on the reasons behind his disciplinary process and subsequent dismissal was actually on account of sexually harassment of a student.

21. The Respondents contend that the instant Application has been overtaken by events the Applicant herein having already dismissed from service on 7/7/2020 and a copy of the dismissal letter dispatched to his address of service thereby rendering this Application otiose.

22. The Respondents further submitted that the Applicant has no sufficient reason and /or grant for the transfer of the suit to Nairobi while it pends for ruling of its Preliminary Objection. In the circumstances, the Respondents urged this Honourable Court to find the instant Application being devoid of merit and therefore proceed to dismiss the same with costs to the Respondents.

23. I have considered the averements and submissions of the Parties herein.

24. The Applicants seeks to have the file filed in Meru Chief Magistrates Court transferred to Nairobi Employment and labour Relations Court.

25. The Respondents have not opposed the application in principal only stating that the matter should not be disturbed.

26. However, even if the matter was to be transferred from the Chief Magistrates' Court due to lack of monetary jurisdiction, the Court to move the suit to will be Nyeri Employment and Labour Relations Court, which is within the jurisdiction where the cause of action arose.

27. The Respondents have also submitted that the Applicant seems to be forum shopping since the matter at the Chief Magistrates' Court is alive and there is a pending application filed. The matter is therefore sub judice. The fact that the cause is sub judice is in my view obvious hence the application to transfer the cause before the Employment and Labour Relations Court.

28. The Respondents have however pointed out that the Applicant is guilty of abuse of the Court process in that he is seeking same prayers he sought in the Chief Magistrates' Court and were not granted. That notwithstanding, the Respondent avers that the Applicant has already been dismissed from the service and there is therefore nothing for this Court to stay.

29. In response to this, the Applicant did not deny he had already been dismissed from the service on 7/7/2020. In the circumstances, there is nothing to stay in terms of termination.

30. As for transferring of the case to Nairobi, I find this is not a viable solution. If at all, the transfer should be sought to move the file to Nyeri Employment and Labour Relations Court - I find therefore the application without merit and I dismiss it accordingly.

Dated and delivered in Chambers via zoom this **20th day of August, 2020.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Oyicho holding brief Onyuer for Respondent – Present

Irungu holding brief Ngunjiri for the Applicant – Present