



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 1695 OF 2016**

(Originally Nairobi Chief Magistrates Court Civil Case No. 7973 of 2010)

**JOHNSON LISAMULA MURILA.....CLAIMANT**

**VESUS**

**PRESBYTERIAN CHURCH HOSPITAL.....1<sup>st</sup> RESPONDENT**

**REGISTERED TRUSTEES OF THE**

**PRESBYTERIAN CHURCH OF EAST**

**AFRICA.....2<sup>nd</sup> RESPONDENT**

**RULING NO. 2**

1. For determination is a Motion dated 2 December 2019 by the Respondents seeking orders

1. THAT the Memorandum of Claim dated 5<sup>th</sup> September 2016 and filed in Court on 7<sup>th</sup> September 2016 be struck out with costs.
2. THAT costs of this application be borne by the Claimant.

2. The Claimant cause to be filed a replying affidavit sworn on 3 August 2020 by his advocate in opposition to the Motion.

3. Pursuant to Court directives, the Respondents filed their submissions dated 26 September 2020 while the Claimant filed his submissions dated 11 September 2020.

4. The main grounds in support of the application were that the Cause before this Court was transferred from the Chief Magistrates Court (CMCC No. 7973 of 2010) after it had been struck out by the Magistrates Court on 2 March 2012 and since there was no appeal against the striking out, there was no valid suit before this Court; the Claimant had not amended the Plaint before the Magistrates Court; that the Claimant purported to introduce a new Respondent through Misc Civil Application No. 64 of 2016 and that the Judge who heard the application allowed the application without affording the *new Respondent* audience.

5. Citing a passage in the Court of Appeal authority of *Phoenix E.A. Assurance Company Ltd v S.M. Thiga t/a Newspaper Service (2019) eKLR* that

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...

the Respondent submitted that the Court making the transfer order was wrong as in law there was no suit capable of being transferred.

6. On behalf of the Claimant and in opposition to the Motion, it was asserted that the Chief Magistrates Court did not strike out the suit before it but rather struck out one of the Respondents and granted leave to add another Respondent by amending the Plaint upon which an application to transfer the suit to this Court was made and allowed; that an attempt by the Respondent to have the transfer order reviewed was rejected and the Respondents appealed but failed to prosecute the Appeal and that a Memorandum of Claim was filed in this Court on 7 September 2016.

7. In his submissions, the Claimant asserted that the questions brought for determination by the Respondents were *res judicata* as they had been determined on 22 September 2017.

8. The Court has considered the Motion, affidavits, submissions and the record.

9. On record is a Ruling dated 22 September 2017 in which the Judge rendered himself thus

9. As correctly pointed out by both the Respondent and Claimant the lower Court did not fully strike out the Claimant's suit. What the Court did was to strike out a party which the Court felt was wrongly enjoined in the proceedings. Under Order 8(3)(4) of the Civil Procedure Rules, an amendment to correct the name of a party can be allowed even if the effect would be to substitute a new party.

10. This was the intention of the learned Magistrate when she struck out the wrong defendant from the suit but permitted the Claimant to join the correct party. The Court would be unjust to turn a blind eye to the close nexus between the PCEA Church and the PCEA Hospital. The confusion on the part of the Claimant as to who is the correct party to sue can be understood in this context.

11. Concerning the order made on 26<sup>th</sup> May 2016, this Court as per the Constitution has exclusive jurisdiction over employment and labour relations matters. The Chief Magistrates court does not have jurisdiction to hear matters preserved to the jurisdiction of this Court.

12. The Court therefore does not see any error it made in allowing the application to transfer the suit in the lower Court to this Court. The Court will therefore decline the orders sought in the review application.

10. The above paragraphs from the Ruling dated 22 September 2017 already rendered by another Judge of this Court leave no doubt in the mind of this Court that the questions the Respondent are bringing forth were the subject of determination by this Court, differently constituted, and therefore *res judicata*.

11. The *wrongness* of the Ruling of 22 September 2017 properly belongs to appellate jurisdiction otherwise this Court risks sitting on appeal on a decision of a Judge of concurrent jurisdiction.

12. Before concluding, the Court wishes to observe that the Court of Appeal decision in ***Phoenix E.A. Assurance Company Ltd v S.M. Thiga t/a Newspaper Service (2019) eKLR*** appears to be inconsistent with the legal proposition in another Court of Appeal decision in ***Daniel N Mugendi v Kenyatta University & 3 Ors (2013) eKLR*** that

..... in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant's petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to industrial and labour relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matters in that context and with regard to ***Article 165(5)(b)***. And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & Land Court comes across a matter that ought to be litigated in any of the other courts, it should be prudent to have the matter transferred to that court for hearing and determination.

13. The Motion is found without merit and is dismissed with costs to the Claimant.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 23<sup>rd</sup> day of October 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant                      Kaplan & Stratton Advocates

For Respondents                Amuga & Co. Advocates

Court Assistant                 Lindsey