



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

MISC. APPLICATION NO.7 OF 2018

(Before D. K. N. Marete)

BERNARD KIPNGETICH KOSKEI.....APPLICANT

VERSUS

JAMES FINLAYS (K) LTD.....RESPONDENT

RULING

This is an application dated 29th June, 2018 and seeks the following orders of court;

1. *THAT Kericho CMCC NO.131 of 2018 be transferred to the Employment & Labour Relations court at Kericho for hearing and disposal.*
2. *THAT costs of this application be in the cause.*

It is grounded as follows;

1. *THAT Kericho CMCC NO.131 of 2018 was mistakenly filed in the Chief Magistrate's court instead of the Employment & Labour Relations Court.*
2. *THAT it is until after we had been served with the defendant's pleadings and documents that we have realized that the suit ought to have been filed in the Employment & Labour Relations Court.*
3. *THAT the Employment & Labour Relations court therefore has jurisdiction to hear and determine this suit.*
4. *THAT no prejudice will be occasioned to the defendant who has already indicated in its documents that the matter ought to be heard before the Employment & Labour Relations court.*

The respondent in opposition to the application files a Notice of Preliminary Objection and Grounds of Opposition both dated 4th December, 2018 respectively as follows;

1. *This honourable court lacks jurisdiction to hear and determine this application, instituted in blatant disregard of the provisions section 18(1)b(ii) of the Civil Procedure Act.*
2. *The suit herein constitutes an abuse of the court process and ought to be struck out with costs.*
3. *The Application is fundamentally fatally defective, frivolous, vexatious and constitute a flagrant abuse of the court process.*
4. *The Application is not brought in good faith.*
5. *THAT the application herein is only designed to muddle the issues herein and unduly delay the conclusion of this suit.*
5. *The Application is fundamentally and fatally defective.*

She also files an elaborate Replying Affidavit sworn on 4th October, 2018 reiterating her case and in vehement opposition to the application.

The parties chose not to file any written submissions on the subject. This is despite directions to this extent. This is allowed. It is not fatal.

This application and suit raises peculiar circumstances. The claimant/applicant files this suit in the Chief Magistrate's court and when the going gets tough, he chooses to seek refuge up here, through this application. The application seeks a

smooth thoroughfare to this court, all other factors notwithstanding. The respondent furiously opposes this maneuver. It is her case and position that this application is in blatant disregard of section 18 (1) (b) and (2) of the Civil Procedure Act and constitutes an abuse of the process of court and material for striking out with costs.

The respondent's further case is that the application is fundamentally defective, frivolous, vexatious and cannot stand the test of good faith.

I note that the suit was filed in court in due disregard of trite law and practice on the subject. The claimant/applicant must have known or was expected to know of the law and practice as set out and therefore has no excuse for such misadventure. That is why I agree with the respondent that this application is an attempt at muddling and meddling the issues herein and unduly delay a conclusion of the issues in dispute and consequent suit. It should not be entertained, or at all.

I am therefore inclined to dismiss the application with costs to the respondent.

Delivered, dated and signed this 1st day of February, 2019.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Okato instructed by T. O. Nyangosi & Company Advocates for the applicant.
2. Mr. Koech instructed by Bett & Company Advocates for the respondent.