



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

MISCELLANEOUS APPLICATION NUMBER 6 OF 2014

BETWEEN

WYCLIFF MWANGAZA KIHUNGA.....APPLICANT

VERSUS

GRAIN BULK HANDLERS LIMITED.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

J.J. Chesaro & Company Advocates for the Applicant

Oloo & Chatur Advocates for the Respondent

RULING

1. The Applicant filed this Miscellaneous Application on 10th April 2014. He seeks to have Mombasa CMCC Number 3392 of 2010, which he filed against his former Employer, the Respondent herein, transferred to the Industrial Court [Employment & Labour Relations Court], for trial and determination. The Claim before the Chief Magistrates Court is about terminal benefits and damages for wrongful dismissal. The Applicant argues that the Chief Magistrate's Court does not have jurisdiction to hear and determine the Claim.

2. The Advocate for the Applicant scheduled the hearing date in the absence of the Respondent's Advocate. Hearing fixed for 24th June 2016. The Applicant's Advocate did not attend Court for hearing. Respondent's Advocate attended Court, and prayed for dismissal of the Application for non-attendance. The order dismissing the Application was granted with costs to the Respondent.

3. Through an Application dated 27th July 2016, the Applicant seeks to revive his Miscellaneous Application. The Application is supported by the Affidavit of the Advocate for the Applicant, Mr. Michael Oduor, sworn on 26th July 2016.

4. The Advocate explains that he was on the hearing date, involved in another matter at the Voi High Court. He made arrangement to have a Colleague hold his brief at the hearing before the Employment and Labour Relations Court, on 24th June 2017. The Advocate entrusted Applicant's Advocate's brief, had stepped out of the Court when the Application was called out. Upon return he found the Application already dismissed.

5. Parties agreed to have the Application considered and determined through Written Submissions. They confirmed filing of Submissions when the matter was last mentioned in Court on 17th November 2017. The Respondent's position is that the Applicant had made a similar Application before the High Court for transfer of the Claim from the Chief Magistrate's Court, to the Employment and Labour Relations Court, vide High Court at Mombasa Miscellaneous Application Number 159 of 2013. The High Court rejected the Application.

The Court Finds:-

6. The Applicant has not shown sufficient reasons to justify revival of his Application for transfer of the Claim from the Chief Magistrate's Court.

7. His Advocate took the hearing date in the absence of the Respondent's Advocate. The Applicant's Advocate was aware he had other obligations before other Courts, on the date he scheduled the Application for hearing. He prioritized other obligations.

8. The Advocate said to have been entrusted brief, is not named, and there is no Affidavit sworn by the said Advocate, confirming he was

entrusted brief, and explaining why he was absent when the matter was called out.

9. The Application sought to be revived appears to the Court to be *res judicata*, a similar Application having been presented, and rejected at the High Court Mombasa. It would not be useful to revive an Application, which on the face of it, looks unsustainable. ***The Application dated 27th July 2016 is rejected with costs to the Respondent.***

Dated and delivered at Mombasa this 15th day of February 2018.

James Rika

Judge