



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
MISCELLANEOUS APPLICATION NO. 114 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

BENARD RACHIEG.....CLAIMANT

VERSUS

SUNTORY BEVERAGE AND FOOD (K) LIMITED.....RESPONDENT

RULING

By notice of motion dated 27th September 2018 and filed on 1st October 2018 under certificate of urgency, the applicant seeks the following orders –

1. The Honourable Court be pleased to transfer Claim No.129 of 2018, filed at the Milimani Commercial Courts, to the Employment and Labour Relations Courts at Nairobi for filing, hearing and final determination of the matter.
2. Costs of this application be provided for.

The grounds in support of the application are that –

1. The matter was wrongly filed at the Chief Magistrates court.
2. The claim exceeds the pecuniary jurisdiction of the Chief Magistrate’s Court.
3. It is in the interest of justice that this suit be transferred and be heard in the High Court.

The application is made under Section 18(1)(b) and 3A of the Civil Procedure Act and Order L (sic) of the Civil Procedure Rules. It is supported by the affidavit of George Omwansa, Counsel for the applicant in which he deposes that Claim No. 129 of 2018 was wrongly but inadvertently filed in the Chief Magistrates Court instead of this court, that the claim exceeds the pecuniary jurisdiction of the Chief Magistrates Court and that it is in the interest of justice to transfer the said claim to this court.

A copy of the memorandum of claim dated 29th August and filed on 30th August 2018 is annexed to the application. At paragraph 14 thereof it is pleaded as follows –

“The Claimant herein prays that this Honourable Court declares that the Claimant’s employment was terminated/dismissed unlawfully and/or wrongfully and he be awarded damages amounting to Kshs.33.240.403.70/=.”

The respondent opposes the application and filed grounds of opposition to the application as follows –

1. The claim having been filed in a Court without jurisdiction is fatally incompetent and cannot gain legitimacy by order of transfer.
2. This being an employment claim seeking damages in excess of Kshs.30,000,000.00, the Chief Magistrate’s Court did not have jurisdiction.
3. The provisions of Section 18 of the Civil Procedure Rules do not avail the Claimant any relief as the Court in which the suit is filed lacks the requisite jurisdiction in the first instance.

4. Even by reason of the pecuniary jurisdiction, the Court lacked jurisdiction to be seized of the matter.

5. The proper reason is for the Claimant to withdraw the suit and file his claim before the Court of competent jurisdiction.

The application was argued orally in court on 4th December 2018.

Mr. Omwansa, Counsel for the applicant submitted that the registry inadvertently directed that the claim be filed at the Chief Magistrates Court, that the mistake was realised after filing and after counsel failed to convince the Chief Magistrates Court registry to transfer the file to this court, it opted to file the present application.

Mr. Omwansa submitted that what the respondent states in the grounds of opposition would achieve the same objective but waste judicial time. He further submits that the grounds are premised on wrong grounds. He cites the provisions of the Constitution which according to him have been made notorious by the courts, which provide that justice be administered without regard to procedural technicalities.

Ms Miringu holding brief for Mr. Kirimi for the respondent submitted that the claim which was filed in a court without jurisdiction is incompetent and cannot gain legitimacy by the transfer. That from the pleadings it is clear that the claimant was earning Kshs.1.2 million per month, that Section 18 of the Civil Procedure Act does not avail relief to the claim as the Chief Magistrates Court does not have jurisdiction.

Ms. Miringu submitted that the rules of the court are not made in vain and the respondent is opposing the application to uphold the rule of law. She relied on the decision of Ringera J. (as he then was) in the case of **Charles Omwata Omwango –V- African Highlands and Produce Company Limited**, the case of **Ndykak Investments Limited –V- Joseph Irungu Kinoru** and **Peter Ouma –V- Mugo David and 2 Others**.

She submitted that there was negligence in this case and counsel should bear the consequences by withdrawing the claim and filing in the proper court.

Determination

I have considered the application together with the grounds and affidavit in support thereof as well as submissions by Counsel for the applicant. I have further considered the grounds in opposition to the application and submissions of counsel in respect thereof. There are two fundamental issues for determination in the application: whether this court has jurisdiction to issue the orders sought and if the suit sought to be transferred from the Chief Magistrates Court, Milimani is incapable of being transferred to this court.

I agree with the respondent that the claim having been filed in a court without jurisdiction, was fatally incompetent and is not capable of being transferred to this court. The argument by Counsel for the claimant to the effect that the court should administer justice without undue regard to technicality does not apply to this case as jurisdiction is a question of law and not a procedural technicality.

As was stated by Ringera J. in the case of Charles Omwata Omwoyo–

*..... the sole issue for determination here is whether this court has jurisdiction to transfer a suit from a court which is seized of it but has no jurisdiction to determine it to a court vested with jurisdiction. In **Kagenyi V Misiramo & Another [1968] E.A. 48**, Sir Udoma Udoma C.J. held in relation to Section 18 of the Uganda Civil Procedure Act - a provision which is in **pari materia** with section 18 of our code- that an order for the transfer of a suit from one court to another cannot be made unless the suit has been in the first place brought to a court which has jurisdiction to try it. And in the very early case of **Mendonca V Rodrigues [1906-1908] 2KLR 51**, Hamilton J. held that the High Court do not have power to order a transfer of the suit on the ground of want of jurisdiction only. The case involved a dispute which was outside the local limits of the jurisdiction of the lower court in which it had been filed. The principle of law to be gleaned from those authorities is that the High Court cannot exercise its discretion to transfer a suit from one court to another if the suit is filed in the first place in a court which does not have the pecuniary and/or territorial jurisdiction to try it. The application fails for that reason only.*

Even if the matter involved an exercise of discretion I would have declined to exercise the court's discretion in favour of the applicant on the grounds that he found himself in a predicament as a result of his advocate's alleged mistake. I think the time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour."

The same position was reiterated by the court in the case of Peter Ouma to the effect that –

*"The famous Ugandan case of **Kagenyi =Vs= Musiramo & Another [1968] Ea 48** established the principle that the High Court has no jurisdiction to transfer a suit from a court that had no jurisdiction in the first place to hear and determine the suit to another court with jurisdiction. This case has been cited with approval by the Kenyan High Courts in various cases such as in **Charles Omwata Omwonyo =Vs= African Highlands & Produce Company Limited – Nairobi Hc Misc. Appl. No. 308 of 2002 (unreported)**. Also the same principle was held in the Court of Appeal case of **Kenya Seed Co. Ltd =Vs= Joseph Bosire – Nairobi CA No. 72 of 2002 (unreported)**."*

Fortunately for the applicant herein, his case is not statute barred and he will only suffer the consequences of withdrawing the case filed in the Chief Magistrates Court and file a fresh suit in this court. He will thus not suffer irreparable harm or be locked out of the judicial system.

Since this court has no powers to grant the prayers sought for want of jurisdiction, the application is without merit and is accordingly

dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF DECEMBER 2018

MAUREEN ONYANGO

JUDGE