



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO.2611 OF 2016**

**PATRICIA S MUMO .....CLAIMANT**

**VERSUS**

**ISIS AFRICA LTD .....RESPONDENT**

**RULING**

1. The claimant, by application and Notice of Motion dated 16<sup>th</sup> February, 2017 and seeking for orders that;

*The court be pleased to withdraw Civil Suit No.4163 of 2014 pending before Chief Magistrate Court Milimani for disposal at the Employment and Labour Relations Court;*

*Upon the withdrawal and transfer, this court be pleased to order to order consolidation of this suit with Civil Suit No.4163 of 2014 between ISIS Africa Limited versus Patricia S Mumo.*

2. The application is supported by the annexed affidavit of the Claimant and on the grounds that prior to the filing of CMCC No. 4163 of 2014 the Claimant was employed by the Respondent as the Medical Sale Representative and due to her mobile nature of work, the Respondent on 1<sup>st</sup> march, 2012 agreed to sell to the Claimant Vehicle Registration No. KBQ 725N at Kshs.1,410,000.00 at a loan at 18% per annum rate and which loan was to be repaid from mileage allowance deductions.

3. On 17<sup>th</sup> May, 2014 the Claimant tendered her letter and notice of resignation by giving one (1) month notice to which the Respondent responded with a termination letter. The Claimant had by this time been deducted the sum of Kshs.505, 525.00 toward offsetting the car loan. The Respondent then filed CMCC No. 4163 of 2014 on 18<sup>th</sup> July, 2014 claiming to repossess the vehicle which was in the possession off the claimant. The Claimant filed notice of Preliminary Objections on the jurisdiction of the lower court as the dispute arose out an employment relationship the subject for the Employment and Labour Relations Court. This objection was upheld by the court.

4. The Respondent then filed Application in CMCC No. 4163 of 2014 to have the file transferred to this court which application was rejected and dismissed. The matter in the lower court is still pending.

5. On 21<sup>st</sup> December, 2016 the Claimant filed suit herein claiming damages and an order that the Claimant be allowed to pay the balance of outstanding dues and that the Respondent be compelled to accept the balance of the purchase price for the vehicle now held by the claimant. This suit and CMCC No. 4163 of 2014 relate to the same subject and thus should be consolidated and heard by his court.

6. The Claimant counsel also made ordeal submissions is court. That upon filing of CMCC No. 4163 of

2014 the court made a ruling on the objections that the court had no jurisdiction. The matter proceeded before the High Court and a ruling for review held that there was no employment question over the matter and thus parties were effectively returned to the position in CMCC No. 4163 of 2014.

7. To tidy up the issues, the Claimant has filed this Cause on the grounds of her unfair termination from employment by the respondent. The lower court cannot move as there is no jurisdiction. The Respondent has moved the lower court for pre-trial directions but the court cannot move as it has no jurisdiction and hence this application.

8. In reply the Respondent opted to make oral submissions.

9. The Respondent submits that the High Court made a ruling that the lower court has jurisdiction over the dispute and the Respondent has right to get costs in CMCC No. 4163 of 2014 as this suit has not been dismissed.

### **Determination**

10. Section 18 of the Civil Procedure Act relate to the High Court transfer of suits from the lower court or to the lower court from the High Court. Such a rule cannot apply for matters before this court. However, in **Abraham Mwangi Wamigwi Versus Simon Mbiriri Wanjiku & Another**, the court held that a case filed in a court without jurisdiction is a nullity and should be struck out.

11. With regard to a *withdrawal* or *transfer* of suits between superior courts, the Court of Appeal in **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR** has had this to say

*... 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. These three courts with similar/equal status should in the spirit of harmonization, effect the necessary transfers among themselves until such time as the citizenry is well-acquainted with the appropriate forum for each kind of claim. However, parties should not file “mixed grill” causes in any court they fancy. This will only delay dispensation of justice*

12. The active word here is *to seek a transfer*. Effectively a negative cannot follow a positive in that a withdrawal cannot follow a transfer as there will be nothing for the court to transfer once the withdrawal of suit is ordered. These are not just semantics.

13. The orders sought by the Claimant herein are problematic in two ways as the orders sought are that an order be issued to *withdraw CMCC No. 4163 for disposal at the Employment and Labour Relations Court*. First, to allow such an order would effectively remove such suit from the record as a withdrawal is not similar to a transfer of suit. Secondly, it is for the parties to move the lower court for *withdrawal of suit* before that court and not for this court to direct such withdrawal. Even where this court is a Superior Court to the court presiding over CMCC No. 4163 of 2014, for due process and effective administration of all matters pending before either court, the practice should not be for this court to order a withdrawal of any suit before the lower court. That is for the parties to do.

14. A withdrawal of the suit will mean there will be no suit available for a transfer to this court.

15. Rule 23 of the Employment and Labour Relations Court (Procedure) Rules cannot aid the Claimant in this regard. The Rule contemplates matters already filed with the court and have a common thread to warrant a consolidation. Such cannot be construed to mean that suits before the lower court such as CMCC No. 4163 of 2014 can be lifted and transplanted to this court for hearing without the parties first addressing the question of withdrawal or transfer of the same to this court.

15. On the second order sought that *upon withdrawal and transfer, this court to order a consolidation of CMCC No. 4163 of 2014* such can only arise and be addressed by this court once the parties herein have

been able to address the question of either a withdrawal of CMCC No. 4163 of 2014 before the lower court or a transfer of the suit from the lower court to this court.

16. In my view, there is a suit filed herein relating to the issues of unlawful termination of employment; non-payment of terminal dues; and failure to any mileage and other allowances. Should such a claim remain pending and unprosecuted on the basis that there exists CMCC No. 4163 of 2014?

17. My reading of annexure “PSM3” to the claimant’s affidavit of 16<sup>th</sup> February, 2017 is the Complaint filed by the Respondent as plaintiff in CMCC No. 4163 of 2014 and is seeking orders relating to the Claimant as the defendant in holding motor vehicle KBQ 725N. CMCC No. 4163 of 2014 is a suit filed by the Respondent herein, ISIS Africa Ltd and as it is their suit, the court cannot force the Respondent to withdraw the same without good basis. Only a transfer is possible but this cannot be done on the basis and nature of orders herein as set out.

**Accordingly, on the application dated 16<sup>th</sup> February, 2017 cannot be allowed in its form, character and by the nature of orders sought. Application is hereby declined. Costs in the cause.**

Dated and delivered in open Court at Nairobi this 6<sup>th</sup> day of April, 2017

**M. MBARU**

**JUDGE**

In the presence of:

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