



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION NO 2 OF 2016

HASSAN ANDALE.....APPLICANT

VS

NATIONAL BANK OF KENYA.....RESPONDENT

RULING

1. The Applicant's application dated 4th December 2015 seeks orders for transfer of CMCC No 4408 of 2011 from the Chief Magistrate's Court at Milimani, Nairobi to this Court.
2. The application which is supported by the Applicant's affidavit is based on the following grounds:
 - a. That the Applicant is a former employee of the Respondent;**
 - b. That he filed CMCC No 4408 of 2011 at the Chief Magistrate's Court at Milimani and the Respondent raised a preliminary objection on the ground that the case ought to be heard in this Court.**
3. The Respondent filed a replying affidavit sworn by its Head of Commercial Transactions and Litigation, Samuel Mundia plus Grounds of Opposition on 22nd March 2016.
4. Mundia depones that the Respondent raised a preliminary objection to the Applicant's suit in CMCC No 4408 of 2011 on the ground that the Chief Magistrate's Court lacks jurisdiction to entertain the Applicant's suit and that the Applicant's suit does not lie against the Respondent.
5. When CMCC No 4408 of 2011 came up for hearing on 27th October 2015, the Court directed that the preliminary objection be dispensed with by way of written submissions. The Respondent filed and served its written submissions as directed by the Court but the Applicant was yet to file his submissions.
6. The Respondent was therefore shocked when served with the current application which though dated 4th December 2015 was filed on 7th January 2016 and served on the Respondent on 7th March 2016.
7. The Respondent takes the position that the application is intended to defeat the preliminary objection filed at the Chief Magistrate's Court. Further, since the suit was filed in a court without jurisdiction in the first place, there is nothing capable of being transferred to this Court.
8. The Court was referred to the case of *Rob De Jong & Another v Charles Mureithi Wachira [2012] eKLR* where it was held that a suit that is filed in a court without jurisdiction is a nullity and is therefore incapable of being transferred.

9. While this law held sway in yesteryears I do not think it can survive the constitutional glare of the Constitution, 2010 in which access to justice is a key pillar. In stating thus I draw strength from the decision of the Court of Appeal in ***Professor Daniel N. Mugendi v Kenyatta University & 3 Others (Civil Appeal No 6 of 2012)*** to the effect that a suit that is filed in the wrong court should be transferred to the right court for determination on merit.

10. On his part, the Applicant appears to be blowing hot and cold. On the one hand he seeks transfer of his case from the Chief Magistrate's Court to this Court while on other he believes that the Chief Magistrate in fact has jurisdiction to entertain his claim.

11. Nevertheless and in spite of the apparent confusion in the Applicant's mind, the Court must seize every opportunity to render substantive justice to parties appearing before it.

12. With this in mind, I have looked at the Claimant's claim as filed in the Chief Magistrate's Court and have formed the opinion that it arises out of an employment relationship within the judicial province of this Court.

13. That being the case I direct that Civil Suit No 4408 of 2011 be transferred from the Chief Magistrate's Court at Milimani to this Court for hearing and disposal.

14. The costs of this application will be in the cause.

15. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF JULY 2016

LINNET NDOLO

JUDGE

Appearance:

Mr. Muindi for the Applicant

Mr. Wanjohi for the Respondent