



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

CAUSE NO.1102 OF 2014

EDWARD MATHEMBA MUSEMBA.....CLAIMANT

VERSUS

THE BOARD OF GOVERNORS TSEIKURU

SECONDARY SCHOOL THROUGH THE CHAIRMAN.....RESPONDENT

RULING

1. This suit was formerly SPMCC No.77 of 2009, filed at Mwingi Chief Magistrate's Court. The suit was transferred to the court and a confirmation to this effect entered on record following the claimant's application dated 15th May 2013. The court allowed this application on 10th March 2014.
2. The Claimant through application and Notice of Motion dated 6th August 2015 is seeking for orders;
 - a. *The Claimant be and is hereby granted leave to amend his plaint in terms of the annexed Amended Plaint.*
 - b. *The annexed draft Amended Plaint be deemed as duly filed upon payment of the requisite fees.*
 - c. *The costs of the application be costs in the cause.*
3. The application is supported by the annexed affidavit of the Claimant and on the grounds that the Claimant filed his suit in 2001 at Mwingi Senior Resident magistrate's court. By an order of 10th March 2014 the suit was transferred to this court for hearing and determination. There is need to amend the pleadings to conform to the manner of pleadings before the court. The defendant has also ceased to exist following the repeal of the Education Act and the coming into force of the Basic Education Act, 2013 and there is therefore need to enjoin the defendant's successor in title to these proceedings. The order sought is within the jurisdiction of the court and no prejudice shall be suffered by the respondent.
4. The Respondent filed a Replying Affidavit and Grounds of opposition that;
 - a. The application is inordinately delayed;
 - b. The suit is already time barred;
 - c. The intended application is time barred;

d. The suit filed in 2007 at Mwingi was never transferred but dismissed;

e. There is no proper suit before court for amendment as such an amendment would be in vain.

5. In the Replying Affidavit of Joel Kinyua, he avers that as the advocate for the respondent, the suit originated in a court without jurisdiction and the entire suit is null and void *ab initio*. The amendments sought to be introduced at this stage are overtaken by events.

6. The Claimant filed written submissions.

Determination

7. As noted at paragraph (1) above, the original suit from Mwingi Magistrate's Court was transferred to this court and this was confirmed following the claimant's application that was not opposed by the respondent.

8. Going through the Magistrate's court proceedings, the question of jurisdiction arose but this was not resolved. The Claimant took the option of having the file transferred to this court which has since been done. On 5th November 2012, the subordinate court observed that the court may not have jurisdiction and the file should be moved to the *Industrial Court* but there was no order to this effect.

9. The Complaint was filed in the SPMCC court on 22nd July 2010 and seeking damages for unfair dismissal and costs of the suit. The defence was filed on 20th August 2009. In the defence, the Respondent has raised questions of law, which were never addressed before the lower court. The suit before the lower court was thus never gone into in terms of its substance.

10. With the operationalisation of the Employment and Labour Relations Court vide article 162(2) of the constitution read together with the Employment and Labour Relations Court Act, 2015 and the appointment of Judges of the Court vide gazette Notice of 11th July 2012, and the Chief justice practice directions and gazette Notice No. 9243, designated various matters that fall under this court and the subordinate court. Claims for unfair termination are specifically within the jurisdiction of this court. See **Rwaken Investments Limited versus Minister for Labour and Social Service & Another, Cause no.2553 of 2012.**

11. Cognisant of the transitional changes and the appointment of Judges to preside over employment and labour relations cases in Kenya, matter pending before subordinate court, the High Court and other forum that lacked jurisdiction in terms of article 162(2) of the Constitution, cause such matters to be transferred to the court or parties took the option to move the appropriate court for the moving of such suit to this court. This was an administrative, operational and judicial matter putting into account the constitutional changes thus introduced in 2010 and with the expansion of the Bill of Rights to include employment and fair labour relations.

12. It is trite that parties are to be allowed to make amendments to their pleadings before judgement. Such a right should not be denied of the claimant. Once the amendments are made, and a legal issue does arise, noting the objections raised and putting into account when the cause of action arose and the filing of the Complaint, the Respondent will have the appropriate forum to raise such objections once the complaint (memorandum of claim) is amended and served upon the Respondent formerly. To stop the process at this stage would be to kill a suit before the court is formerly seized of the same.

However, the claimant, at this early stage and before filing the amended claim, should put into account matters of time, previous suits if filed and the potential challenge. As otherwise, the application dated 6th August 2015 is hereby allowed.

The Claimant shall file the amended memorandum of claim within 14 days; serve the Respondent who shall reply within 14 days and where the Claimant wishes to file a reply thereto, this shall be

done within 14 days upon service.

Costs shall be in the cause.

Delivered in open Court at Nairobi this 25th day of November 2016.

M. MBARU JUDGE

In the presence of:

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