



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO. 1965 OF 2014

(Before Hon. Justice Hellen S. Wasilwa on 5th February, 2015)

NATIONAL BANK OF KENYA LIMITED.....CLAIMANT

VERSUS

LEONARD GETHOI KAMWETI.....RESPONDENT

RULING

The application before court is a Preliminary Objection filed by the Applicants herein dated 14/1/2015. The Preliminary Objection is based on the fact that High Court Civil Suit No. 370/13 was initiated by the Plaintiff before a court having no jurisdiction and therefore the High Court had nothing to transfer to the Employment and Labour Relations Court and any order of transfer was annulity *ab initio*. The history to this matter is such that this cause was initially filled before the High Court as Nairobi HCCC No. 370/2013. The parties appeared before Hon. Lady Justice Ougo who made a ruling dated 24.10.2014 transferring this matter to the Industrial Court for hearing and determination and at the same time declining to strike out the suit for being in a wrong court for interest of justice.

It is in respect of the order made by the High Court transferring the matter to the Industrial Court that the Preliminary Objection is raised with Applicants submitting that the High Court did not have that jurisdiction to transfer the matter, given that the case had been instituted before a wrong Court making the whole process annulity *ab initio*. It is for this reason that the Applicants want this suit struck out.

The Respondents opposed the Preliminary Objection. They filed their replying affidavit filed on 22/1/2015. Their main contention is that in their statement of defence Para 4, there was also a Preliminary Objection raised which sought to have the suit struck out. On that Preliminary Objection, a ruling was made by Hon J. Ougo where she declined to strike out the suit but instead chose to transfer it to this Court. It is therefore Respondent's contention that by seeking the same prayer to strike out the suit, the Applicants are abusing the Court process and that if the Applicants were aggrieved by the ruling of Hon. J. Ougo, they ought to have appealed to the Court of Appeal. It is therefore Respondents position that the Preliminary Objection is *res judicata* and should be dismissed. The Respondents further aver that this Court and High Court are of same status and therefore this Court cannot sit on appeal against the judgment of the High Court.

Having considered the submissions of both parties, the issues for determination are as follows:

1. Whether this application is *res judicata*

2. Whether the High Court can transfer a matter to Employment and Labour Relations Court and/or make any order on the same matter accordingly.

On the first issue, it is apparent that the issue of the Applicant's case being struck out was raised before Hon. Lady Justice Ougo. In her ruling dated 24/2014 she declined to strike out the suit but instead opted to transfer the same to this Court for hearing. Indeed my Learned Sister considered the viability of striking out of the suit and rejected it. She made a final position on the same and if the parties were not satisfied with that position, the only avenue open to them was to appeal against that decision. The Respondents have not appealed that position to date. They now raise the current Preliminary Objection which seeks the same orders.

For this court to sit and entertain that Preliminary Objection and allow it is tantamount to sitting on appeal against the orders of the Learned Judge of the High Court whereas the High Court and this Court are Courts of the same status. The matter having been adjudicated upon by a competent Court and with the status of this Court is *res judicata* and can no longer be addressed by this court.

The 2nd issue is whether the High Court can transfer cases to this Court having found that it has no jurisdiction to deal with the matter. The issue of whether there can be inter transfer of cases between the High Court and the Courts with the status of the High Court has been discussed in several authorities. In the case of **Prof Daniel N. Mugendi – vs- Kenyatta University, Benson I. Wairegi, Eliud Mathiu & Prof Oliver M. Mugenda C. A No. 6/2012** at Page 11 the Court of Appeal rendered itself thus:-

“Believing as we do that the approach taken by Majanja J. is the correct one, and in endeavouring to meet the ends of justice untrammelled by procedural technicalities, we set aside the order striking out the appellant’s petition and direct that the High Court do transfer it to the Industrial Court which also has jurisdiction and authority to consider the claims of breach of fundamental rights as pertain to Industrial and Labour Relations matters. It is only meet and proper that the Industrial Court do exclusively entertain those matter in that context and with regard to Article 165(5)(b). An in order to do justice, in the event where the High Court, the Industrial Court or the Environment and 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 form 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”.

The Court of Appeal rendered itself thus that the High and the Industrial Court are corresponding Court and therefore the suit was not struck out but was instead transferred.

It is therefore the finding of this Court that transfer of cases between the 2 Courts is in order and therefore the Preliminary Objection has no merit and is therefore dismissed accordingly.

Hearing may now proceed on merit.

Read in open Court this 5th day of February, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Odera for Claimant – Present

Kamweti for Respondent/Applicant – Present