



**REPUBLIC OF KENYA**  
**EMPLOYMENT & LABOUR RELATIONS COURT**

**AT NAIROBI**

**MISCELLANEOUS NO. 29 OF 2015**

**SAMUEL GATHUKU KIMORI.....APPLICANT**

**VERSUS**

**TOTAL KENYA LIMITED.....RESPONDENT**

**RULING**

1. The Applicant seeks the transfer of a suit CMCC 5675 of 2005 between the parties herein transferred to this Court for hearing and disposal. The application dated 16<sup>th</sup> March 2015 is brought under Order 51 Rule 1 of Civil Procedure Rules and Sections 3A of the Civil Procedure Act. It is supported by the Affidavit of the Claimant Samuel Gathuku Kimori.

2. The Respondent opposed the application and filed Grounds of Opposition dated 20<sup>th</sup> April 2015. The grounds were to the effect that it is impractical to transfer the Magistrates suit to the Employment & Labour Relations Court as the 2 courts have different rules and pleadings in the 2 courts completely differ. The Respondent also stated that it will suffer prejudice as the witnesses testified over 6 years ago. The Respondent asserted the Applicant was guilty of laches and that the application was untenable and should be dismissed with costs.

3. Parties consented to urge and oppose the application by way of written submissions. The Applicant's submissions were filed on 17<sup>th</sup> July 2015 and the Respondent's were filed on 23<sup>rd</sup> July 2015. In the submissions by the Applicant it was submitted that the suit that is sought to be transferred relates to an employer employee relationship and therefore the suitable Court to hear the matter is this Court. The Applicant submitted that the matter was to proceed on 24<sup>th</sup> November 2010 but the Magistrate advised that the suit be transferred to the Industrial Court for hearing. The Applicant submitted that the Respondent will not suffer prejudice as its witness evidence is on record.

4. The Respondent submitted that the application was incompetent, bad in law and misconceived. The Respondent submitted that it was impractical to transfer the Magistrates suit to the Employment & Labour Relations Court as the 2 courts have different rules and pleadings in the 2 courts completely differ. The Respondent also stated that it will suffer prejudice as the Applicant's witness testified over 6 years ago and closed his case. The Respondent submitted that the application was brought under the Civil Procedure Act and the Civil Procedure Rules which are not applicable to the Employment & Labour Relations Court and was therefore incompetent. The Respondent submitted that the Applicant had not demonstrated why the application was made almost 6 years later after the directions of the Magistrate. The Respondent relied on the case of **James Davies Njuguna v Simon Mithamo & 3 Others [2014] eKLR** for the proposition that the Civil Procedure Rules and the Civil Procedure Act do not apply to matters in this

Court. The Respondent also relied on the case of **Bernard Aloyo Yaya v Kenya Revenue Authority [2011] eKLR** for the proposition that the employment matters commenced in ordinary courts before labour laws commenced would have to be determined in the courts in which they were instituted.

5. The Applicant has moved this Court beseeching orders in his favour. He has called in aid the Civil Procedure Act and the Civil Procedure Rules. In the matters before this Court, the Employment & Labour Relations Court may have recourse to the Civil Procedure Act and Rules when there is lacunae in the rules of this Court. In the present circumstances, the calling in aid of these provisions is, in my considered view, not anathemic to the procedures in this Court. The decision of my brother Rika J. is therefore distinguishable as the facts in that case and the circumstances therein are not on all fours as in this case. The Applicant wishes to move the matter from the Magistrates Court to this Court for disposal. The last time the case in the court below was before a magistrate was in 2010. That is a whopping 5 years ago. There is no reason why an attempt to transfer was not made then and it clearly does not make any sense to transfer it now. The decision of Dulu J. in the case of **Yaya v KRA** is instructive. As the Court held, there is no provision in the new labour laws for the taking over of matters pending in other courts. Additionally the Fifth Schedule of the Constitution of Kenya Section 22 provides as follows:-

All judicial proceedings pending before any court shall continue to be heard and shall be determined by the same court or a corresponding court established under this Constitution or as directed by the Chief Justice or the Registrar of the High Court.

6. The Court is of the firm view that the best course in this case is to allow the Magistrates Court seized of the matter to hear and conclude the matter now pending before it. The Applicant's application is dismissed but each party to bear their own costs.

Orders accordingly.

Dated at Nairobi this 5<sup>th</sup> day of **August** 2015

**Nzioki wa Makau**

**JUDGE**

Delivered at Nairobi this 5<sup>th</sup> day of **August** 2015

**Hellen Wasilwa**

**JUDGE**