



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION NO. 7 OF 2014

MAENDELEO YA WANAWAKE ORGANISATIONCLAIMANT

VERSUS

HELLEN MAKONE 1ST RESPONDENT

CHIEF MAGISTRATE,

MILIMANI COMMERCIAL COURT2ND RESPONDENT

RULING

The Suit herein was commenced by a Petition filed by the Petitioners on 10th February 214 seeking orders as follows:-

1. A declaration that the proceedings in CMCC 8114 of 2013 and al subsequent orders arising out of the said proceedings be and are hereby stayed pending hearing and determination of this application.
2. A declaration be issued to declare that the proceedings in CMCC 8114 of 2013 are employer/employee and the correct forum is the Industrial Court for resolution of the dispute if any.
3. A declaration be issued to declare that all proceedings relating to CMCC No. 8114 of 2013 be transferred to the Industrial court for determination.
4. The costs of this petition be provided for.

The petition is supported by the affidavit of RUKIA SUBOW the 2nd Petitioner who is the Chairperson of the 1st Petitioner sworn on 7th February 2014.

The petition was filed under certificate of urgency with a certificate in support of the urgency sworn by BILLY AMENDI on 7th February 2014.

I heard the Petitioners advocate on 11th February 2014 ex-parte and granted temporary orders staying further hearing of Milimani CMCC No. 8114 of 2013 pending the hearing interpartes of the application to transfer the same to this court for hearing and determination.

On 24th February 2014 the Petitioners filed a Notice of Motion under certificate of urgency seeking orders inter alia:-

- i. That this court be pleased to declare the proceedings in CMCC 8114 OF 2013 as

- employer/employee and the Chief Magistrate's court lacks jurisdiction to redress the dispute.
- ii. That the court orders the proceedings relating to CMCC No. 8114 of 2013 are to be transferred to this court for hearing and determination.

The application was heard by my sister Justice Ndolo *ex parte* on 24th February 2014. She certified the application urgent and fixed it for *inter partes* hearing on 6th March 2014 before me.

When the parties appeared before me on 6th March 2014, I granted the Petitioners leave to file a further affidavit within 7 days and corresponding leave to the Respondent to reply to the further affidavit if necessary. Both parties filed their respective affidavits and the application was canvassed on 20th March 2014.

Mr. Amadi appeared for the Petitioner while Ms Njagi Nyaboke appeared for the Respondent. The gist of Mr. Amadi's argument is that the Chief Magistrate's court has no jurisdiction to handle the claim by the Plaintiff therein as the subject matter is an employment issue. That under Article 165 of the Constitution the Industrial Court has exclusive jurisdiction on labour and employment matters. He urged the court to find accordingly and transfer the case to this court for hearing and determination.

Ms. Njage Nyabuto for the Respondent relied on the Replying affidavit of Hellen Makone the 1st Respondent sworn on 3rd March 2014, the 1st Respondent's further Affidavit sworn on 17th March 2014 and the 1st Respondent's list of Authorities dated 4th March and filed on 5th March 2014. Ms. Njage Nyabuto started by giving a background of this case. She submitted that the 1st Respondent filed proceedings in CMCC 8114 of 2013 wherein she obtained orders on 20th December 2013 compelling the Petitioners herein to open her office and restraining them from harassing, intimidating or locking her office or in any other manner interfering with her rendering her national duties pending the *inter-parties* hearing of the application. The order further directed the OCS Central police station to ensure the offices were opened. The Petitioners herein thereafter filed an application seeking the lifting of the said orders but the court declined to grant the orders *ex parte*. The Petitioners thereafter filed Petition No. 6 of 2014 in the High Court seeking similar orders but the High Court directed them back to the Milimani Chief Magistrate's Court. That the advocates of the Petitioners herein did not disclose these orders of the High Court to the Respondent and 1st Respondent only learnt about the orders from the court. That following the failure by the Petitioner's herein to comply with the orders of the Chief Magistrate in Case No.8114 of 2013, the Respondent herein moved to court with an application for contempt. On the date of ruling in the contempt application the Chief magistrate was served with the orders of this court staying the proceedings in CMCC 8114 of 2013 .

Ms. Nyabuto submitted that the proceedings herein are made in bad faith, and that the petitioners are running away from the contempt proceedings in CMCC 8114 of 2013. That the orders of this court issued on 11th February 2014 in anticipation of transfer of the CMCC 8114 of 2013 to this court were made in vain. That the petition herein does not show the Constitutional provisions that have been violated and how they have been violated. That having withdrawn the claim against the Chief magistrate the orders sought by the petitioners herein cannot stand.

On the issue whether CMCC 8114 of 2013 can be transferred to this court Ms. Nyabuto submitted that this court cannot transfer a matter from a court without jurisdiction.

Ms. Nyabuto relied on the decision of Justice J.B. Ojuang (as he then was) in the case of *Boniface Waweru Mbivu V Mary Njeri & Another* (no citation given) quoted by Justice Odunga in *Abraham Mwangi Wamigwi V Simon Mbiriri Wanjiku Another* [2012] eKLR to the effect that where a suit is instituted before a court having no jurisdiction, such suit cannot be transferred to a court where it ought to have been properly instituted. Justice Odunga stated that the reason for this is that a suit filed in a court without jurisdiction is a nullity in law and whatever is a nullity in law is in the eyes of the law nothing: That the court cannot purport to transfer nothing and mould it into something through a procedure known as "transfer". Justice Odunga further stated that courts can only transfer a cause whose existence is

recognized by law.

Ms Nyabuto further submitted that the Petitioners are forum shopping as this is the fourth court the petitioners are seeking orders from. That the Respondent has not been served with some of the applications filed by the Petitioners in other courts.

On the issue of jurisdiction Ms. Nyuabuto submitted that under Article 165(6) of the Constitution this court does not have supervisory powers over the Chief Magistrates court. That if the draftsmen wanted to give the Industrial Court supervisory powers it would have said so.

Ms. Nyaboke urged this court to dismiss this application and lift the interim orders so that the Chief Magistrate's court can be free to adjudicate on CMCC 8114 of 2013.

I have considered the pleadings in respect of this application and the submissions of the parties. In my opinion the twin issues I have to determine are whether this court has jurisdiction to supervise the Chief magistrates court and whether the Chief magistrates Court has jurisdiction to determine the Respondent's claim in CMCC NO. 8114 of 2013.

This court's jurisdiction is provided for under Article 162 (2) and 165 of the Constitution and Section 12 of the Industrial Court Act.

The issue was considered by Justice Majanja in the case of United States International University (USIU) V Attorney General 2012 eKLR Justice Majanja held that the High Court lacks jurisdiction to deal with matters of employment and labour relations.

Article 162 (2) provides that parliament shall establish court with the status of the high court to hear and determine disputes relating to:-

- a. Employment and labour relations and
- b. The environment and the use and occupation of, and title to land.

Article 165 (5) provides that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2). Supervisory powers over subordinate courts is donated to the High Court in Article 165 (6) and (7).

From the foregoing, does this court have jurisdiction to supervise a subordinate court when exercising jurisdiction over employment and labour relations matters ?

My answer to this question is that it has. My reasoning is that the Industrial Court has the same jurisdiction as the High Court when handling employment and labour relations matters. This is my view is what is meant by Article 162 (2) by the use of the words "Courts with the status of the High Court" as read together with Article 165 (5) which, gives the High Court jurisdiction but excluding the jurisdiction in matters over which the courts in Article 162 (2) have jurisdiction. It means that the Industrial Court has jurisdiction to supervise subordinate courts in so far as employment and labour relations matters are concerned. This was the substance of Justice Manjanja's ruling in the USIU case (supra).

Section 18(2) and 29 (3),(4) and (5) as read with Section 12 (1) of the Industrial Court Act further support this position.

Having determined that the Industrial Court has jurisdiction to supervise subordinate courts while exercising jurisdiction in employment and labour relations matters, the next issue to consider is whether the Respondents case in CMCC 8114 OF 2013 is an employment and labour relations issue.

A copy of the plaint in CMCC 8114 of 2013 is attached to the petition herein at page 32. At paragraph 4, 5 and 6 of the plaint , it is pleaded as follows:-

4. That the Plaintiff has been the executive director of the 1st

Defendant since August, 2012.

5. That on 17th Decembr, 2013 the 2nd Defendant arbitrarily without notice

Illegally, without justification, ultra vires her powers locked the Plaintiff

out of her office and changed locks.

6. The Plaintiff has suffered and continues to suffer loss and damage and is unable to perform her duties.

These paragraphs demonstrate that the issue in dispute between the Respondent and the Petitioners for which the Respondent filed suit CMCC 8114 of 2013 is a dispute between an employer and employee as envisaged in Section 12 (1) (a) of the Industrial Court Act and Section 87 (1) of the Employment Act. Indeed the prayers in the suit are for re-instatement and non-interference with the Respondent in the performance of her duties as an employee of the 1st Petitioner herein in the position of executive director.

I find that the Chief magistrates court has no jurisdiction to hear the dispute as it falls within the exclusive jurisdiction of the Industrial Court under Article 162 (2) and 165 (5) of the Constitution, Section 12 of the Industrial Court Act and Section 87 of the Employment Act.

As stated by Justice Ojuany (as he then was) in Boniface Waweru Mbivu V Mary Njeri & Another and by Justice Odunga in Abraham Mwangi Wamigwi V Simon Mbiriri Wanjiku & Another, a case filed in a court without jurisdiction is a nullity and for these reasons I declare that CMCC 8114 of 2014 is a nullity and hereby strike out the same.

This being the case, there is nothing to be transferred to this court.

The foregoing would also mean that the substratum of the Petition herein has collapsed and there is no more issue to be considered in the petition. The petition has thus been conclusively dealt with by this ruling and is spent.

The issues as to whether or not the National officials are properly in office or otherwise are matters that can substantively be dealt with in Petition No.9 of 2014 currently pending before the Constitutional and Human Rights Division of the High Court.

The Respondent herein is free to file her claim in this court afresh for hearing and determination.

Each party shall bear its cost to this application and the Petition.

Orders accordingly.

Read and signed in open Court this 10th day of June, 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Ms. Ndegwa holding brief for Petitioners/Applicant

Munene for Respondent