



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT NAIROBI**

**MISC. APPLICATION NO. 87 OF 2014**

RAJIV (ROGER) MANDAL.....APPLICANT/CLAIMANT

VERSUS

STANGY BOYZ PROMOTIONS T/A SOUND ASIA.....RESPONDENT

**RULING**

1. The application before me is the Applicant's Notice of Motion Application dated 22<sup>nd</sup> August 2014. It seeks transfer of a suit now pending before the Chief Magistrates Court, being CMCC 5042 of 2006, for hearing and determination by this Court. The Application is premised on Section 87 (1) and (2) of the Employment Act, Section 3A of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules 2010 and all enabling provisions of the law. The grounds on the face of it are that the Applicant filed a suit on 12<sup>th</sup> May 2006 before the enactment of the Employment Act 2007. It is supported by the affidavit of David Mukii Mereka, Advocate sworn on 22<sup>nd</sup> August 2014.
2. The Respondent is opposed and filed a Replying Affidavit sworn by Odhiambo M. T. Adala, Advocate sworn on 26<sup>th</sup> November 2014. The affidavit deponed that the Applicant was given 30 days to file the application but the same had been made inordinately late. It was also deponed that there was no employee-employer relationship between the parties as the Claimant was paid on commission basis. It was stated that the issue of jurisdiction is still pending before the Chief Magistrates Court. He thus urged that the present application be dismissed with costs.
3. Miss Jemator urged the Application on behalf of the Applicant she submitted that the Application sought transfer of civil suit number 5042 of 2006 now pending before the Chief Magistrates Court. she submitted that the Replying Affidavit filed on 26<sup>th</sup> November 2014 by the Respondent does not address the Court as to how the Respondent will be prejudiced if the Court does allow the Application for transfer.
4. Mr. Kalove opposed the application on behalf of the Respondent. He submitted that there was issue of prejudice as 2 witnesses for the Claimant had been heard. He also stated that there was no application presented to Court from the Chief Magistrates Court. He submitted that we have not been told what the outcome in the Chief Magistrates Court was. He submitted that the Applicant had been granted 30 days to make the application for transfer but had delayed for 2 years. He submitted that the present application was an abuse of the Court process. He stated that the Hon. Ole Keiwua PM had held on 30<sup>th</sup> October 2013 that he did not see the basis for the transfer of the case and parties were to address the Court on the issue of transfer on another date. He made

submission on the non-existence of an employee-employer relationship between the Applicant and the Respondent and that there was payment on commission basis which according to him did not fall under the Employment Act. He thus urged the Court to dismiss the application with costs.

5. In a brief reply Miss Jemator submitted that the issue of the Applicant having testified alongside his witnesses would not occasion prejudice as the Court would give directions on the hearing and proceedings already on record. She submitted that the Hon. Ole Keiwua had held that he did not think that the Court had jurisdiction to transfer the matter. She thus submitted that the Court had already made a determination on the matter. In regard to the nature of the contract she submitted that was an issue to be addressed in the substantive hearing of the suit. She urged the Court to allow the application as prayed.
6. The Court is being asked to determine whether the suit now pending before the Magistrates Court ought to be transferred to this Court for hearing and determination. The Court has been referred to the law and facts deposed to by the parties.
7. In an application for transfer of suit, the party seeking the transfer has to demonstrate that the suit is capable of transfer. The suit herein is stated to have been filed on 12<sup>th</sup> May 2006. At the time, the Industrial Court Act 2011 and the Employment Act 2007 were not in place. The applicable law at the time was Employment Act cap 226 and the Trade Disputes Act now repealed. The proper forum for agitation of the issues at hand was either the Industrial Court tribunal which was the precursor to this Court or the Magistrates Court. On passage of the new laws and the establishment of the Industrial Court under Article 162(2) of the Constitution, one could either transfer a suit or proceed before the Court in which the case was filed.
8. In the case of **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR** the learned Judges of Appeal (Nambuye, Mwera and Kiage JJA) held as follows:-

*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 matters in that context and with regard to Article 165(5)(b). And in order to do justice, in the event where the High Court, the Industrial Court or the Environment & 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 forum 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.*

*In the same token we venture to put forth the position that as we have concluded that the Industrial Court can determine industrial and labour relations matters alongside claims of fundamental rights ancillary and incident to those matters, the same should go for the Environment & Land Court, when dealing with disputes involving environment and land with any claims of breaches of fundamental rights associated with the two subjects.*

9. By parity of reasoning, the Plaintiff in CMCC 5042 of 2006 had the capacity to initiate a suit to seek redress in the magistrate's court or before the predecessor of this Court. The fact that the Applicant went to the Magistrates Court first is not fatal to the Claim.
10. The Applicant in sum has an application which this Court can consider and where merit is found can grant. The Magistrate in the lower Court has already made certain findings. It is clear from the record of proceedings that the Magistrate is aware that he cannot transfer the suit to this Court. It

would be remiss on my part if I did not serve the interests of justice which is to do justice to all irrespective of status. It is prudent to have the matter now pending before the Magistrates Court transferred to this Court for hearing and determination and I do so order. Regarding the perceived bias, the Court is alive to the fact that the parties will have to address the Court on the issue once the file is transferred and listed for Directions. In the final result I order the transfer of CMCC 5042 of 2006 to this Court for hearing and determination.

Orders accordingly.

Dated and delivered at Nairobi this 17<sup>th</sup> day of **December** 2014

**Nzioki wa Makau**

**JUDGE**