



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**  
**MISCELLANEOUS APPLICATION NO. 22 OF 2013**

**DIANA KAGENI**  
**MBARI.....**  
**.....CLAIMANT**

**VERSUS**

**NATIONAL EMPOWERMENT NETWORK OF PEOPLE WITH HIV/AIDS IN KENYA  
(NEPHAK).....RESPONDENT**

**RULING**

The Application herein is a Miscellaneous Application brought by way of Notice of Motion dated 28<sup>th</sup> May 2013. It is brought under Section 12(1) (a) of the Industrial Court Act, Section 18(1) (b) (i) and Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. The Application seeks the following orders;

- a. That this matter be certified urgent and service be dispensed with in the 1<sup>st</sup> instance.
- b. This Honourable Court be pleased to withdraw the matter in PMCC 7157 OF 2007: DIANA KAGENI MBARI NATIONAL EMPOWEREMENT NETWORK OF PEOPLE WITH HIV/AIDS IN KEYA (NEPHAK) in the Chief Magistrates Court at Milimani Commercial courts, Nairobi for trial and determination in this court,
- c. That upon transfer the same be fixed for hearing the earliest possible date.
- d. The costs of this application be in the cause.

The application is grounded on the facts that the applicant is the plaintiff in Milimani PMCC NO. 7157 OF 2007, that it is in the interest of justice that the case be transferred to the Industrial Court for quicker determination, that the applicant is a resident and citizen of Canada and is in the country for only three months with her next possible earliest return being 3 years, that the 2013 diary for hearing dates at the Chief Magistrate’s Court at Milimani Commercial Courts Nairobi is closed, that the case was instituted on 21<sup>st</sup> August 2007 and todate has not been heard and determined and that the interests of justice will be served by granting the prayers sought.

The application is supported by the affidavit of DIANA KAGENI MBARI the Applicant in which she reiterates the facts in the grounds on the face of the application. The Respondent filed a Replying Affidavit of JULIUS CHEPTAREI, the Finance Officer of the Respondent in which he opposes the application and depones among other issues, that delay in prosecution of PMCC NO. 7157 of 2007 is

wholly attributable to the applicant, that the applicant knew well in advance her imminent travel to Kenya but neglected to secure hearing dates within the period of her stay in Kenya, that the applicant is not treating the processes of court with seriousness and respect, that the application is incurably defective, completely misconceived and without any basis in Law. He further depones that the applicant is guilty of forum shopping, that the prayers are incapable of being granted as it is only the High court that can grant the prayers sought and that the applicant will not suffer any prejudice if the orders sought are not granted. He prays that the application be dismissed with costs.

The application was heard on 13<sup>th</sup> June 2013 when Mr. Kilemi appeared for the Applicant while Mr. Odhiambo appeared for the Respondent.

Mr. Kilemi submitted that the Applicant prays for withdrawal of the case from Resident Magistrate's court and the same be determined by this court. That the Applicant further prays that the case be fixed for hearing as soon as possible subject to convenience of the court. The application is premised on the fact that the case is a purely employment matter and it is in the interest of justice that the case be transferred to this court for quick determination. He reiterated the grounds on the face of the application and the Supporting Affidavit. He submitted that Article 62(2) of the Constitution and the Industrial court Act 2011 confer jurisdiction on this court. He relied on Section 18(1)(b) of the Civil Procedure Act which confers powers on the High court to withdraw any suit pending in a subordinate court and to hear the same. Mr. Kilemi further submitted that the applicant prays for an early date of hearing as she is in the county for a short time and that all pre-trial procedures have been accomplished. He denied that the claimant has prolonged the delay of hearing of the suit. He submitted that the court file went missing and the file had to be reconstructed through a court order on 8<sup>th</sup> August 2012 as is borne by the court record and that counsel is not in control of the client's travel dates.

He urged the court to allow the application.

Mr. Odhiambo for the Respondent opposed the application. He submitted that the application seeks orders to withdraw the case and that if the case is withdrawn there will be no matter to be transferred. Secondly that the Respondent does not oppose the transfer of the case, but is opposing the section invoked, that the Civil Procedure Act only recognises the High Court, that under Article 162 (2) it is only the High Court that has Jurisdiction to supervise subordinate courts, that it is only the High Court that can order transfer to the Industrial Court and not this court, the reason being that these are two completely separate courts established by the Constitution, that to entertain the application would be to assume powers not conferred by the Constitution.

Mr. Odhiambo further submitted that hearings ought to be conducted within 3 months and the application is belated. That this is a matter of procedural law and not a technicality. He urged the court to strike out the application so that the Applicant can make the application in the proper court.

I have read the application, the affidavit in support thereof and the Replying Affidavit. I have also considered the oral submissions by advocates of the parties.

The issue for me to determine is whether this court has jurisdiction to order the removal of a file from the subordinate court and transfer it to this court for hearing and determinations and if the answer in the affirmative, whether the application by the Applicant is too belated that the court should refuse to grant the orders sought.

Article 162 (2) creates the Industrial Court as a Superior Court with the status of the High Court.

Article 165 establishes the High Court and provides for its jurisdiction.

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).

Both parties do not contest that the case in the Chief Magistrates Court at Milimani Commercial Court

which the Applicant wishes to have transferred to this court falls within the jurisdiction of this court. By virtue of Article 165(5) the High court would not have jurisdiction to handle the matter as it falls within the jurisdiction of a court contemplated with Article 162(2) of the Constitution.

The Civil Procedure Act having been enacted before the Constitution and being inferior to the Constitution cannot override the Constitution. Under the 6<sup>th</sup> Schedule of the Constitution which deals with Transitional and Consequential Provisions, clause 7 provides that all law in force immediately before the effective date shall be construed with alternations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution and that where there is a conflict the Constitution will prevail to the extent of the conflict.

For this reason I find that the proper court for the application filed by the Applicant herein is the Industrial Court and further that the High Court does not have jurisdiction to entertain the application.

On the second issue, I find that the Respondents argument that the application is belated is misplaced. Such application should have been made in the main case. The case is not yet before this court and therefore this court cannot make a determination of delay in a matter not before it.

For the same reason, the applicant's prayer that the case be fixed for hearing at the earliest possible date is rejected. This court cannot fix a date for a case that is not before it. The Applicant should first have the case transferred to this court and only then can the application for an early hearing date be made.

Since the Respondent has submitted that it does not oppose the transfer of the case to this court I make the following orders.

1. PMCC 7157 OF 2007 between DIANA KAGENI versus NATIONAL EMPOWERMENT NETWORK OF PEOPLE WITH HIV/AIDS IN KENYA (NEPHAK) is hereby withdrawn from the said court and transferred to the Industrial Court for hearing and final determination.
2. There shall be no orders for costs on the grounds that since the Respondent has admitted that it did not object to the transfer of the case to this court, it was a waste of judicial time to subject the application to a hearing. The application could have been granted by consent.

Orders accordingly

**Read in open Court this 26<sup>th</sup> day of July 2013**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**

**In the presence of:**

**Mr. Kilemi for Applicant**

**Mr. Odhiambo for Respondent**