REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO.377 OF 2004

***(Being an appeal from the order of the Hon. Chief Magistrate Esq. in Misc. Cause No. 35 of 2003 delivered on 24th May 2004)*SUSAN KIRAGU**

RAPHAEL KAMAMI
PAULING RACHIER
LINCOLN OILELINET AZIZA
JACKSON
ONYANGO.....APPELLANTS
MAXWELL OKUTO
ELIZABETH OCHIENG
ROSEMARY ADALA
GOFREY NYAWADE

VERSUS

LEADING RESORTS OF THE WORLD LTD.....RESPONDENT

JUDGMENT

I. INTRODUCTION

1. The appeal before this court concerns Civil Practice and Procedure as to "costs" awarded by one Magistrate but reversed by another Magistrate who was originally the one who handled the matter?

2. The background of this appeal began in the Hon. Chief Magistrate's Court cause No. 35 of 2003. Ten employees filed a complaint under the Old Employment Act Cap 226 of the Laws of Kenya, The Regulation of Wages and Conditions of Employment Act Cap 227 Laws of Kenya as to their terms and conditions of employment.

3. The employees had been employed as the tele-marketers since 1999. They were to market and solicit for business from potential customers who wish to occupy holiday homes. This business was commonly known as Time sharing space for holiday premises. All the employees would contract their respective customers using the telephone. “They were paid in return a commission with no benefits save for a phone and credit given by the employer for the use of the phone.

4. In February 2003, the employer decided to stop the commission payment and instead place the employees on salaried employment together with home allowance of 15 % with effect from February 2003. The employees rejected this proposal and “downed their tools.

5. On the 5 of November 2003, the employee filed a complaint under the Old Employment Act and Regulations in the Chief Magistrate’s Court through their advocates. The employees advocate took issue with this format of coming to court as either the employee applicants would have gone to the labour office or come to court under a known format. The trial magistrate overruled this preliminary objection and stated that there is no known procedure to coming into court, then the employees had a right to be heard as they would have either written a letter or made an oral application to court. The trial magistrate then made orders that the dispute be heard by way of oral evidence.

6. The employer then approached the employees directly and outlined into a settlement of the whole case outside court. They, the employees had raised issues which the employees on the misuse of their phones.

7. Each employees then filed a letter dated 30 January 2004 to court that was addressed to their two respective advocates for both parties which stated in part:-

“… in full settlement of my claim against the said Defendant whom I hereby fully discharge from any or all liability whatsoever….”

8. An earlier letter dated 4 December 2003 by the employees to their respective advocates for the parties acknowledged receipts of moneys from the defendants and stated in part:-

“…Formally confirm that this is in full settlement of my claim against the said Defendant whom I hereby full discharge from any or all liability whatsoever….”

“I have also withdrawn the above case against the defendant.”

9. 30 January 2004, a letter written by the original defendant in person and signed by Mevil O’souza to the Chief Magistrate and Rosemary Adala, Susan Kiragu:

“We the undersigned have settled this matter with the defendants and hereby withdraw our claim with no order as to costs”

On 3 February 2004, letter dated 4 December 2003 for the other eight in person was filed.

10. The advocate for the employees claims he had not been aware of this settlement. When he did become aware of it he went back to court and appeared before another Magistrate, not originally concerned with the mater and in the absence of the advocate for the employer (whom he later stated had been served to attend court) and obtained orders as follows:-

"matter settled with no orders as to costs"

"Court marked as settled with costs to the complainants"

11. The advocate for the employee filed his bill of costs and appeared before the original Magistrate. The said magistrate recalling the background of the case stated that a bill of costs can only be drawn up if ordered by the court. The bill of costs was struck out.

12. The advocate being dissatisfied with the said orders filed for a review of the trial original magistrates orders that indeed there were orders by another Magistrate as to costs.

13. The advocate for the employer raised a Preliminary Objection (105 of 2004) that the case was *functus officio* and the application could not be entertained.

14. The original Magistrate ruled on 24 May 2004 that when the letters by the employees were filed they were not contested. That the clients/employees settled the case on grounds that there would be no costs. The original Magistrate declined to honour the orders of costs by another Magistrate:-

"It is for these reasons that I refuse the orders of 16.2.04 in regard to costs. One, because the Respondent were not served to be party to the order and secondly, because it was against the consent letters filed. In place of the order, these will be order that this dispute between the complainants and Respondents is marked as settled with no orders as to costs. Orders accordingly. Right of Appeal, 14 days, 24 May 2004"

15. Being dissatisfied with this ruling, the advocate for the employees appealed to this High Court in the name of the said ten employees.

II. APPEAL

16. The Memorandum of Appeal, in summary alleged that the Hon. Magistrate erred:-

i. In not considering the complainants advocate's submissions.
ii. In holding that the respondent had no notice of the matter coming up on the 16 February 2004.
iii. In replying on a letter of 4 December 2004.
iv. In holding that appellants had no basis in coming to seek for costs.
v. In ignoring the orders of 16 February 2004 (That gave orders of costs).
vi. In holding that the respondent was not served on 16 February 2004.
vii. In substituting the orders of 16 February 2004 that ordered costs with those of 24 May 2004 that rejected costs to be awarded.

17. Before the appeal was heard, both parties conceded that there was now a new Act to replace the

Employment Act hence, the Labour Institutions Act 12 of 2007. Because this matter began in the year 2003, in the subordinate courts and that the appeal was filed in 2004, the parties conceded that this court has jurisdiction to hear this appeal.

18. The gist of the appellants' argument being that the subordinate court failed to grant orders to review the said ruling stating that there was no orders of costs granted. That the trial Magistrate had been misdirected. The said Hon. Magistrate took into consideration letter dated 4 December 2003. These letters so filed wee done improperly. The issue was not addressed properly by the said magistrate.

19. There was evidence of service on the respondent to appear to court on 16 February 2004. They did not appear before that other magistrate and be applied for costs which was granted. There was therefore a misdirection on this point, service was done.

20. As to the letter of 4 December 2004, settling the case this was done without the knowledge of the advocate on record for the parties. At no time were parties acting in person. That was an illegality which the court had acted on.

21. The ruling by the Hon. Magistrate was that no taxed costs should be ordered for without orders of the court. There were already orders to this office. The said Hon. Magistrate had no powers to substitute orders given "for costs" with those of "no costs being given at all"

22. In reply, the respondents advocate stated the proceedings were never civil but criminal in nature. The civil proceedings are not applicable nor relevant and therefore by assumption there is not issue of costs.

23. The respondent had no notice that they were to attend court. If so, there would have been an affidavit of costs.

24. The parties were to withdraw the case and file a consent. There were criminal proceedings as such the fact that eh advocates clients (the appellants) came in person and ordered no costs means that no costs should be awarded. Looking at the Act only a fine may be awarded.

III. OPINION

25. What I require to look at in this appeal as stated in the introduction is whether the "costs" awarded by one Magistrate but reversed by another Magistrate who originally handled the case can actually be done?

26. It is not disputed that this was a complaint by the employees against their employees against their employers. Both parties engaged legal services of advocates. The employer moved swiftly and reached a settlement with the employees without the participation of their advocates. This at times is in order to allow matters to be amicably settled.

27. Both advocates were notified of this settlement through individual letters written by each employee

and employer and duly signed by them. The crucial letter thereafter is one dated 30 January 2004 and 4 December 2003 that was written to the Chief Magistrate and copied to the two advocates.

28. These two letters signed by the parties in person states the matter has been settled

"with the defendants and hereby withdraw on claim with no orders as to costs".

"**By copy of this letter the advocates on record are hereby accordingly advised".**

29. The position of the law under the former Order III of the Civil Procedure unless is that once a party enters appearance and or appoints an advocate to act for them, it is that advocate who remains on record unless otherwise removed by the parties.

30. In this case, there was nothing wrong for the parties to settle their matters outside court. They must nonetheless notify their respective advocates who on giving their advice required would file a join notice that the case be "marked as settled". The issue of costs would either be agreed, taxed or forego by the parties through their advocates.

31. The grave error that occurred in this matter was the employer and employee filing a notice to discontinue the matter and not their advocates as required by law. This explains the reasons why the registry did not minute this notice to the court file. What the parties would have done is to file a "***notice to act in person***" then file the notice settling the matter.

32. As long as you have advocates on record, it is the advocates who must move the file and write the requisite letter to court, not the parties.

33. The parties seem to have accepted this settlement. The advocates appear to have accepted this settlement but the advocate for the employee wanted his costs. The correct position would have been to appear before the original Hon. Magistrate who handled the matter. Instead, he appeared before another magistrate exparte (although he claims he served the other party, which was denied) and prayed for his costs.

34. This award of costs was granted. The advocate filed his bill of costs. I was this bill of costs that was rejected by the original Hon. Magistrate as he had made no orders as to costs, and the settlement was specifically indicating there was no orders as to costs.

35. The advocate for the employee then brought it to the Trial Magistrate's attention that costs indeed were given by another Magistrate. It was then that the original Hon. Magistrate rejected the orders of costs made by another Magistrate and struck out the bill of costs. Is he permitted to do this? That is the question that the appellants want to be answered.

36. The law is clear that once a matter begins with one Judicial Officer, in this case the Magistrate, the file at all times must be handled by that Original Magistrate (with exceptions).

37. The magistrate who made orders for costs to be awarded upon settlement of the suit relied on what the advocate for employees informed him

"***That the matter had been settled and he wanted his costs. If that Hon. Magistrate had perused the file and letters written by parties, he would have questioned as to why the parties in person had not handled the letter through their advocates. There was thereafter required, if the letters were correctly filed, a minute in the file by the Deputy Registrar of the request to withdraw the case with no orders as to costs. (Ministerial Powers given by the Rules former Order 48 Civil Procedure Rules).***

38. This file as it stands has the above stated anomaly. The important item to not e is the court order of the Magistrate who made orders making eh cause as settled with costs to the applicants/employees. That order once on record cannot be changed unless it is so done by the High Court on appeal or to the same Magistrate to set the orders aside on grounds that the other parties were never there, nor agreed to. The Original hon. Magistrate has no powers to reverse the orders of a fellow Hon. Magistrate. The respondent were to appear and ask for the setting aside of those orders. They did not but instead applied for the striking out of the bill of costs. This application was granted.

39. The agreements by the respondent as stated earlier was, this matter was not a civil case but a criminal case where costs are not awarded. This argument was one rejected by the original Hon. Magistrate and bound the parties to the cause. The Original Trial Magistrate state he had jurisdiction to hear the matter. The parties settled the matter instead of going to trial.

40. I would in my opinion hold that the party's intention was to settle the matter. They were to do so in conjunction with their advocates. Failure to do so, as in this case, the parties are at risk to have further orders.

41. Costs follow the events. The costs herein should have either been agreed on or taxed. The respondent, due to anomaly required to return to the other Hon. Magistrate to set aside the orders of costs. Both advocates are to file a consent and or agreement of their clients settling this matter and the same be minuted. It is only then that the two advocates would deal with the issue of costs. As it stands the original Hon. Magistrate orders amounts to reversing the other Magistrate's orders (as wrong as it may be). The orders are therefore set aside as having been given contrary to the law.

42. The appeal is allowed with costs to the appellants.

JUDGMENT DATED THIS 30TH DAY OF MAY 2011 AT NAIROBI

M. ANG'AWA

JUDGE

Advocates

i. V. O. Oluoch instructed by M/S Oluoch & Co. Advocates for the Appellant - present

ii. G. Maina instructed by M/S H. N. Kamau & Co. Advocates for the Respondent - present