



**Mwenesi v Saga Builder Limited (Appeal E006 of 2022)
[2024] KEELRC 1204 (KLR) (14 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1204 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E006 OF 2022**

**AN MWAURE, J
MAY 14, 2024**

BETWEEN

WYCLIFF KIDAKE MWENESI CLAIMANT

AND

SAGA BUILDER LIMITED RESPONDENT

JUDGMENT

1. The appellant' filed an appeal dated 14th July 2021 being dissatisfied with the judgment of the senior resident magistrate honourable E.K Usuh. The appeal was filed in November 2023.
2. The appellant's submissions are that the learned magistrate erred in fact and law by failing to interrogate the suits CMCC No 1926 of 2013 and CMCC 7009/2015.
3. The learned magistrate erred in fact and law by failing to observe that the plaintiff prosecuted the civil suit no 1926 of 2013 through the firm of Owino & Company without the advocate calling for instruction note to the firm of N.A. Owino & Co Advocates from the appellant.
4. The trial magistrate erred in not considering the plaintiff had not authorised the said advocate and did not know of the existence of the said suit.
5. The trial magistrate erred in law and fact in declaring the claimants suit res judicata and striking it on the grounds of duplicity and referring to a consent which was not adopted by the court.
6. The trial magistrate erred in fact and law in failing to appreciate the consent was not approved by the appellant and the matter cannot be regarded as settled.
7. The trial magistrate erred in declaring the honourable court had no jurisdiction to deal with the matter.
8. The appellant prays for the appeal to be allowed and ruling delivered on 19th May 2017 be set aside and the appellant be allowed to consolidate suit No 1926 of 2013 and 7009/2015.



9. The purported consent be set aside and costs be paid by the respondent.

Appellant's submissions

10. The appellant filed his submissions dated 12th February, 2024 which the honourable court had the privilege to consider.

11. The respondents submissions were also considered by the honourable court and are dated 8th March 2024.

Analysis and determination

12. The court has considered the pleadings as per the memorandum of appeal dated 14th July 2021 and the aforementioned submissions by the respective parties and finds main issue for determination is whether the case is re judicata.

13. The evidence from the respondent is that court lacks jurisdiction to consider this appeal. They rely on the case of *Samuel Kamau Macharia & Another vs Kenya Commercial Bank Limited and 2 Others* (2012) eKLR where court held that courts jurisdiction flows from either the *Constitution* or Legislation and courts cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.

14. The respondents also avers that the appeal is improperly before court as ruling appealed from was delivered on 19th May 2017 and certificate of delay is dated 23rd May 2018. The appeal was filed on 6th November 2023.

15. After certificate of delay was given the appellant did not file the appeal and on 21st November 2021 he made an application to file appeal out time. He was granted that prayer on 23rd November 2021 and was ordered to mention case by the honourable court on 20th January 2022. He filed the record of appeal on 6th November 2023 and so is clear is not in compliance with the provision of the certificate of delay or the court order which allowed him 45 days extension to file appeal out of time. The court holds the appeal was filed out of time and so robs the honourable court jurisdiction to deal with the appeal.

16. As it is trite law that jurisdiction is everything as held in statutory law on time bar and in diverse authorities including Civil Appeal No 139 of 2017 *County Government of Embu & Another vs Eric Cheruiyot & 15 Others* (unreported). In this matter the court holds it lacks jurisdiction to deal with this appeal. There is no justification why the appeal took from 8th February 2017 to November 2023 to appeal the ruling in question.

17. In any event, the appellant did sign a discharge voucher dated 15th July 2015 where he accepted receipt of kshs 250,000/-. There is no evidence that the appellant proved his signature was forged and that he did not sign the discharge voucher in the presence of his advocate N.A. Owino.

18. The trial court therefore held rightly that the case No 7609/2015 was res judicata as an agreement had been reached in case no 1926 of 2013.

19. As it is provided in section 107 of the *Evidence Act* of Kenya "he who alleges must prove" the appellant states he did not authorise the filing of suit 1926/2013. There is no evidence that same was filed without his authority and that the consent entered therein was fraudulently obtained.

20. Further the appellant has not denied knowledge of receipt of the settlement amount being kshs 250,000/-. The court having considered the suit in its entirety finds there are enough reasons to dismiss the appeal and particularly because it was filed way after the time provided and secondly, there is proof



the case was settled via suit 1926/2013. In view of the foregoing, this appeal is not merited and is therefore dismissed.

21. Each party will meet their costs of the lower court proceedings and of this appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 14TH DAY OF MAY, 2024.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the [Civil Procedure Rules](#), which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the [Constitution](#) which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the [Constitution](#) and the provisions of Section 1B of the [Procedure Act](#) (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

