Mbugua v Child Care World Wide (K) & another (Employment and Labour Relations Appeal E025 of 2022) [2024] KEELRC 1182 (KLR) (7 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1182 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

EMPLOYMENT AND LABOUR RELATIONS APPEAL E025 OF 2022

HS WASILWA, J

MAY 7, 2024

BETWEEN

LUCY WAIRIMU MWANGI MBUGUA ..... APPELLANT

AND

CHILD CARE WORLD WIDE (K) ..... 1ST RESPONDENT

BILL NIENHUIS ..... 2ND RESPONDENT

JUDGMENT

1. This appeal arose from the ruling of Honourable Yvonne Inyama, Khatambi delivered on 18th October, 2022 in Nakuru CM ELRC Cause 256 of 2019. Dissatisfied with the Ruling, the Appellant (Claimant in the trial Court suit) lodged this Appeal based on the the following grounds; -

    1. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's Claim for want of prosecution yet the Appellant has always been willing and ready to prosecute her claim to conclusion.

    2. That the Learned Trial Magistrate erred in law in in fact in disregarding the Appellant's pleadings and the Applicant has now been condemned unheard.

    3. That the Learned Trial Magistrate erred in fact in dismissing the Appellant's case without according the Appellant a chance to be heard on merit.

2. The Appellant sought for the following orders; -

    a. That this appeal be allowed with costs.

    b. That the Ruling Delivered by the Honourable Yvonne Inyama Khatambi, on 18th October, 2022 in Nakuru CM ELRC No. 256 of 2019 be quashed, set aside and or varied.

Brief facts.

3. The summary of the facts leading to the impugned ruling is that on 7th April, 2022, the 1st Respondent filed an Application notice of motion dated 31st March, 2022, seeking to have the Claim dismissed for want of prosecution. The grounds upon which the Application was made is that the claimant had taken more that 1 year and 11 months to proceed with her case after the ruling delivered by the Court on 3rd March, 2020.

4. It is stated that the Application was served upon the claimant's Advocates but they did not put a response and on 18th October, 2022, when the matter was coming up for hearing, the Claimant and/or her advocate was not in attendance and the Court allowed the Application as unopposed, in effect the suit in the trial Court was dismissed for want of prosecution.

5. On 16th November, 2022, the Claimant filed an Application of even date, seeking to set aside the Orders of the Court of 18th October, 2022, dismissing the suit for non-attendance and having the suit reinstated for hearing on its merits. The Claimant's explanation for non-attendance is that, she was unwell and her Advocates on record had several matters virtually on that day, hence the case herein slipped through the Internet connectivity challenges as such the non-attendance was not deliberate.

6. Honourable Orenge, certified the Application urgent on 16th November, 2022 and directed hearing of the same to be done before the trial Court on 28th November, 2022. Contemporaneously, the Appellant herein filed this Appeal on 16th November, 2022.

7. The Appeal herein was canvassed by written submissions, with the Appellant filling on 21st March, 2024 and the 1st Respondent filed on 30th March, 2024,

Appellant's Submissions.

8. The Appellant submitted from the onset, that he was employed by the 1st Respondent on 12th January, 2000 and Confirmed on 26th April, 2000. That she worked diligently until sometimes in 2019 when she became ill and on 11th April, 2019, she submitted a medical report of her ailment. However, That the Respondent proceeded to terminate her services on 7th May, 2019. She stated that as soon as, she was dismissed, she filed the trial court suit on 5th August, 2019, an indication, that she has always been keen in prosecuting her case.

9. The Appellant on that note, submitted on two issues; whether the Appellant's case ought to be reinstated since the Appellant's suit was dismissed without according the Appellant a chance to prosecute her claim to conclusion and whether the Appellant is being condemned unheard.

10. On the first issue, the Appellant cited the Court of Appeal case of *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR whereby Waki(J.A), Warsame(J.A) and Makhandia(J.A) opined that the mistakes of a counsel ought not be visited upon an innocent litigant and that the door of justice is not closed on account of an advocate's mistake.

11. Accordingly, that the trial court suit came up for hearing of an application by the Respondents dated the 31st March 2022 on the 18th October, 2022, which was allowed on grounds that neither the Appellant nor her Counsel on record attended Court. It is argued that the non-attendance by the Appellant and its counsel was not deliberate. He explained that the Appellant was indisposed while the Appellant's Counsel on record was juggling between different Courts and also having internet hitches within the Microsoft Teams platform.

12. The Appellant submitted that, she is desirous of pursuing this claim to its logical conclusion and urged this Court to to ensure justice for all is upheld without undue regard to technicalities as provided for under Article 159(2(d) of the *Constitution* of Kenya, 2010. In support of this, the Appellant relied on the case of *Bamanya v Zaver* [2002]EA 329 where the Court stated thus:

> " The conduct of former lawyers totally messed up the Applicant who was not a lawyer. He reiterated that mistakes, faults/lapses or dilatory conduct of counsel should not be visited on the litigant. Even if it is accepted that the applicant was somehow at fault lit was only 1% and the rest put on his former advocates...Errors or faults of counsel should not necessarily debar a litigant form enforcing his rights."

13. The Appellant further relied on the case of *Mary Wambui Ngaari v Centers For International Programs Kenya* [2017] eKLR whereby, the Honorable Judge in dismissing the application by the Respondent seeking to dismiss the Claimant's suit for want of prosecution, opined that :

> " ,..In view of the fact that ends of justice would be met by hearing both parties, I will dismiss the application before Court. I will allow parties to ventilate this case and the Court to give a proper determination on merit thereafter..."

14. On that basis, the Appellant urged this to reinstate the suit dismissed as the Appellant has not been accorded a chance to prosecute her claim.

15. On whether the appellant is being condemned unheard, it was contended that this suit was never determined on merit because the Appellant was never given a chance to prosecute this claim to conclusion in line with her right under Article 50 (1) of the *Constitution*.

16. It was submitted that the Appellant's claim has triable issues with high chances of success. Moreover, that the Respondents stand to suffer no prejudice if the appeal is allowed. Additionally, that the mistakes of a previous Counsel ought not be visited on an innocent litigant and that ends of justice will be met by according each party an opportunity to ventilate their case rather than focusing on technicalities. In this, she relied on the case of *Raila Odinga v. I.E.B.C & others* [2013] eKLR, where the Supreme Court observed thus:

> " ...that Article 159(2) (d) of the *Constitution* simply means that a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the Court..."

17. The Appellant also cited the decision by Ngugi. J (as he then was) in *MWK Vs. AMW* [2016] eKLR where the learned Judge cited the Court of Appeal decision in *Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited* [2005] KLR 97 and rendered himself thus:

> " Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper

or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata."

18. Based on the foregoing, the Appellant urged this Court to allow the Appeal herein and order for the prosecution of her case on merit.

Respondent's Submissions.

19. The Respondent on the other hand submitted on three issues; whether there is a Competent Appeal before this Court, whether the instant Appeal ought to be struck out with costs and whether the Ruling given on 18th October 2022 and the Court order issued on 14th December 2023 ought to be set aside.

20. On the first issue, the Respondent argued that Order 43 of the *Civil Procedure Rules* outlines Applications from which Appeals shall lie as of right and Applications from which leave ought to be sought before an Appeal can be filed. Accordingly, that applications brought under Order 17 Rule 2, seeking to dismiss a suit for want of prosecution does not lie as of right. In support of this position, the Respondent cited the decision by Justice J.B Havelock (as he then was) in *Euro Bank Limited In Lleuidaiton v Shah Munge & Partners Ltd* [2012] eklr where while addressing an issue of similar nature stated that;

> " Order 43 (2) of the *Civil Procedure Rules* 2010 provides that an Appeal shall lie with leave of the Court from any other order made under these Rules...In my opinion that Rule would cover an Order made by the Court under Notice to Show Cause why the suit should not be dismissed under Order 17 Rule 2 of the Civil Procedure Rules 2010."

21. Similarly, that Justice J.G Kimei was of a similar view as he stated in the case of in *David Kariuki Ndirangu v Magdalene Wambui Ndirangu & Another* [2019] eKLR where while addressing an Appeal instituted against the Ruling of an Application brought under Order 17 Rule 2 of the *Civil Procedure Rules* stated that; -

> " That the instant appeal falls within the meaning of Order 43 of the *Civil Procedure Rules* which require appeals emanating from applications under Order 17 Rule 2 (2) (3) to be lodged with leave of the Court. Leave in this instant appeal was not sought and not granted hence the appeal before the Court is improper. This is an appeal against a ruling in an application emanating from Order 17 rule 15 (2 and 3 of the *Civil Procedure Rules*). I have had a relook at the relevant order and it is Order 17 Rule 1(2). Guided by Order 50 Rule 10 the Court finds that quoting the wrong provisions of the *Civil Procedure Rules* is not fatal to the appeal. In particular Rule 2) states that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application. It is the view of the Court that this one does not. Having said that Order 43 sets out instances where a party to an appeal requires to seek and obtain leave of the Court to file an appeal. The opening preamble of Order 43 states as follows; "an appeal shall lie as of right from the following orders under the provisions of section 75(1)(h) of the *Civil Procedure Act*."
>
> The specific orders which do not require leave have been listed deliberately thereunder. The provision goes on to state under sub rule 2 that an appeal shall lie with the leave of the Court

from any other order made under these rules. Section 75 of the *Civil Procedure Act* states as follows:

> " An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the Court making such order or of the Court to which an appeal would lie if leave were granted;
>
> (a) .....
>
> (b) .....
>
> (h) any order made under rules from which an appeal is expressly allowed by rules".

My reading of the above provisions of the law indicates that any appeal arising from Order 17 requires leave of the Court. The wording of the *Civil Procedure Rules* and *Civil Procedure Act* are mandatory. To the extent that the Appellant failed to seek and obtain leave of the Court renders the appeal incompetent. It deprives the Court the jurisdiction to hear the appeal. Having found that there is no competent appeal before me, the sensible thing to do in the circumstance is to strike out the appeal which I do with costs to the Respondents."

22. The Respondent reinforced its argument by citing the case of *Ita Nguru & Another v Josphat Njue* [2018] eKLR and the case of *National Bank of Kenya v Maurice Onyango Okongo* [2018] eKLR where the court, while striking out an Appeal of similar nature, stated as follows;

> " Respondent holds the view that this appeal is incompetent on account of appellant's failure to seek leave contemplated under the provisions of Section 75 and 76 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules.* Appellant did not submit on the issue of leave to appeal. I have carefully examined Section 75 and 76 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules* and I find no provision that confers upon the appellant the "right of appeal" under Order 17 rule 2(3) of the *Civil Procedure Rules*. The record does not show that any leave to appeal was sought or obtained after the impugned ruling and before filing of this appeal. In my view, it is that leave which confers this court with the jurisdiction to hear the appeal. Jurisdictional issues are not matters that fall in the category of procedural technicalities. They go to the root of the matter for without jurisdiction, this court or any other court would do no one more thing than down its tools... Appellant has no right to appeal except with leave. Only leave, when obtained, would confer jurisdiction to this court to hear and determine the merits of this appeal. No leave was either sought or granted. The appeal is therefore a nonstarter in limine."

23. Accordingly, that this Court lacks jurisdiction by dint of the fact that leave to appeal has not been sought as required under Order 43 of the *Civil Procedure Rules* and Section 75 of the *Civil Procedure Act*. Therefore, that the Court ought to strike out the Appeal with costs to the Respondent.

24. On available remedy for the Appellant herein, the Respondent argued that the only remedy available for the Appellant is applying to set aside the ex parte orders under Order 51 Rule 15 of the *Civil Procedure Act* because her right of appeal can only crystallize if they had made that application as contemplated under Order 51 Rule 15 and the Court declined to set aside. For the reason that the Appellant has not exhausted that avenue, the Appeal is incompetent.

25. The Respondent urged this Court to strike out this appeal for being incompetent, bad in law or else so fundamentally flawed.

26. I have examined the averments and submissions of the parties herein. The gist of this appeal is that the appellant contends that she was condemned unheard. She avers that the reason why she didn't prosecute her claim in the lower court was because she was unwell and her counsel on record missed court appearance due to challenges in network connectivity.

27. I have looked at the lower court's record and note that on 18/10/2022, the parties appeared before the lower court for hearing of an application to dismiss the claim against the Respondent for want of prosecution. The Claimants were however absent and the trial court allowed the application as being unopposed and dismissed the claim for want of prosecution.

28. The Claimant thereafter filed an application dated 16/11/2022 seeking to reinstate her claim and set aside orders dismissing the claim of 18/10/2022. This application was however never presented before the lower court. The appellant claimant also filed this appeal seeking similar orders.

29. In determining this appeal, I note that the claim by the appellant was dismissed for non-appearance. Whereas the lower court may have heard good reason to allow the application and dismiss the claim, it is apparent that the dismissal was purely based on a technicality as opposed to consideration of substantive issues.

30. The principle of access to justice envisages that a party should never be condemned unheard and a party should be heard in order to submit their case whether merited or not or whether it can be determined in their favour or not.

31. The appellant has indicated that she was unwell and her counsel had internet challenges. I take judicial notice of the fact that indeed at times there are connectivity challenges and a Claimant should not be closed out of their case and should be allowed to feel they have been heard whether in their favour or against them.

32. In the circumstances of this appeal, it is my finding that the Claimant appellant should be granted an opportunity to be heard. I therefore allow the appeal, set aside orders dismissing the appellant's case and direct that the claim be remitted back for hearing before the lower court on merit. Costs to be in the claim.

JUDGEMENT DELIVERED VIRTUALLY ON THE 7TH DAY OF MAY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE.

In the presence of: -

Nyasetia for Appellant – Present

Matiri for Respondent – Present

Court Assistant - Fred