



**Kuria & another v Ongoi (Miscellaneous Application E012 of 2024)
[2024] KEELRC 2014 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 2014 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E012 OF 2024**

BOM MANANI, J

JULY 25, 2024

BETWEEN

PATRICK NJIRU KURIA 1ST APPLICANT

PALEAH STORES LIMITED 2ND APPLICANT

AND

CLEMENT ONDIBA ONGOI RESPONDENT

RULING

1. The Applicants have filed the instant application seeking the following orders:-
 - a. That the court certifies the matter as urgent.
 - b. That the court issues an order staying execution of the decree in Thika CMCC E 221 of 2021 (Clement Ondiba Ongoi v Patrick Njiru Kuria and another) and restrains the Respondent from disposing off the attached motor vehicle registration number KCX 089G pending the hearing of the application inter-partes.
 - c. That the court calls for the proceedings in Thika CMCC E 221 of 2021 (Clement Ondiba Ongoi v Patrick Njiru Kuria and another) to interrogate their correctness and to make any appropriate orders to facilitate the fair administration of justice.
 - d. That pending inter-partes hearing of the application, the court issues an order for the unconditional release of motor vehicle registration number KCX 089G to the Applicants.
 - e. That the court finds that the suit before the trial court was an abuse of the court process for want of jurisdiction.
 - f. That the court grants any other orders as are just and expedient with a view to dispensing justice.



- g. That costs of the application be in the course.
2. The genesis of the application is the trial that took place before the Magistrate's Court at Thika in Thika CMCC E 221 of 2021 (Clement Ondiba Ongoi v Patrick Njiru Kuria and another). The Applicants contend and the Respondent admits that the latter instituted the above cause to pursue compensation following a road traffic accident on 13th September 2020 which involved the Respondent and a motor vehicle that was, at the time, registered in the 2nd Applicant's name.
 3. It would appear that the trial proceeded in the absence of the Applicants. According to the Respondent, although the Applicants were served with summons to enter appearance in the matter, they failed to do so prompting the ex-parte proceedings. On their part, the Applicants contend that they were not served with the summons to enter appearance in the matter.
 4. The record shows that when the Respondent obtained judgment, he moved to enforce the court's decree by way of attachment of property that belongs to the Applicants. It is this action that prompted the Applicants to lodge the application dated 23rd October 2023 before the trial court seeking to have the ex-parte judgment set aside.
 5. It appears that the trial court heard the application ex-parte in the first instance. The court ordered the Applicants to deposit security of Ksh. 1,000,000.00. Meanwhile, it (the court) set the application for inter-partes hearing at a later date.
 6. It would appear that the Applicants were unable to comply with the trial court's conditions for stay of execution. They did not deposit the security of Ksh. 1,000,000.00 as ordered.
 7. According to them, since the impugned proceedings were taken without service of summons to enter appearance on them, they are entitled to have the resultant orders set aside as a matter of right. As such, the trial court was wrong in imposing conditions on their request for stay of execution.
 8. The Applicants also blame their failure to comply with the trial court's orders on the harsh economic conditions. According to them, this did not allow them to raise the security ordered within the timeframe that was set by the trial court.
 9. As a result of the foregoing, the Applicants moved to the High Court sitting at Thika to challenge the trial court's orders through Civil Appeal No. E042 of 2023. Contemporaneous with the said appeal, the Applicants filed an application for stay of execution and or injunction in which they sought substantially the same orders as those in the application before me. They inter alia argued that the trial court's decision was a nullity since the court did not have jurisdiction to entertain the case. According to them, the suit accident arose in the course of employment. As such, the Respondent ought to have lodged his claim with the Director of Occupational Safety and Health under the [Work Injury Benefits Act](#) and not the Magistrate's Court.
 10. In addition to the challenge on the trial court's jurisdiction, the Applicants also argued before the High Court that they were not served with summons to enter appearance in the cause. As such, they were entitled to have the resultant proceedings and judgment set aside as a matter of right. Therefore, it was improper for the trial court to have required them to deposit security of Ksh. 1,000,000.00.
 11. After hearing the arguments on the application, the High Court observed that the Applicants had not placed before it the record of proceedings before the trial court to enable it (the High Court) to evaluate the factors which the trial considered before it rendered its decision. The High Court noted the Respondent's contention that although the Applicants had contended that the Respondent was their employee and therefore precluded from instituting the case before the trial court, they did not



provide proof of the employment relation. Thus, the High Court was unable to address the question of jurisdiction at the stage of the application.

12. After considering the foregoing, the High Court arrived at the conclusion that the Applicants had failed to demonstrate that they had met the conditions for the grant of the orders sought. However, the court allowed them to set down their appeal for hearing to enable it interrogate the matters it could not determine at the interlocutory stage.
13. In what appears to be a strange turn of events, the Applicants abandoned pursuit of the litigation before the High Court and filed the instant miscellaneous application. As noted earlier, the application seeks substantially the same orders as were sought before but declined by the High Court.
14. The Respondent contends that this is a typical case of abuse of the court process. According to it (the Respondent), the matters which the Applicants ask this court to address are the very same ones which they raised before and were determined by the High Court sitting at Thika. As such, they are res-judicata and not available for reopening by this court.

Analysis

15. I have considered the contrasting arguments in the application. It is clear to me that the Applicants moved the trial court to set aside the ex-parte proceedings that had been conducted before it and for stay of execution of the resultant judgment. It is apparent that the trial court gave a conditional stay order which the Applicants did not comply with.
16. It is apparent that the Applicants filed an appeal against the trial court's orders to the High Court sitting at Thika. It is also apparent that in the appeal, the Applicants filed an application for interim relief in which they sought stay pending appeal on the grounds that summons to enter appearance were not served on them and that the trial court did not in any event have jurisdiction to entertain the case since the matter was supposed to have been lodged with the Director of Occupational Safety and Health.
17. It is apparent that after hearing the Applicants, the High Court rejected their request for interim relief. The court observed that the Applicants had not placed before it the proceedings and ruling of the trial court to enable it (the High Court) discern how the trial court adjudicated on the issues in contention. As such, it was impossible to verify the nature of the evidence presented before the trial court.
18. By this, I understand the High Court to have been saying that it was unable to determine the question of jurisdiction for want of evidence. It is noteworthy that whilst the Applicants asserted that the Respondent was their employee, this fact was not admitted by the Respondent. Therefore, the court (High Court) could not have proceeded on assumptions to arrive at the conclusion suggested by the Applicants.
19. Importantly, the High Court having pronounced itself on the issues that have been placed before me, it would be inappropriate for me to ignore this fact and purport to determine the same issues. To do so would be tantamount to sitting on appeal on a decision of a court of equal status, an eventuality which the law does not countenance.
20. If the Applicants felt that the manner in which the High Court handled their grievance was unsatisfactory, the proper course of action was for them to file an appeal to the Court of Appeal. It was not open to them to abandon the proceedings before the High Court and move to this court with typically the same request. Such conduct smirks of abuse of the judicial process.
21. The other matter of concern relates to the manner in which the Applicants have moved this court. As the record shows, they moved the court through a miscellaneous application purporting to ask the



court to call for and examine the correctness of the record before the trial court. I do not think that it was open to them to do so.

22. Even if it were true that the trial court did not have jurisdiction to adjudicate on the matter, the right procedure for challenging the proceedings would be through an appeal to the appellate court. There is no rule of procedure which permits a challenge to a decision by a Magistrate's Court exercising civil jurisdiction to be mounted through a miscellaneous application. The High Court or Court of Equal Status can only entertain such challenge through an appeal.
23. The Applicants have purported to rely on articles 165(6) of the *Constitution* to argue that the court has power to nullify proceeding by the Magistrate's Court which are undertaken without jurisdiction. The Applicants have also cited decisions by this court in which decisions by trial courts which were rendered in excess of their jurisdiction were declared a nullity.
24. It is true that the High Court and courts of Equal Status may declare a decision by a trial court which was rendered in excess of its (the trial court's) jurisdiction a nullity. However, such order can only be issued in proceedings which have been properly commenced through an appeal and not through a miscellaneous cause.

Determination

25. The instant application raises the same issues which are the subject of litigation in Thika High Court Civil Appeal No. E042 of 2023.
26. In an interlocutory application in the aforesaid appeal, the High Court considered the issues in contention and rendered a ruling on them dated 30th November 2023.
27. As such, the instant application is res-judicata and therefore an abuse of the court process.
28. In any event, the instant proceeding were improperly commenced through a miscellaneous application.
29. The only recourse which would have been open to the Applicants would have been to lodge an appeal to this court through which the issue of jurisdiction would have been raised. This is assuming that the appeal to the High Court had not been lodged.
30. As such, the application is in any event incompetent and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 25TH DAY OF JULY, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicants

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

JUDGE

