



**Bakeville Limited v Omar (Appeal E017 of 2024)**  
**[2025] KEELRC 2936 (KLR) (29 October 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2936 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**APPEAL E017 OF 2024**  
**NZIOKI WA MAKAU, J**  
**OCTOBER 29, 2025**

**BETWEEN**

**BAKEVILLE LIMITED ..... APPELLANT**

**AND**

**AHMED SAID OMAR ..... RESPONDENT**

*(Being an appeal from the Ruling of Hon. Maureen Shimenga (SPM)  
delivered on 25th April 2024 in Kisumu CMC ELRC No. E089 of 2023)*

**JUDGMENT**

1. The present appeal arises from the Ruling of the Honourable Magistrate delivered on 25<sup>th</sup> April 2024 in which the Court dismissed the Appellant's application dated 30<sup>th</sup> January 2024. Through that application, the Appellant sought to set aside the Magistrate's order of 29<sup>th</sup> January 2024 closing both its case and that of the Respondent. The Appellant further prayed for a stay of the directions issued on the same date regarding the filing of written submissions, and for leave to be granted to enable it to respond to the claim. Upon grant of such leave, it also sought that the draft statement of response be deemed as duly filed upon payment of the requisite fee. The trial court dismissed the application on 25<sup>th</sup> April 2024, holding that the Appellant had filed submissions one month after leave had been granted, which in its view demonstrated a lack of diligence in prosecuting the matter.
2. Aggrieved with that ruling the Appellant lodged the present appeal on the following grounds:
  - a. The Learned Magistrate grossly misdirected herself in failing to consider the submissions of the Appellant with respect to the application dated 30<sup>th</sup> January 2024 despite the said submissions having been filed.
  - b. The Learned Magistrate grossly misdirected herself in dismissing an application that was unopposed by the failure by the Respondent to file and serve a Replying Affidavit to the



application as was directed by the Court vide the orders and directions issued on 14<sup>th</sup> March 2024.

- c. The Magistrate grossly misdirected herself by denying the Appellant a chance to be heard on grounds of a technicality that was curable as at that time despite the Appellant having presented himself in Court on the hearing date.
  - d. The Magistrate misdirected herself in ignoring the principles applicable and the relevant authorities cited in the written submissions filed in support of the application.
  - e. The Magistrate erred in not sufficiently taking into account the circumstances surrounding the filing of the submissions and not considering that the delay was occasioned by the Respondent not filing their replying affidavit.
  - f. The Magistrate erred in failing to hold that the Appellant had prepared all the documents and thus was ready to take their case before the technical issue of service and exchange of documents arose.
  - g. The Magistrate proceeded on wrong principles (if any) when the ex parte judgment was entered against the Appellant despite the memorandum of appearance having been filed and served on the Respondent's advocate.
  - h. The Magistrate erred in law by failing to appreciate the Appellant's rights as captured under Article 159 of *the Constitution* and denying the Appellant a chance to be heard in order to make a fair and just determination in the matter.
  - i. The Magistrate misdirected herself on the issues of law by basing her determination on the submissions having not been filed in time yet the application itself had not been opposed.
  - j. The Magistrate failed to apply judicially and to adequately evaluate the evidence and exhibits tendered and thereby arrived at a decision unsustainable in law by disallowing the application to set aside the orders and ex parte judgment.
3. On the basis of these grounds, the Appellant prays that this Court allows the appeal with costs and sets aside the judgment delivered on 8<sup>th</sup> April 2024.
  4. Pursuant to directions issued on the disposal of the appeal, both parties filed written submissions.

### **Appellant's Submissions**

5. The Appellant urged this Court, as the first appellate court, to re-evaluate the evidence on record and draw its own conclusions, guided by the principles set out in the cases of *Selle & another v Associated Motor Boat Co.* [1968] EA 123, *Susan Munyi v Keshar Shiani* [2013] eKLR, and *David Kahuruka Gitau & George Kuria v Nancy Ann Wathithi Gitau & Mercy Wangui Ng'ang'a* [2016] KEHC 6964 (KLR). The Appellant submitted that refusal to hear the application on its merits drove it from the seat of justice. It highlighted that it had complied with all pre-trial directions and exchanged documents with the Respondent's counsel. However, when the matter came up for hearing on 29<sup>th</sup> January 2023, the Court stood down the Appellant's witness and closed its case on account of non-compliance.
6. The Appellant further submitted that despite the application having been filed under certificate of urgency, it was not heard expeditiously. Instead, the Court on 14<sup>th</sup> March 2024 directed the Respondent to file a replying affidavit within seven days, which was not done. Nevertheless, the court proceeded to enter interlocutory judgment on the same date before the application had been heard. It asserted that these events violated its right to a fair hearing under Articles 47 and 50 of



the Constitution. It maintained that the Trial Court ought to have exercised its discretion judiciously to allow reopening of the case, noting that the inadvertent failure to upload documents had been explained in the supporting affidavit. Reliance was placed on *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] eKLR, which stated as follows on exercise of discretionary powers:

“It is settled law that whenever a Court is called upon to exercise its discretion, it must do so judiciously... judicious because the discretion to be exercised is judicial power derived from the law and as opposed to judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by Court to do real and substantial justice to the parties in the suit.”

7. In addition, for the proposition that that parties should not be penalized for counsel’s mistakes, the Appellant cited *Phillip Chemwolo & another v Augustine Kubede* [1982-88] KLR 103, in which it was stated:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit”

8. It was further submitted that closure of its case without consideration of the evidence offended the principles of natural justice. The Appellant relied on *Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 others* [2018] KECA 41 (KLR) which held:

“The Rules of Natural Justice require that the court must not necessarily drive any litigant from the seat of justice without a hearing, however weak his or her case may be...”

9. Finally, the Appellant submitted that its application did not introduce new evidence but only sought to admit documents already exchanged but inadvertently omitted from the CTS. It relied on *Joseph Ndungu Kamau v John Njihia* [2017] eKLR to urge the court to exercise its discretion to reopen the case where necessary to meet the ends of justice. In conclusion the Appellant urged this Court to allow the appeal, set aside the ruling of the Magistrate, admit the Appellant’s documents, reopen the case, and remit the matter for hearing on the merits.

### **Respondent’s Submissions**

10. The Respondent opposed the appeal, asserting that the application was not unopposed as alleged, pointing to a replying affidavit dated 6<sup>th</sup> January 2024 and submissions dated 25<sup>th</sup> March 2024. It urged the Court to disregard the Appellant’s prayer to set aside the judgment of 8<sup>th</sup> April 2024, contending that the application neither sought to arrest the judgment date nor to set aside the judgment. The Respondent further submitted that the Appellant’s application offended Orders 3, 7, and 11 of the Civil Procedure Rules on pre-trial directions. He asserted that the Appellant had ample opportunity to comply with pre-trial directions but failed to do so despite several mentions. In particular, on 13<sup>th</sup> July 2023, the Appellant was granted 14 days to comply but did not, and on 18<sup>th</sup> September 2023, it set the matter down for hearing despite non-compliance. It was also contended that the application was res judicata, the trial court having earlier denied an oral application seeking similar relief. The Respondent maintained that admitting documents after close of his case without leave would have been prejudicial, amounting to trial by ambush. He asserted that the Appellant had not demonstrated that the documents were unavailable during pretrial. To buttress his position the Respondent relied on *Railway Corporation v E.A Road Services Limited* [2015] eKLR, which frowned upon late filing of documents without leave after close of the Plaintiff’s case, stating that it should only be allowed in



exceptional circumstances to prevent trial by ambush. He also cited *Alois Oceano D'sumba v Rajkant Narshi Shah & another* [2017] eKLR, which underscored the filing of documents within the 14-day timeline under Order 2 Rule 13 of the Civil Procedure Rules, failure to which leave must be sought before hearing commences. The Respondent maintained that it would be unjust to allow the documents given the Appellant's failure to comply well past the date fixed by court without extension or consent based on *Topen Industries Limited v Afrolite Industries Limited* [2003] KECA 101 (KLR). Additional reliance was placed on the case of *Menze and others v Matata* [2003] 1 EA 151, which held that wilful disregard of compliance that causes an impediment to the cause of justice could preclude a party from setting its defence.

11. The Respondent further submitted that the Appellant had demonstrated a disregard of court orders, which must be obeyed to preserve the rule of law. It cited *Republic v County Chief Officer, Finance & Economic Planning Nairobi City Ex-parte Stanley Muturi* [2018] KEHC 8748 (KLR), which emphasized that court orders are not for cosmetic purposes. The Respondent also cited the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828 which in reference to *Gulabchand Popatlal Shah & another Civil Application No. 39 of 1990* (unreported) underscored the obedience of court orders as an essential for maintenance of the rule of law and the dignity of courts. Further fortifying this position, he relied on *A.B & R.B Civil Application No. 4 of 2016* [2016] eKLR, and *Republic v County Chief Officer, Finance & Economic Planning Nairobi City County (Ex Parte David Mugo Mwangi)* [2018] eKLR. In conclusion, the Respondent urged the Court to dismiss the appeal with costs and to release the security deposit of Kshs. 456,000/- held by the court.

## Disposition

12. The Court has considered the law and authorities cited as well as the rival arguments and comes to this determination. In the matter before me, the Appellant did not take some steps. Consequently, the Learned Magistrate found against the Appellant precipitating this appeal. The Appellant asserts that its right to a fair hearing under Article 50 was impacted and that the Court should find that in light of Article 159 there was a patent miscarriage of justice deserving of censure by this Court and a total reversal of the findings in the Trial Court. Article 159 of *the Constitution* is no excuse for a party to fail to adhere to directions of a Court. It ought and must never be elevated to a fetish. Indolence in legal proceedings is a choice. It is the party's "mta do?" and emphatic endorsement of the laissez faire attitude of the Appellant.
13. In the matter before the Learned Magistrate, the Appellant failed to take steps and causally asserts its rights were impacted. When one is litigating in an adversarial system such as ours, the proper thing to do is take requisite steps as and when they are due. The Learned Magistrate gave the Appellant an opportunity to be heard and the Appellant declined that invitation citing Article 50 - that cannot fly. The Appellant now beseeches this Court to reverse the Learned Magistrate offering 10 grounds which all demonstrate the inability of the Appellant to comprehend that it was entirely to blame and not the Magistrate.
14. The failure to file submissions on time as directed by the Learned Magistrate was consequential and this Court sees no need to review point by point the failure by the Appellant to abide by Court directions which led to the motion in the Trial Court being decided against the desire of the Appellant. As I find the entire appeal to this Court without any merit I dismiss the appeal with costs to the Respondent. I affirm the findings of the Lower Court which were not made in any error and where no caprice or misdirection was evident. Appeal is accordingly dismissed with costs to the Respondent. The security deposit of Kshs. 456,000/- held by the Court is hereby released.



Orders accordingly.

**DATED AND DELIVERED AT KISUMU THIS 29<sup>TH</sup> DAY OF OCTOBER 2025**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

