



Esebwe v Pyramid Packaging Co. Limited & another (Employment and Labour Relations Appeal E053 of 2022) [2025] KEELRC 2925 (KLR) (23 October 2025) (Judgment)

Neutral citation: [2025] KEELRC 2925 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
EMPLOYMENT AND LABOUR RELATIONS APPEAL E053 OF 2022
MA ONYANGO, J
OCTOBER 23, 2025**

BETWEEN

ANDREW MUSIGANE ODINDO ESEBWE APPELLANT

AND

PYRAMID PACKAGING CO. LIMITED 1ST RESPONDENT

BALE CONSULTANTS LIMITED 2ND RESPONDENT

(Being an appeal against the Ruling of Honourable R. Odenyo, Senior Principal Magistrate delivered on 3rd November, 2022 in Eldoret CMELRC No. 265 of 2019)

JUDGMENT

1. This Appeal arises from a ruling delivered by the trial court in Eldoret CMELRC No.265 of 2019 on the 3rd November 2022.
2. A brief background is that, vide a Statement of Claim dated 6th July 2019, the Appellant instituted proceedings against the Respondents seeking compensation for alleged unfair and unlawful summary dismissal from employment. The Appellant sought the following remedies: -
 - a. A declaration that the summary dismissal of the Claimant from his permanent employment by the Respondent was malicious, unlawful, unfair, unprocedural and fundamentally violated the rights of the Claimant
 - b. A declaration that the Claimant was entitled to house allowance
 - c. A declaration that the Claimant is entitled to one month salary in lieu of notice
 - d. A declaration that the Claimant is entitled to National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF) for the period worked.



- e. A declaration that the Claimant is entitled to his dues, compensation, damages, benefits as a result of wrongful dismissal from the employment
 - f. A maximum compensation of 12 months as per section 49(c) of the [Employment Act](#) and section 12 of the [Employment and Labour Relations Court Act](#)
 - g. Damages and terminal dues as per the calculations in the statement of Claim
 - h. Loss of earning of salary for a period of 12 years that the Claimant would have worked until the statutory retirement age of 60 years
 - i. A Certificate of Service as per section 51 of the [Employment Act](#)
 - j. Costs of this suit from the date of filing until its full determination
 - k. Any other relief the Honourable Court may deem just and fit to grant.
3. The 1st Respondent filed a Memorandum of Response dated 4th February 2020 denying that the Appellant herein was its employee.
 4. Before the matter was set down for hearing, the 1st Respondent filed an application dated 30th July 2021 seeking an order that the Appellant's claim be struck out with costs to the 1st Respondent for being time barred.
 5. The grounds upon which the application was premised were that the Appellant was initially engaged by the 1st Respondent in the year 1997 where he worked on a contractual basis until 1999 when he deserted duty; that the Appellant was re-engaged by the 1st Respondent he worked until 2007; that the Appellant again deserted employment in November 2007 and has never worked for the 1st Respondent to date; that the 1st Respondent subcontracted a lot of its human resource functions to the 2nd Respondent in the year 2011 including the work that was initially done by the Appellant; that the Appellant re-applied for employment on 26th October 2011 and he was directed to the 2nd Respondent; and lastly, that the Appellant thereafter applied for employment to the 2nd Respondent and was employed on a contract basis and deployed to work at the 1st Respondent's premises where he continued to work until 22nd July 2016 when he again deserted employment.
 6. The trial court delivered its ruling on 3rd November, 2022 allowing the 1st Respondent's application.
 7. The Appellant (Claimant in the lower court) was aggrieved by the said ruling and filed the instant appeal vide the Memorandum of Appeal dated 2nd December 2022 on the grounds that: -
 - a. The learned Magistrate erred in law and fact and rendered a decision that struck out with costs the Appellant's claim against the 1st Respondent.
 - b. The learned Magistrate erred in law and fact and failed to appreciate the proper effect and purport of enjoining the 1st Respondent to the instant suit and arrived at a decision which is not supported by the Law.
 - c. The learned Magistrate erred in law and fact and failed to consider the fact that the 1st and the 2nd Respondents were sued jointly and severally.
 - d. The learned Magistrate erred in law and fact by failing to act judiciously and hence failing to properly appreciate the fact that the 1st Respondent, Pyramid Packaging Ltd is the principal of the 2nd Respondent, Bale Consultants Ltd.



- e. The learned Magistrate erred in law and fact by failing to act judiciously and hence failing to properly appreciate the fact that the 1st Respondent,nd Respondent, Bale Consultants Ltd jointly and severally employed the Claimant/Appellant.
 - f. The learned Magistrate erred in law and fact by failing to act judiciously and hence failing to properly appreciate the fact that the 2nd Respondent, Bale Consultants Limited were the employing agencies and employing agency for the 1st Respondent
 - g. The learned Magistrate erred in law and fact by misapprehending the evidence on record and applying the wrong principles of law and rendered a decision that is incompetent and not supported by evidence and law.
 - h. The learned Magistrate erred in law and fact by misapplying the provisions of the employment law and/or procedural law rendered a decision that is incompetent and not supported by evidence and law.
 - i. The learned Magistrate erred in law and fact by failing to act judiciously and hence failing to properly appreciate the fact that the claimant was jointly and severally employed by the 2nd Respondent, Balest Respondent, Pyramid Packaging Ltd and that he worked from the premises of the said 1st Respondent.
 - j. The learned Magistrate erred in law and fact by summarily dismissing the Appellant's Claim against the 1st Respondent.
 - k. The learned Magistrate erred in law and fact in dismissing the Plaintiff's/Appellant's claim against the 1st Respondent in total disregard of the provisions of *the Constitution*, the Statutory Law, the Employment Law, the Case Law and the submissions tendered therein.
8. Consequently, the Appellant prayed that this appeal be allowed and the ruling given on 3rd November 2022 be set aside and the Respondent's application dated 30th July 2022 be dismissed with costs.
 9. The appeal was disposed of by way of written submissions. The Appellant's submissions are dated 18th March 2025 while the Respondents submissions are dated 6th May 2025.

The Appellant's submissions

10. In his submissions, the Appellant asserted that the striking out of his claim amounted to a summary determination of substantive issues, contrary to the principles set out in *D.T. Dobie & Co (K) Ltd v Muchina* [1982] KLR 1. He contended that parties should be allowed to ventilate their cases fully through evidence rather than being locked out at a preliminary stage.
11. The Appellant maintained that he sued both the 1st and the 2nd Respondents jointly, as both were responsible for his dismissal. It was his submission that he worked at the 1st Respondent's premises and that the 2nd Respondent acted as its employing agency.
12. The Appellant submitted that only through a full hearing could the Court determine who between the two Respondents was liable for his unfair dismissal.
13. The Appellant relied on Order 1 Rule 7 of the Civil Procedure Rules, which permits joint suits, and maintained that the trial court erred in striking out the 1st Respondent when its role was central to the dispute.



14. It is the Appellant's submission that both Respondents ought to have been retained in the suit so that liability, if any, could be established upon hearing evidence.
15. He further submitted that the 2nd Respondent, being an agent of the 1st Respondent, rendered the 1st Respondent vicariously liable for his unfair dismissal from employment. In support of this position, reliance was placed on *Rosephine Mumbi Munyoki & 4 others v Blue Edge Hotels Ltd & another* [2016] eKLR.
16. In the end, the Appellant submitted that it is in the interest of justice that the 1st Respondent remains enjoined to these proceedings until the matter is heard through full trial to its logical conclusion.
17. The Court was thus urged to allow the appeal with costs.

Respondents' Submissions

18. The Respondents submitted that the Appellant's claim was founded on an employment relationship that ceased in 2007. They contended that the Appellant subsequently became an employee of the 2nd Respondent from 2011 to 2016, and therefore any claim against the 1st Respondent was statute-barred under Section 90 of the *Employment Act*.
19. According to the 1st Respondent, the 2nd Respondent was an independent contractor and not an agent of the 1st Respondent. The 1st Respondent contended that the mere fact that the Appellant worked at the premises of the 1st Respondent's did not, of itself, create an employment relationship between them.
20. The 1st Respondent maintained that the two are distinct legal entities and that the 1st Respondent could not be vicariously liable for the acts of the 2nd Respondent.
21. It was submitted that since the Appellant last worked for the 1st Respondent in 2007, the claim filed in 2019 was brought outside the three-year limitation period under section 90 of the *Employment Act* and was therefore incompetent. In support of this position, the Respondents relied on the case of *Safari Joseph Ngala & 2 others v Rapid Kate Services Ltd* [2017] eKLR and urged the Court to uphold the ruling of the trial court and dismiss the instant appeal with costs.

Analysis and Determination

22. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & another v Associated Motor Boat Company Ltd & Others* [1968] EA 123.
23. In his statement of Claim dated 6th July 2019 and filed in court on 6th July 2019, the Appellant averred that in 2011, the 2nd Respondent was the employing agency and the agent of the 1st Respondent.
24. He asserted that he was employed by the Respondents in the 1997 as a technician earning a salary of Kshs 10,000 per month where he served diligently until 4th August 2016 when he was summarily dismissed orally and without just cause.
25. The 1st Respondent, on the other hand, contended that the Appellant was never an employee of the 1st Respondent when the alleged cause of action arose and that any employment relationship between them ceased in 2007. According to the 1st Respondent, from 2011 to 2016, the Appellant was employed by the 2nd Respondent, an independent contractor.



26. The main issue for determination is whether the learned trial magistrate erred in law and fact by striking out the claim against the 1st Respondent on the ground that it was time-barred
27. For context, the ruling of the trial court which is the subject of this appeal is reproduced hereunder: -

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE'S COURT AT ELDORET

ELRC SUIT NO. 265 OF 2019

ANDREW MUSIGANE.....PLAINTIFF

VERSUS

PYRAMID PACKAGING LTD.....1ST RESPONDENT/DEFENDANT

BALE CONSULTANTS.....2ND RESPONDENT/DEFENDANT

By the notice of motion dated 30/7/2021, the 1st respondent sought that the claimant's case against it (1st Respondent) be struck out on grounds that it is time barred. The application was supported by the affidavit of one Jonah Kimeli Bor, who deposed inter alia that the claimant last worked for the 1st respondent in the year 2007. The application also relied on the provision of section 90 of the *employment Act* No. 11 of 2007 which shows that a claim of such a nature cannot be brought after the time expiry of three (3) years. I have looked at the application together with the supporting affidavit and the respective submissions, and I am persuaded that the 1st respondent's application has merit. I therefore grant the application dated 30/7/2021 as prayed.

28. From a perusal of the impugned ruling of the learned trial magistrate, it is evident that the court summarily struck out the Appellant's claim against the 1st Respondent on the basis that it was time-barred under Section 90 of the *Employment Act*, having found that the Appellant last worked for the 1st Respondent in 2007.
29. The reason for the summary manner in which the application was disposed of by the trial court was that the Appellant had not filed a reply to the 1st Respondent's application from 3rd August, 2020 to the date 15th September, 2022, when the trial court decided to give a date for ruling. The Appellant had requested for and was given 14 days to file reply to the application on 9th September, 2022 but did not do so. The appellant was again ordered to file the reply on 28th April, 2022 but had not done so by the date the matter was in court when the ruling date was given.
30. It is trite that striking out pleadings is draconian and should be resorted to only in the clearest of cases. In the case cited by the Appellant, *D.T. Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1, at p. 9 by Madan, J.A. stated as follows: -
- “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
31. The Appellant herein maintained that he was jointly employed by the 1st and 2nd Respondents and that the 2nd Respondent acted as an employing agency or agent of the 1st Respondent. The 1st Respondent



- denied this averment, asserting that the Appellant last worked for the 1st Respondent in 2007 and was later re-engaged by the 2nd Respondent in 2011.
32. It is evident from the pleadings that these are contested factual issues that could only be resolved through evidence and not by way of interlocutory proceedings. Whether the Appellant's employment with the 1st Respondent ended in 2007 or continued through the agency of the 2nd Respondent is a question of fact requiring proof. Similarly, the alleged agency relationship cannot be conclusively determined on affidavit evidence and without considering evidence of the 2nd Respondent.
 33. Secondly, on the day that the trial magistrate gave a date for ruling, the Appellants counsel had informed the court that its replying affidavit was ready but was yet to be served. Counsel for the Respondent on the other hand informed the court that he had filed his submissions. The said submissions are dated 14th September, 2022 and the parties were in court on 15th September, 2022, just a day after the said submissions were filed.
 34. It is not clear from the record if the submissions had been served on the Appellant's counsel as at the time the parties were in court. Irrespective of whether the Appellant had been served or not, the Appellant was entitled to be given time to respond to the same on legal issues. The least the court should have done is to allow the Appellant's counsel to file its submissions in reply to the 1st Respondent's submissions which the Appellant had a right to file even in the absence of a replying affidavit.
 35. I therefore find and hold that the learned trial magistrate misdirected himself in law and fact by determining contested issues prematurely and thereby denying the Appellant a fair opportunity to be heard on the merits of his claim.
 36. I further find that the learned trial magistrate denied the Appellant a fair hearing by not allowing him to file submissions in the application which had been filed just the day before the parties appeared in court, even without ascertaining whether or not the Appellant had been served with the same.
 37. Consequently, the appeal is allowed. The ruling and order of the trial court delivered on 3rd November 2022 striking out the Appellant's claim against the 1st Respondent is hereby set aside.
 38. The file is remitted back to the trial court for hearing and determination on the merits to be presided over by a judicial officer other than Hon. R. Odenyo.
 39. The costs of this appeal shall be in the cause.

DATED, DELIVERED AND SIGNED THIS 23RD DAY OF OCTOBER, 2025.

M. ONYANGO

JUDGE

