Njogu & 33 others v Kirinyaga Construction (K) Limited (Civil Appeal 19 of 2020) [2025] KECA 1841 (KLR) (7 November 2025) (Judgment)

Neutral citation: [2025] KECA 1841 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 19 OF 2020

S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA

NOVEMBER 7, 2025

BETWEEN

WILSON MWANGI NJOGU & 33 OTHERS .... APPELLANT

AND

KIRINYAGA CONSTRUCTION (K) LIMITED .... RESPONDENT

(Being an appeal against the Ruling of the Employment and Labour Relations Court at Nyeri (Nzioki wa Makau, J.) delivered on 3rd July, 2019 in Nyeri ELRC No.95 of 2017 as consolidated with ELRC No. 96 of 2017, ELRC No. 120 of 2017 and ELRC No.221 of 2017)

JUDGMENT

1. The appellants in this appeal are before this Court, aggrieved by the ruling of the Employment and Labour Relations Court (hereinafter “ELRC”) which dismissed their claims for non- attendance and thereafter declined their application to reinstate the aforementioned claims.

2. This being a first appeal, our mandate is as stated in the case of Nairobi Bottlers Limited vs. Imbuga (Civil Appeal E661 of 2022) [2024] KECA 434 (KLR);

> “ Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re- appraise the evidence and to draw inferences of fact; to retry the case.”

3. A look at the record reflects that the appellants filed their claims at the ELRC against the respondent who they said was their former employer. They primarily sought damages for unfair termination, salary arrears, unpaid house allowances, among other prayers. The appellants claimed to have been employed at different times in different capacities but they jointly complained of delayed salaries, unpaid salaries, the respondent refusing to assign them work, being locked out of the work premises, being sent on compulsory leave and not being told when to come back to work and the occasioning of constructive dismissals.

4. The respondent filed a reply to the claims which were denied. The respondent stated that some of the claimants had never worked for the company, some of the claimants had absconded duty while others had resigned. They termed the claims as an abuse of the court process.

5. On 6th March 2019, the claims were listed for hearing but were all dismissed for non-attendance. The record shows that there was no appearance by counsel for the claimants or respondent thus the matter was dismissed for non-attendance.

6. The appellants filed an application dated 26th March 2019 seeking to have the claims reinstated. They stated that all the claimants had been in the court premises on the hearing date but many of them were outside the courtroom as it was congested. They further stated that the name called out was supposedly that of Paul Mwai Mwangi but no one recognized the name. It was stated that their Advocate had instructed them to inform the court that he would be ready at 9.30am as he was in the High Court within the same premises briefly but this was never communicated to the court.

7. The respondent opposed the application and held the position that the appellants lost their opportunity to be heard and the claims should not be reinstated.

8. On 3rd July 2019, the ELRC delivered a ruling on the application and held that it was not convinced as to the circumstances placed forward by the appellants for non-attendance at the hearing. The court dismissed the appellants' application for reinstatement of the claims, which action gave rise to the present appeal.

9. The memorandum of appeal is dated 13th February 2020 asking the court to set aside the ELRC ruling and reinstate the claims for hearing. The court is accused of using its discretion unjudiciously and failing to consider the claims and the circumstances arising. The appellants have filed submissions dated 25th October 2023 in support of the appeal. The respondent did not file any submissions.

10. This appeal was heard on 12th May 2025 on the court's virtual platform. Learned counsel Mr. King'ori appeared for the appellants. There was no appearance for the respondent despite being served with a hearing notice on 29th April 2025, which proof of service we were satisfied with.

11. We have considered the record of appeal and the submissions filed for the appellants.

12. The decision to reinstate a dismissed claim is discretionary and an appellant must give the court sufficient reason to exercise discretion in his or her favour.

13. This Court in Mukanda vs. Mutswenje (Civil Application 138 of 2020) [2022] KECA 1016 (KLR) (23 September 2022)(Ruling) stated that:

> "The principles that guide the exercise of judicial discretion are now well settled. See Githiaka v. Nduriri [2004] 1 KLR 67 where we reiterated, inter alia, that judicial discretion has to be exercised judiciously, that is to say on sound reason rather than whim, caprice or sympathy."

14. We also rely on the reference by this Court in Wilson Cheboi Yego vs. Samuel Kipsang Cheboi [2019] eKLR where this court stated;

> "The Court of Appeal in Tanzania had this to say on "sufficient cause" in The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006 in discussing what constitutes sufficient cause:
>
> > "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)"."

15. In the application that was before the ELRC, the deponent to the affidavit explained, and this is borne out by the record, that there were originally various claims that were consolidated. Indeed the record shows that on 10th October 2017, Mr. Kingori, appearing for the claimants made an application to consolidate the claim with

> "... cases 96 of 2017, 121 of 2017 and 220 of 2017. The transaction in case (sic) of action is the same and between the same parties."

16. The Court ordered that causes 95 of 2017, 96 of 2017, 121 of 2017 and 220 of 2017

> "...are hereby consolidated with the lead file being cause 95 of 2017."

17. Wilson Mwangi Njogu, (one of the appellants here) explained in the affidavit in support of his motion before the ELRC Judge, that after the causes were consolidated it was agreed by all the claimants that he be their representative in prosecuting the claim and connected purposes. He deponed that on the material day of the hearing he and his co-claimants visited their lawyers chambers where it was agreed that since the lawyer had other brief matters at the High Court within the same premises, Wilson Mwangi Njogu would inform the Judge that they were ready to proceed at 9.30 a.m.; that they all went to court but since the space was limited only he and a few other claimants were able to find space inside the court room. He explained himself thus at paragraphs 7-10 (inclusive) of the supporting affidavit;

> "7. That when the court commenced in business at 9.00 a.m., we were already in court as stated above.
>
> 8. That the court called the several matters for the day and alerted that the cause list was over as it had only a few matters, and that the court was then proceeding to hear those matters that had been confirmed ready for hearing.
>
> 9. That immediately at around 9.30 a.m., our advocate entered the court as agreed and after a brief stay, he rose and called us out with information that our cases had been dismissed for non-attendance.
>
> 10. That I informed him that as his representatives (sic) of the other claimants, I did not hear my name being called hence I did not respond with the agreed arrangement for the hearing as stated above..."

18. He goes on to explain that his lawyer explained that the name that had been called out was Paul Mwai Mwangi whose sole claim had been made the lead file when the claims were consolidated; that Paul Mwai Mwangi was one of the claimants who had remained outside the court room due to the limited congested space in the court room.

19. The Judge considered the application and was of the view that counsel for the appellants should have alerted the Judge when he arrived in court at 9.30 a.m. that he and the appellants were in court ready to proceed.

20. We agree that the lawyer for the appellants, upon arrival in court, should have at least alerted the Judge of his late arrival and that the appellants were all in court ready to proceed. The matter could indeed have been handled by the lawyer more elegantly than it was and that is all we would like to say on that issue.

21. Looking at the whole record there is evidence that the various claims were consolidated and the claim by one of them -Paul Mwai Mwangi- made the lead file. The claimants then in their wisdom elected that Wilson Mwangi Njogu be their representative for purposes of pursuing the claims which were nearly similar in nature. It was not said by the respondent or anybody else that

22. Wilson Mwangi Njogu was a person learned in the law who was expected to know the intricate procedures of the court. What he (Wilson Mwangi Njogu) was telling the Judge in the application to reinstate the suit was that he had been in court all along and being representative of his colleagues he expected his name to be called out; if it had he would have answered; that the name called out was that of Paul Mwai Mwangi (he of the lead file) who was waiting outside the court room due to the constrained space that did not allow all litigants and their witnesses to find space in the court room.

23. We think in the circumstances that the explanation given by the appellants was reasonable and the Judge erred in finding fault with the conduct of the appellants or their lawyer; the Judge should have found the explanation to be reasonable and should have exercised the discretion judiciously in favour of the appellants.

24. We think that this is one of the rare cases where we should exercise our appellate jurisdiction and interfere with the exercise of discretion by a lower court. As was stated by De Lestang, JA. in the oft-cited case of Mbogo vs. Shah [1968] EA 93 at pg. 94:

> "I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself, or because it has acted on matters on which it should not have acted, or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

25. We find merit in this appeal which we allow. We set aside the ruling by Makau, J. delivered on 3rd July, 2019 and allow the application dated 26th March, 2019. The claims at the ELRC are hereby reinstated and shall be placed for hearing before a Judge apart from Makau, J. Each party will meet their costs of this appeal.

DATED AND DELIVERED AT NYERI THIS 7TH DAY OF NOVEMBER, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

ALI- ARONI

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR