Alfarooq Hospital Limited v Masinde (Civil Appeal E029 of 2022)
[2025] KECA 892 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 892 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E029 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

MARCH 7, 2025

BETWEEN

ALFAROOQ HOSPITAL LIMITED ..... APPELLANT

AND

EMILY CATHERINE MASINDE ..... RESPONDENT

(Being an appeal against the Ruling and Orders of the Employment and Labour Relations Court of Kenya at Mombasa (L. Ndolo, J.) dated 15th April 2021 in E.L.R.C Cause No. 427 of 2018)

JUDGMENT

1. The respondent, Emily Catherine Masinde, was employed as a "theatre supporting staff" of Alfarooq Hospital situate on Naivasha Street off Kenyatta Avenue, Mombasa, with effect from 1st October 2015. Her letter of appointment of even date was signed by "Alfarooq Hospital Management" on terms that she would be on probation for a period of three (3) months subject to successful completion of which she was to be confirmed as a permanent staff.

2. Gathering from the impugned judgment and the record of the proceedings, the respondent took up her appointment and continued in employment until 1st May 2018 when she was retrenched and her employment terminated without prior notice. Her retrenchment was communicated through a letter dated 21st March 2018, which she received on 1st May 2018, the very date of her termination. The letter read in part:

> " This is to bring to your attention the management's decision to retrench part of the staff from May 2018 due to poor business performance at the hospital. The management has tried its best for the past couple of months to save the situation but its proven difficult. As one of the affected staff you are hereby notified of the decision to retrench you from May onwards."

3. Dissatisfied by her employer's decision, the respondent filed a Memorandum of Claim in the Employment and Labour Relations Court at Mombasa (the ELRC) in ELRC Cause No. 427 of 2018 against "Alfarooq Hospital also known as Alfarooq Hospital Management" praying for:

> " a) A declaration that the Respondent unfairly and unlawfully terminated the Claimant.
>
> b. Unpaid house allowance dues at Kshs. 60,075/-
>
> c. Unpaid annual leaves from dues at Kshs. 21,561.38/-
>
> d. Unpaid public holidays worked dues at Kshs. 26,699.92/-
>
> e. Compensation for unfair termination Kshs. 160,200/-
>
> f. An order that the Respondent issue the Claimant with a certificate of service.
>
> (g) Costs of the suit."

4. The appellant did not enter an appearance or file a defence to the respondent's claim. Accordingly, her undefended suit proceeded to formal proof and determination vide the impugned judgment dated 6th February 2020 in favour of the respondent in the following terms:

> " a) 6 months' salary in compensation Kshs. 92,118/-
>
> b. House allowance for 30 months @ Kshs. 2,003 Kshs. 60, 090/-
>
> c. Leave pay for 2 years (15,353/30x21x2) Kshs. 21,494/-
>
> b. Prorata leave for 6 months (15,353/30x1.75x6) Kshs. 5,373/-
>
> Total Kshs. 179,075/-
>
> This amount will attract interest at court rates from the date of the judgment until payment in full.
>
> The Claimant is also entitled to a certificate of service plus costs of the case."

5. Subsequently, the respondent sought to execute the decree and obtained warrants of attachment and sale of the appellant's movable assets. Consequently, Trophy Auctioneers attached and proclaimed certain items of the appellant's movable assets within the hospital.

6. By a Notice of Motion dated 29th January 2021, the appellant, referring to itself as "Alfarooq Hospital Limited (wrongly sued as Alfarooq Hospital a.k.a Alfarooq Hospital Management)", sought orders that: the execution of the judgment and decree in favour of the respondent be stayed pending hearing and determination of its application; that the judgment delivered on 6th February 2020 be set aside; and that the costs of its Motion be provided for.

7. The appellant's Motion was supported by the annexed affidavit of Salahuddin Farooqi sworn on 29th January 2021 deposing to the grounds on which the application was anchored, namely: that the respondent obtained an irregular ex parte judgement against the appellant, who was never served with summons; that the respondent wrongly sued the appellant which is a separate and distinct legal entity from Alfarooq Hospital Management Limited; that the appellant never employed the respondent, and that it was a total stranger to the respondent's claim; that the appellant was condemned unheard, and that the respondent ought to have directed her claim to the proper party; that it was in the interest of

justice that the orders sought be granted; and that the respondent had commenced execution against the appellant, and had instructed auctioneers to attach and sell its goods.

8. Salahuddin Farooqi further deponed that Alfarooq Hospital Management was owned by Miftah Construction & Supplies Limited; that on 29th September 2015, the appellant executed a Management Agreement with Miftah Construction & Supplies Limited t/a Alfarooq Hospital Management allowing the latter to take over the running and operation of the hospital; that on 2nd July 2018, the appellant terminated the said Management Agreement and took over management of the hospital; that it was therefore clear that the respondent was never employed by the appellant and the claim was therefore misconceived and fatally defective; and that the appellant was non-suited and had a reasonable defence to the respondent's claim.

9. Opposing the appellant's Motion, the respondent filed her replying affidavit sworn on 10th February 2021 stating, inter alia: that the appellant's Motion was an abuse of the court process; that, if the appellant was a separate entity as claimed, it had no locus standi to seek orders to set aside the judgment; that the appellant operates the same hospital 'Alfarooq Hospital', and that the change of names is a ploy to escape liability under the judgment; that the appellant, Alfarooq Hospital Limited is one and the same entity as 'Alfarooq Hospital Management', and carried on business in the name and style of 'Alfarooq Hospital'; that the appellant is the judgment debtor, and cannot escape liability for the decree by change of name; that the liability to pay the sum decreed arose from the respondent's employment, and that the purported change of name is an attempt to transfer the appellant's debt to the new managing company, which the appellant claims to be; and that the appellant's application has no merit and should be dismissed as it is not based on any pleadings.

10. By a ruling delivered on 15th April 2021, the trial court (L. Ndolo, J.) dismissed the appellant's application with costs to the respondent. According to the learned Judge:

> "16. A reading of the present application and the affidavit in support thereof, reveals that the assertion that there was no proper service is intertwined with the averment that the wrong party has been sued....
>
> 17. In pursuing its argument, the Applicant relies on a document titled 'Memorandum of Understanding' dated 29th September 2015 between Dr. Salahuddin Farooqi T/A Alfarooq Hospital as the Lessor and Miftah Construction and Supplies Limited T/A Alfarooq Hospital Management as the Lessee.
>
> 18. Having read the said document, the Court notes that although it is titled 'Memorandum of Understanding', its contents are in the nature of a lease agreement....
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> 19. More significantly, under Clause 4.5 of the 'Memorandum of Understanding', the name of the facility would remain Alfarooq Hospital Ltd, although the lessee would be responsible for payment of all licences and permits. The Applicant did not bother to file any of the licences or permits to show the identity of the party who had been licensed to run the Hospital. A hospital is not an ordinary business to be shoved around from one entity to another.
>
> 17. As it is, the Court could not tell whether Miftah Construction and Supplies Limited, whose Memorandum and Articles of Association were not availed and whose name does not suggest a stake in the medical field, actually had the capacity to run the Hospital.

18. I have looked at the Claimant's letter of appointment dated 1st October 2015, which proudly bears the logo of Alfarooq Hospital. I have also looked at the Hospital Policies issued to the Claimant, clearly stating that she was a member of staff of Alfarooq Hospital.

19. What is clear to the Court is that the Claimant was employed to work for Alfarooq Hospital. Further, because the Applicant has not demonstrated any change of ownership or control of the Hospital, the argument that the Claimant was employed by some other entity has no basis in law or fact.

20. That said, I find and hold that service of summons was properly effected upon the Claimant's employer, who chose not to respond. There is therefore no reason to set aside the ex parte judgment entered in favour of the Claimant.

21. The application dated 29th January 2021 is consequently dismissed with costs to the Claimant."

11. Aggrieved by the trial court's decision, the appellant moved to this Court on appeal on 7 grounds set out in its Memorandum of Appeal dated 28th February 2022 faulting the learned Judge for: failing to find that the respondent was an employee of Alfarooq Hospital Management and not Alfarooq Hospital Limited; failing to find that Alfarooq Hospital Management was a separate and distinct legal entity from Alfarooq Hospital Limited; failing to find that Alfarooq Hospital Limited were never served with summons or court process, and that the judgment on record was therefore irregular; holding that failing to find that all evidential documents and the evidence relied on by the respondent in support of her claim were clear that her employer was Alfarooq Hospital Management and not Alfarooq Hospital Limited; failing to consider the express and clear provisions of clause 3.4.9 of the Memorandum of Understanding,(MoU) dated 29th September 2015 which was clear that Alfarooq Hospital Management was to hire their own staff and workforce with effect from 1st October 2015; and for failing to allow the appellant's application dated 29th January 2021.

12. In addition to the grounds aforesaid, the appellant argued that the learned trial Judge erred in law and fact when she held that there were no licenses or permits for the party who has been licensed to run the Hospital and that the said party had no capacity to run a Hospital when the Memorandum of Understanding signed between the parties was clear and unequivocal that Alfarooq Hospital Limited had assigned by way of a lease for Ten (10) years the hospital operations and management to Miftah Constructions & Supplies Limited T/A Alfarooq Hospital Management.

13. In support of the appeal, counsel for the appellant, M/s. Sherman Nyongesa & Mutubia, filed written submissions & list of authorities dated 25th March 2024. Citing the case of Peter Ngigi Kuria & another (Suing as the legal representatives of the Estate ofJoan Wambui Ngigi) v Thomas Ondili Oduol & another [2019] eKLR, counsel highlighted the role of a first appellate court.

14. On their part, learned counsel for the respondent, M/s. Chebukaka & Associates, opposed the appeal and filed written submissions and a list of authorities dated 24th June 2024 to which we will shortly return.

15. Having considered the record as put to us, the impugned ruling, the grounds on which the appeal is anchored and the respective submissions by learned counsel, we form the view that the appeal stands or falls on our finding on the following two issues, namely: whether the learned Judge erred in failing to find that the respondent was employed by an entity distinct and separate from the appellant; and

whether the learned Judge erred in finding that service of summons was properly effected upon the respondent's employer.

16. On the 1st issue as to the identity of the respondent's employer at the time of redundancy, counsel for the appellant submitted that the evidence on record affirms that the respondent was employed by Alfarooq Hospital Management and not by the appellant and that, therefore, the execution proceedings against the appellant were irregular and illegal; that the appellant is a totally different and distinct entity from the said Alfarooq Hospital Management, and that it has no relationship with the said entity; that the appellant provided evidence that the two companies are separate and distinct with totally different directors; that the appellant signed a MoU with Alfarooq Hospital Management pursuant to which Alfarooq Hospital Management was allowed to operate the appellant's hospital facility for a period of 10 years; that, subsequently, Alfarooq Hospital Management defaulted on the MoU, forcing the appellant to terminate the agreement and retake possession of the hospital premises; that, during the pendency of the agreement, Alfarooq Hospital Management was at liberty to employ, and was liable for, their employees, including the respondent, who was employed and allegedly terminated within the pendency of the agreement; that the MoU was unequivocal that the appellant had assigned, by way of a 10 year lease, the hospital operations and management to Miftah Constructions & Supplies Limited T/A Alfarooq Hospital Management; and that the learned Judge erred in failing to consider the express and clear provisions of Clause 3.4.9 of the MoU, which was clear that Alfarooq Hospital Management was to hire their own staff and workforce with effect from 1st October 2015.

17. In rebuttal, counsel for the respondent submitted that the appellant was not party to the suit in the trial court; that the appellant admitted that it is not the same as the respondent as named in the suit; that the appeal must fail on this ground alone, which in itself raises a pure point of law that the appellant has no locus standi to address this Court; and that, on this account, the respondent raises a preliminary objection to the appellant's audience in this Court.

18. According to counsel, the appellant had no audience in the lower court to move the court without first seeking to be joined as a party to the suit in compliance with Order 1 rule 10(2) of the Civil Procedure Rules. Counsel further submitted that, as the appellant was not a party to, or an interested party in, the suit in the court below, it cannot succeed in having the impugned judgment set aside. Counsel drew the Court's attention to rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 which defines an "interested party" as "a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court, but is not a party to the proceedings or may not be directly involved in the litigation."

19. In counsel's view, the appellant filed the instant appeal disguising itself as an interested party so as to institute a fresh cause to obstruct execution of the impugned judgment and decree. Counsel cited the case of Trusted Society of Human Rights Alliance v Matemo & 5 others [2014] KESC 32 (KLR) where the Supreme Court held that:

> "A suit in Court is a 'solemn' process, "owned" solely by the parties. This is the reason why there are laws and Rules, under the Civil Procedure Code, regarding Parties to suits, and on who can be a party to a suit. A suit can be struck out if a wrong party is enjoined in it. Consequently, where a person not initially a party to a suit is enjoined as an interested party, this new party cannot be heard to seek to strike out the suit, on the grounds of defective pleadings."

20. Drawing the Court's attention to the Offer of Employment dated 1st October 2015 and the Notice of Retrenchment dated 21st March 2018, counsel submitted that the respondent's employer was Alfarooq

Hospital AKA Alfarooq Hospital Management; that the respondent therefore sued the right party in the lower court; that the respondent fulfilled the requirement of section 107 of the *Evidence Act* and exhausted her burden of proof of the identity of its employer by reliance on the above documents as evidence; that the appellant has identified itself as Alfarooq Hospital Limited; and that the appellant could not have filed the instant appeal if it was not the party sued in the lower court.

21. We take to mind the fact that the appellant's application in the trial court was primarily premised on Order 10 rule 11 which provides for setting aside of default judgments in the following words:

> 11. Setting aside judgment [Order 10, rule 11]
>
> Where judgment has been entered under this Order the court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.

22. In James Kanyiita Nderitu & another v Marios Philotas Ghikas & another [2016] KECA 470 (KLR), this Court set out the guiding principles when considering an application to set aside a default judgment in the following terms, which we take the liberty to recite as hereunder:

> " From the outset, it cannot be gainsaid that a distinction has always existed between a default judgment that is regularly entered and one, which is irregularly entered. In a regular default judgment, the defendant will have been duly served with summons to enter appearance, but for one reason or another, he had failed to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under Order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgment and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside the default judgment, and will take into account such factors as the reason for the failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer; whether on the whole it is in the interest of justice to set aside the default judgment ....
>
> In an irregular default judgment, on the other hand, judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justitiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion... The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."

23. It is noteworthy that the first ground on which the appellant's application to the ELRC was made was that it was never served with summons or court process which ground, as the learned Judge correctly observed, was intertwined with the second ground that default judgment had been entered and execution proceedings commenced against the appellant irregularly and illegally because it was a separate entity from Alfarooq Hospital Management, which the appellant insisted was the entity that employed the respondent.

24. Beginning with the second ground on which the application was founded, the appellant relied on several documents annexed to its application, including copies of an MoU dated 29th September 2015

between Dr. Salahuddin Farooqi T/A Alfarooq Hospital as the Lessor and Miftah Construction and Supplies Limited T/A Alfarooq Hospital Management as the Lessee; Certificates of Incorporation; and Official Company Search (CR12) documents.

25. Pronouncing itself on the principles that guide litigants in discharge of their legal burden of proof and evidential burden in the case of Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another [2004] KECA 65 (KLR), this Court held that:

> " As a general proposition, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107 (1) of the *Evidence Act* ...
>
> There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act... The two sections carry forward the often repeated evidential adage: 'he who asserts must prove'."

26. In Tadis Travel & Tours Ltd & another v Astral Aviation Limited [2015] KECA 403 (KLR), this Court also held that:

> "(18) Of relevance to this appeal is the general rule that the standard of proof required in civil claims is proof on a balance of probabilities or preponderance of probability. This means that the claimant must adduce evidence that leads the court to a conclusion that it is more probable than not, that the facts happened as alleged by the claimant. Where there are two versions and there is a probability of both versions being true, or both being untrue then the burden of proof is not discharged.
>
> (19) In an action anchored on a contractual relationship the burden of proving the existence of a contract, performance of conditions precedent, breach and damages, lies with the claimant..."

27. To our mind, the onus was upon the appellant to prove that it was not the same entity as Alfarooq Hospital Management; or that Alfarooq Hospital Management was owned by Miftah Construction and Supplies Limited, which was held out as the counterparty to the MoU signed with the appellant. Whereas the appellant annexed the Certificates of Incorporation in respect of Alfarooq Hospital Limited, Alfarooq Hospital Management Limited and Miftah Construction and Supplies Limited, it only annexed the Company Search (CR12) documents for Alfarooq Hospital Limited and Miftah Construction and Supplies Limited, curiously choosing not to include the CR12 document for Alfarooq Hospital Management Limited, which would have shed light on the real owners and administrators of the said entity. In addition, the appellant did not adduce any evidence, from the attesting advocate, to corroborate the execution of the MoU by the respective company directors; or any evidence of payment of the consideration set out in Clause 1.8 of the MoU on account of monthly rent of Kshs. 400,000.

28. As the learned Judge correctly found, the appellant also failed to annex any of the licences or permits to show the identity of the party licensed to run the hospital. Accordingly, the appellant failed to demonstrate any change of ownership and control of the hospital, or that it was a completely distinct and separate entity from Alfarooq Hospital Management. Neither did the appellant demonstrate that any of the essential elements of the contract it was relying on had been fulfilled in order to establish

its validity. In view of the foregoing, we reach the conclusion that the respondent was employed and retrenched by none other than the appellant.

29. Turning to the 2nd issue as to whether the appellant was served with summons to enter appearance, counsel for the appellant submitted that the learned Judge was at fault in failing to find that the appellant was never served with Summons or Court process and the judgment on record and/or execution proceedings.

30. On their part, counsel for the respondent submitted that the appellant did not adduce any evidence to back its allegation that it was not served with summons to enter an appearance in the ELRC; that there is on record an affidavit of service that was not questioned or challenged by the appellant in its application in the lower court; that the summons was served on the respondent and received as shown in its receiving stamp in which its name is indicated as 'Alfarooq Hospital Management'; and that an application challenging service of summons without any attempt to cross–examine the process server must not be allowed. According to counsel, the application was incurable and stood to be struck out for being an abuse of the court process within the meaning of order 2 rule 15 of the civil procedure Rules.

31. The record as put to us includes an affidavit of service sworn on 18th October 2018 by Patrick Mwendwa, a duly authorised court process server, and in which he depones that he proceeded to the hospital premises on 16th July 2018 whereupon he served one Dr. Mwaura, the Director of the appellant's hospital, with the Notice of Summons and the documents comprising the respondent's claim. It is instructive that the appellant did not challenge or rebut Patrick Mwendwa's account, and neither did it seek to have him cross- examined.

32. It is worth noting that the Notice of Summons on record bears the stamp of Alfarooq Hospital Management, indicating receipt of the document on 16th July 2018. Equally noteworthy is the appellant's annexure to its application a company resolution dated 2nd July 2018 indicating that the appellant's directors resolved: to terminate the 'agreement' with Alfarooq Hospital Management/ Miftah Construction and Supplies Limited; to revert the management to Alfarooq Hospital; and to appoint Dr. David Mwaura as the CEO, the same Dr. Mwaura who received the Notice of Summons on the appellant's behalf.

33. The appellant also annexed to its application a Notice of Termination of the MoU dated 2nd July 2018 in which the appellant informed Alfarooq Hospital Management Limited that the MoU was "considered cancelled and terminated with immediate effect, further to this Alfarooq Hospital Ltd took over the possession of the premises." There being no doubt that the appellant had taken over the administration of the hospital when service was effected and that the person it had appointed as CEO was the person who was served with the Summons and respondent's claim, the appellant's allegation that it was never served is, in our respectful view, baseless.

34. The appellant's inaction after service was effected upon it is baffling, considering its insistence that it was separate and distinct entity from the entity to which it attributes the respondent's employment contract. The most suitable remedy that was available to the appellant immediately upon service was to institute third party proceedings, but the appellant took no action until default judgment was entered in the respondent's favour. Its indolence can only be construed as suggestive of non-existence of a third party on whom the appellant could have offloaded its burden.

35. Even after the execution proceedings were commenced naming the judgment debtor as Alfarooq Hospital Management, it was obvious that the most suitable remedy was to be found in objection proceedings rather than an application to set aside the default judgment on the contradictory ground that the appellant was a separate entity from the one against which the default judgment had been

entered. No such proceedings were instituted. The only plausible conclusion that can be drawn from the appellant's inaction is that it intended to use 'Alfarooq Hospital Management' to shield itself from liability arising from the respondent's claim through the appellant's subsequent application, which only sought to set aside the default judgment with intent to leave the respondent without any remedy.

36. As Harris, J. held in Shah v Mbogo and another [1967] 1 EA 116:

> "I have carefully considered, in relation to the present application, the principles governing the exercise of the court's discretion to set aside a judgment obtained ex parte. This discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice."

37. The sequence of events leading to the appellant's incompetent application giving rise to the impugned ruling and the instant appeal are suggestive of its intention to obstruct or delay execution of the decree in the respondent's favour, and we need not say more.

38. Having carefully considered the record of appeal, the grounds on which it was anchored, the rival submissions of respective counsel, the cited authorities and the law, we reach the inescapable conclusion that the appeal has no merit and is hereby dismissed with costs to the respondent. The ruling and orders of the ELRC (L. Ndolo, J.) dated 15th April 2021 are hereby upheld with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR