Toppias & 4 others v Bomet County Govrnement & another (Civil Appeal 13 & 22 of 2018 (Consolidated)) [2025] KECA 841 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KECA 841 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 13 & 22 OF 2018 (CONSOLIDATED)

JM MATIVO, PM GACHOKA & WK KORIR, JJA

MAY 9, 2025

BETWEEN

KOSGEI TOPPIAS ..... 1ST APPELLANT

JOHN KOECH ..... 2ND APPELLANT

SAMMARY CHEPNGETICH ..... 3RD APPELLANT

NGENO WELDON ..... 4TH APPELLANT

JACOB RONO ..... 5TH APPELLANT

AND

BOMET COUNTY GOVRNEMENT ..... 1ST RESPONDENT

COUNTY PUBLIC SERCIE BOARD, BOMET ..... 2ND RESPONDENT

(Being an appeal against the ruling of Employment and Labour Relations Court of Kenya at Kericho (D. K. Marete, J.) dated 15th December 2017 in ELRC Cause No. 50 of 2017)

JUDGMENT

1. A brief account of the litigation before the Employment and Labour Relations Court (ELRC) in Kericho which culminated in the ruling dated December 15, 2017, the subject of this appeal is necessary so as to contextualize and appreciate the arguments presented by the parties herein in support of their respective positions.

2. Briefly, the appellants representing Bomet County Enforcement Officers sued the respondents at the Kericho ELRC by a memorandum of claim dated 31st October 2017. Their grievance was that by a letter of appointment dated 17th March 2017, the 2nd respondent employed them as enforcement officers, but the respondents intended to illegally terminate their services. Therefore, they prayed for: (a) a declaration that the intended termination was unlawful and infringed the principles of natural

justice, *the Constitution* and the *Employment Act*; (b) an order compelling the respondents to issue them with confirmation letters; (c) that they be absorbed in permanent and pensionable terms; (d) in the alternative, the respondents be ordered to pay to them monetary compensation equivalent to 25 years' salary; (e) any other relief the Court may deem fit to grant and (f) costs of the claim.

3. The Statement of Claim was accompanied by a notice of motion dated 31st October 2017 in which the appellants prayed for inter alia orders that the respondents be ordered to stay the intended laying off of the Enforcement Officers until the suit is heard and determined; that the respondents be ordered to issue the Enforcement Officers with confirmation letters pending the hearing of the suit; that the respondents be compelled to re-open their offices and that an order of certiorari be issued to quash the decision to lay them off.

4. The 1st respondent filed a replying affidavit dated 8th November 2017 opposing the application on grounds that it was devoid of merit.

5. The 2nd respondent filed a replying affidavit and grounds of opposition both dated 7th November 2017. The key grounds in opposition to the application are that there was no employer/employee relationship between the parties, that the 2nd respondent was implementing a court decision issued in Kericho ELRC No. 8 of 2015, that the claimants were guilt of material non-disclosure, that the appellants were appointed on contract basis, and that their employment was declared irregular by the court.

6. During the hearing of the application, the 1st respondent's counsel raised a preliminary objection citing breach of Rule 9 A (2) & (3) of the Employment and Labour Relations Court (Procedure) Rules, 2016 (the Rules), which provides:

> " 9. Suits by several persons
>
> 1. A suit may be instituted by one party on behalf of other parties with a similar cause of action.
>
> 2. Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties:
>
> Provided that in appropriate circumstances, the Court may dispense with this requirement.
>
> 3. The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant."

7. The respondents in opposition to both the memorandum of claim and the application maintained that the consent annexed to the claim was signed by 6 claimants, yet paragraph 15 of the memorandum of claim, the claimants purported to act for all the County employees. It was also contended that the claimant had not attached to the statement of the claim a schedule indicating the names of all the claimants, their addresses, descriptions and specific breaches of their claims as required by Rule 9 (2) & (3).

8. In response to the preliminary objection, the appellants' counsel urged the court to interpret the said rules together with Article 159 (2) (d) of *the Constitution* which requires courts to disregard undue technicalities.

9. In upholding the preliminary objection, the learned judge stated:

> " ... The claimants have brought out a suit in contravention of the rules of procedure. Such rules are mandatory in nature and intent. Rule 9 (2) and (3) is intended to clearly express the extent of the claim and therefore serve as a notice to the respondent of the extent of anticipated liability. It eliminates ambush and warns the respondent of the areas to address in defence. This would not fall into the criterion of undue regard to technicalities envisaged by Article 159 (2) (d) of *the Constitution*.
>
> The application is therefore not sustainable. It must fail. I am therefore inclined to dismiss the application in its entirety for being incompetent, formless and devoid of merit. This being the situation, the entire suit collapses without apology. "

10. Aggrieved by the above verdict, the appellants filed a notice of appeal dated 15th December 2017 and a memorandum of appeal dated 16th February 2018 in which they have cited 11 grounds of appeal. It is important to mention that in their memorandum of appeal, the appellants state that they are appealing against a judgment delivered on 15th December 2017. This must be a mistake. What was delivered on the said date is the ruling highlighted above which upheld the 1st respondent's preliminary objection and struck out the suit.

11. The grounds cited in the memorandum of appeal can be summed up as follows: (a) the learned judge failed to consider the evidence presented before him; (b) failed to adjudicate the principle of legitimate expectation which had been raised; (c) failed to allow the suit to proceed to full hearing (grounds 3, 4 and 7); (d) failed to uphold the rights of the employees; (e) failed to determine a contempt application which was pending before him; (f) erred in dismissing the case on a technicality contrary to Article 159 (2) (d) of *the Constitution*, and, (f) used a none existent annexture; (g) failed to appreciate the merits of both the application and the suit, and, (h) failed to address the rights and claims of the 5 claimants whose address and particulars had been provided.

12. The appellants pray that the appeal be allowed and the impugned ruling be set aside. They also pray for a declaration that the appellants were hired legally, and that they be issued with confirmation letters. In all honesty, these two prayers are misguided because they presuppose the suit was heard on merits and a final judgment rendered. The suit was struck out on grounds that it did not comply with Rule 9 (2). We say no more. Lastly, the applicant prays for costs of this appeal plus interests at court rates and any other relief this Court may deem necessary.

13. During the virtual hearing of this appeal on 4th March 2025, learned counsel Mr. Peter Wanyama appeared for the appellants. Learned counsel Ms Oganga appeared for held brief for Mr. Mutai for the 1st respondent while learned counsel Mr. Kipkoech appeared for the 2nd respondent.

14. In his written submissions dated 22nd November 2012 which he highlighted orally, the appellant's counsel Mr. Wanyama admitted that the list of employees on whose behalf the claim was filed was not attached to the Memorandum of Claim, but it was filed separately, but the learned judge disregarded it. Counsel cited Article 159 (2) (d) of *the Constitution* which requires courts to administer justice without undue regard to procedural technicalities and urged this Court to be guided by the said provision. Counsel also cited Halsbury's Laws of England, 3rd Edition, Volume 30 at page 38 in support of the proposition that the jurisdiction to strike out pleadings should be exercised with extreme caution and the court should not strike out the pleadings unless it is clear and obvious that the action will not lie.

15. Mr. Wanyama also cited Madan JA. in D. T. Dobie & Company (Kenya) Ltd vs. Muchina [1982] KLR 1 that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously

discloses no reasonable cause of action or is so weak as to be beyond redemption and incurable by amendment. Counsel also cited Coast Projects Ltd vs. M. R. Shah Construction (K) Ltd [2004] 2 KLR 119 in which it was held that summary procedure is a radical remedy and a court of law should be slow in resorting to it and it should only be applied in plain, clear and obvious cases.

16. Mr. Wanyama also referred to Martha Wangari Karua vs. Independent Electoral & Boundaries Commission & 3 Others [2018] KECA 41 (KLR) in which this Court held that courts must always strive to render justice without much regard to procedural technicalities where the dispute is clearly discernible from the pleadings. Counsel maintained that the claim was properly before the court and ought to have been heard on merits. He maintained that *the Constitution* is the supreme law of the land and the Rules ought not to be elevated above *the Constitution*.

17. The other issue urged by Mr. Wanyama is whether the appellants were lawfully terminated. Clearly, this issue delves into the merits of the appellants' claim before the ELRC. The appellants' suit was dismissed after the trial court upheld a preliminary objection that it offended Rule 9 (2) & (3). The issue being urged could only be canvassed and determined in the final judgment. We decline the invitation to determine a completely new ground which was not urged and determined in the impugned ruling.

18. In his written submissions dated 17th February 2022, the 1st respondent's counsel Ms. Oganga cited Rule 9 (2) and (3) and submitted that the appellants failed to attach a schedule of the names of the claimants, their address, description and details of wages due or the particulars of any other breaches and reliefs sought by each claimant. Counsel maintained as was held in Cosmas Foleni Kenga vs. IEBC & 2 Others, [2017] eKLR, that Article 159 (2) (d) of *the Constitution* does not oust the parties' obligation to comply with rules of procedure nor is it an excuse for a party to fail to comply with procedural imperatives. Counsel also cited James Mangeli Musoo vs. Ezeetec Limited [2024] eKLR which held that a technicality is a provision of the law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Counsel referred to Order 2 Rule 15 (1) of the Civil Procedure Rules which provides for striking out proceedings on grounds that they are scandalous, frivolous or vexatious or may prejudice or delay a fair trial or it is an abuse of court process.

19. Counsel also submitted that the question whether the appellants were the 2nd respondent's employees was not determined in the ruling the subject of this appeal and urged this Court not to delve into the said issue.

20. Learned counsel for the 2nd respondent Mr. Kipkoech in his written submissions dated 18th February 2022 maintained that the appellants' suit was dismissed for failure to comply with Rule 9 (2) and (3) and cited this Court's decision in Nicholas Kiptoo arap Korir Salat vs. IEBC & 6 Others [2013] eKLR which held that Article 159 (2) (d) of *the Constitution* was not meant to overthrow rules of procedure. Counsel maintained that Rule 9 (2) and (4) is mandatory and maintained that compliance with the said rule goes into the root of competence of the suit. Further, counsel asserted that the claimants had all the time to comply with the said rules before the delivery of the suit but they failed to do so. In addition, counsel maintained that only 6 claimants out of all the claimants signed a consent allowing the appellants to sue on their behalf. Lastly, all the other issues addressed by counsel relate to the main dispute and were not among the issues determined in the ruling appealed against.

21. A useful starting point in this determination is to underscore that procedural statutes are legal frameworks that outline the processes and methods by which substantive legal rights and obligations are enforced. However, procedural laws should not be interpreted in a manner that creates unnecessary barriers to justice. Instead, they should be applied in a way that promotes access to justice and ensures that legal processes are fair and efficient. (See the Supreme Court of India decision in Desh Bandhu Gupta vs. N. L. Anand, 1994 SCC (1)).

22. Long before the promulgation of our 2010 Constitution, our Superior Courts consistently upheld the need to determine cases on merits, emphasizing that a litigant should not be sent away from the seat of justice unheard, that the jurisdiction to strike out pleadings ought to be exercised with great care and caution and it should only be invoked in clear cases where a pleading is clearly hopeless, frivolous or vexatious and discloses no reasonable cause of action. (See Madan J. A. in D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Ano. [1980] KECA 3 (KLR)).

23. The need to exercise the discretion to strike out pleadings with great circumspection was underscored by this Court in Deepak Chamanla Kamani and Ano. vs. Kenya Anti- Corruption Commission and 3 Others, [2010] eKLR that:

> " The initial approach of the Courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objective set out in the legislation. If a way or ways alternative to a striking out are available, the Courts must consider those alternatives and see if they are more consonant with the overriding objective than striking out."

24. Our courts have on many occasions consistently held that procedural rules are not an end to themselves, but rather a means to achieve the ultimate goal of fair trial and just outcomes in legal proceedings. Our courts have also emphasized the importance of balancing procedural compliance with overriding objective of justice, as outlined in Article 159 of *the Constitution* and allowing flexibility in applying the rules when strict adherence might lead to an unjust result. (See the Supreme Court decision in Githiga & 5 Others vs. Kiru Tea Factory Company Ltd. (Petition 13 of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgment)).

25. Our courts have steadily upheld the above principles, especially when technicalities of procedure might unjustly prevent a party from having their day in court or obstruct the resolution of a dispute. This perspective underscores the importance of interpreting procedural provisions in a manner that facilitates the resolution of disputes on merits as opposed to procedural technicalities which prevent the spirit of the law from being enforced. (See the Supreme Court of India decision in Desh Bandhu Gupta vs. N. L. Anand, [1994] SCC (1)). However, complying with procedural rules in litigation is not a mere technicality, but a necessary element of ensuring fair and just proceedings. The only fetter is that, procedural rules, while important, should not be used to deny justice or perpetuate injustice.

26. The question narrows itself to whether requiring strict compliance of Rule 9 (2) and (4) prevents the spirit and letter of the law. We note that on record is a consent signed by 6 claimants only out of the 238 persons listed in the schedule of claimants on whose behalf the suit is said to have been filed.

    The appellants' counsel stated that this scheduled was filed after the suit was instituted. Even if we were to condone these two documents, still, the appellants have two challenges to surmount. One, the consent signed by the 6 persons cannot stand because the 6 were obligated to comply with Rule 9 (3) as highlighted shortly. Two, under the said rule, the statement of claim was mandatorily required to be accompanied by a schedule of all the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant. The schedule containing 238 persons did not conform to this requirement. This schedule was filed late, without court's leave. No effort was made to regularize this document both in terms of its contents or to be admitted out of time. Also, the 6 persons who signed a consent, did not provide the information required by sub rule (3). This means that the two documents did not comply with these two provisions.

27. Earlier in this judgment, we reproduced the above rules, therefore, it will add no value for us to rehash it here. However, it is important to note the use of the word shall in these two provisions. The word

"shall" when used in a statutory provision imports a form of command or mandate. The word shall in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote an obligation. The Longman Dictionary of the English Language states that "shall" is used to express a command or exhortation or what is legally mandatory.

28. Rule 9 (2) mandatorily requires that where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties, provided that in appropriate circumstances, the Court may dispense with this requirement. The appellants who were represented by an advocate never deemed it fit to invoke this proviso, which they could do, even during the hearing of the preliminary objection. The failure to invoke this provision was not explained. In every litigation, a party is expected to put his or her best foot forward. The drafters of the above rule were magnanimous enough to ensure that a very wide window remains open, at least to ensure that the door of justice is not completely shut, where a litigant, through an excusable lapse fails to comply with the said rule. Therefore, the appellants' failure to enter into the temple of justice through the said proviso can only be blamed on themselves and not to shift the blame to the trial court disguised as "undue regard to procedural technicalities."

29. A technicality was defined by the Employment and Labour Relations Court in James Musoo vs. Ezeetec Ltd [2014] eKLR as a provision of the law that inhibits or limits the direction of pleadings, proceedings and even decisions in court matters. Clearly, a provision of the law that leaves such a wide window open for a litigant to rectify a procedural lapse as in this case cannot be said to be inhibiting access to access nor can the court be accused of locking a litigant from entering the seat of justice in the circumstances of this case. Conversely, it is the appellants who pushed themselves out from the seat of justice by failing to seize the opportunity afforded to them by the said proviso.

30. The other glaring omission the appellants fell into is their failure to comply with Rule 9 (3) which, just like sub rule (2) in mandatory terms requires the statement of claim to be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant. Again, nothing barred the appellants from seeking court's leave to introduce the said schedule either by way of a formal application or orally even as late as during the hearing of the preliminary objection. We reiterate that a party who is evidently in default should not seek refuge under Article 159 (2) (d). This article was not meant to cover lapses by parties who fail to comply with clear rules of procedure either owing to their own negligence or lack of diligence. The Supreme Court in Karan vs. Ochieng & 2 Others [2018] eKLR had this to say about Article 159 (2) (d) and particularly the phrase "undue regard" deployed in the said Article:

> 70. "Article 159 (2) of *the Constitution* provides that in exercising judicial authority, the courts and tribunals should be guided by the principle inter alia that: (d) Justice shall be administered without undue regard to procedural technicalities.
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> 71. It is noteworthy that the phrase "procedural technicalities" in article 159 (2) (d) is qualified by the preceding phrase "undue regard". The word, "undue" is defined in the Concise Oxford Dictionary, 9th Edition. The first meaning is "excessive, disproportionate." Thus, article 159 (2) (d) cannot be interpreted to mean that all procedural stipulations are to be disregarded in the administration of justice. Certainly, the procedural requirements which facilitate the courts functioning as courts of justice, in a particular case, are not targeted. The courts have a duty to determine objectively in every case where the question of undue procedural technicality arises, whether the stipulation falls in the class of undue procedural technicalities, and if so, whether it should be disregarded in favour of substantive justice."

31. The requirements set out in Rule 9 (2) and (3) serves a salutary purpose of ensuring that the respondent gets full details regarding the number of the claimants, their grievances and details of their claims so that he/she can appropriately respond to the claim. It also assists the court in determining whether the claim meets the key requirements for a valid representative suit which include: (a) the existence of a large number of persons with a common interest, (b) the need for a representative to act on behalf of all or some of those persons, and (c) the importance of satisfying itself that those represented have consented to the suit being filed on their behalf.

32. This determination now narrows to whether the appellants having failed to comply with the above rules, including failing to seek refuge in the earlier cited proviso, can now be heard to complain that the trial court upheld technicalities of procedure at the expense of substantive justice in total disregard of Article 159 (2) (d). Simply put, did the trial court dismiss their case on a technicality. A "technicality" generally refers to a minor procedural or formal point, often a deviation from the rules or regulations, that could be used to invalidate a legal action or claim. We do not think that the requirements provided under Rule 9 (2) and (3) are minor issues. To the contrary, these requirements are substantive and go into the root of dispute because they directly touch on the competence and substance of the suit. A competent pleading is crucial for a fair and efficient adjudication of the dispute. It serves as a foundation of a case because it defines the issues and rights of the parties. A competent pleading ensures that each party knows the case they must address and prevents surprises during the trial. Properly drafted pleadings promote the identification of disputed issues, leading to quicker resolution of the case.

33. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred. Substantive information specifically required to be part of the pleadings cannot be disregarded. (See the Supreme Court decision in Karan vs. Ochieng & 2 Others (Supra). In this appeal, this Court has to examine whether there is really a failure of justice or whether it is only a camouflage. Justice is a virtue which transcends all barriers, therefore, it cannot be tilted to support a finding that goes against the law. Neither the Rules of procedure, nor technicalities of law can stand in its way. As the saying goes, even the law bends before justice.

34. While procedure is crucial, courts cannot allow minor procedural errors to derail a case and deny parties their day in court. Therefore, courts often strike a balance between upholding the rules of procedure and ensuring substantive justice is achieved. Judges have some discretion to overlook procedural technicalities, especially when doing so is necessary to prevent injustice.

35. The courts understanding of the foregoing is that while procedure is a necessary component in the administration of justice, substantive justice is the ultimate goal unless the procedural deficiency is sufficiently grave to render substantial justice unattainable. Therefore, a litigant who relies on the provisions of Article 159 (2) (d) must satisfy the court that in the circumstances of the particular case, it was not desirable to pay undue regard to a relevant technicality. This is because Article 159 (2) (d) is not a magic wand in the hands of defaulting litigants. As was held by the Supreme Court in Zacharia Okoth Obado vs. Edward Akong 'o Oyugi & 2 Others. Article 159 (2) (d) of the *the Constitution* is not a panacea for all procedural shortfalls. It further stated that, all that the courts are obliged to do is to be guided by the undue regard to technicalities principle and that it was plain to the court that Article 159 (2) (d) is applicable on a case-by- case basis.

36. The other important wound inflicted by the appellants on themselves is that their suit was not "dismissed." It was "struck out." As was held by the High Court in Swan Carriers Limited vs. Samuel Koskei Kibet [2010] eKLR:

> " ...Once a matter or application is dismissed, there is finality to it. If a matter is "struck out" on a technicality, then the said (sic) aggrieved party is permitted to file a court (sic) application in the same court. In this case, the applicants had the option to file the application struck out a fresh before the magistrate's court where the application was struck out on technicalities. They chose to come to the High Court. Is this res judicata."

37. Similarly, this Court in Allan Robinson & 2 Others vs. Philiph Gikaria Muthami Civil Application No. 187 of 1997 (unreported) held that an appellant whose appeal has been struck out for being incompetent has the right to move the court afresh for extension of time to file a competent appeal. In the instant case, instead of filing a fresh competent suit before the trial court, the appellants opted to prefer an appeal to this Court, effectively allowing yet another golden opportunity to slide through its fingers.

38. We have said enough to demonstrate that this appeal lacks merit and it deserves only one remedy, that is, dismissal. Accordingly, we dismiss this appeal with costs to the respondents.

DATED AND DELIVERED AT ELDORET THIS 9TH DAY OF MAY, 2025.

J. MATIVO

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JUDGE OF APPEAL

M. GACHOKA CIArb, FCIArb.

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JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.