Kenyatta National Hospital Board & another v Ruteere (Civil Appeal E233 of 2021) [2025] KECA 1461 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KECA 1461 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E233 OF 2021

DK MUSINGA, M NGUGI & GV ODUNGA, JJA

JULY 31, 2025

BETWEEN

KENYATTA NATIONAL HOSPITAL BOARD ..... 1ST APPELLANT

JUSTUS KIMATHI MBUI ..... 2ND APPELLANT

AND

STEPHEN KABURIA RUTEERE ..... RESPONDENT

(Being an appeal from the ruling and order of the Employment and Labour Relation Court at Nairobi (Byram Ongaya, J.) dated 23rd October, 2020 in ELRC Cause No. 181 of 2016)

JUDGMENT

1. In his statement of claim before the Employment and Labour Relations Court (ELRC) dated 11th February 2016, the respondent, Stephen Kaburia Rutere, sought, inter alia, orders that any decision of the Staff Disciplinary and Advisory Committee of the Kenyatta National Hospital to interdict him was unlawful; that the court lifts his interdiction and that he be allowed to resume his duties without loss of benefits; that he should be paid benefits withheld during interdiction, and that any bad record entered into his file as a result of the interdiction should be expunged. The claim was filed against the Kenyatta National Hospital Board and Mr. Justus Kimathi Mbui, the appellants before us.

2. The matter proceeded for hearing on 17th December 2019 in the absence of the appellants, on the basis that they had been duly served and had been given directions to file a response, but had not done so. At the hearing, the respondent adopted his witness statement and his documents were admitted as evidence before the court. Through his advocate, Mr. Chimei, the respondent amended his claim from one challenging and seeking lifting of his interdiction to one claiming unlawful dismissal and seeking reinstatement.

3. In the judgment dated 9th April 2020, the trial judge allowed the respondent's claim and declared that the respondent's termination from employment had been unlawful. He directed the respondent's

reinstatement to his position with due benefits, and that he be allowed to resume duty not later than 2nd May 2020.

4. The appellants then filed an application dated 4th May 2020, brought under rules 11(3), 13(5), 17, 26 and 33 of the ELRC (Procedure) Rules 2016, orders 12 rule 7, 51 rule 1 of the Civil Procedure Rules, and Article 159 of *the Constitution*. It was supported by three affidavits, similar in content, sworn on the same date by Edwin Simiyu Wabuge, Eugene Lubale Lubulellah and Calvin Nyachoti, the 1st appellant's corporation secretary.

5. The appellants sought, inter alia, stay of execution and setting aside of the judgment; for summons to issue or for the validity of summons which may been previously issued to be extended; for leave to be granted to file a memorandum of appearance, a response to the claim and witness statements and bundle of documents; for the suit to be set down for hearing inter partes; and in the alternative, the court does review its judgment and find that no summons were issued to the appellants and make appropriate orders or directions pursuant to such orders.

6. The appellants averred that the ELRC had not issued summons to enter appearance, a mandatory requirement under rule 11 (2) of the ELRC (Procedure Rules) 2016; which went to the jurisdiction of the court; that accordingly, without service of summons, the appellants were not under an obligation to enter appearance or file a defence to the claim; that the appellants' advocates' office had closed on 15th December 2019, a fact that was known to the respondent's advocates; that due to an administrative error on the part of the appellants' advocates and an inadvertent failure by Mr. Wabuge to hand over the matter to Mr. Eugene Lubale Lubulellah, who took over the conduct of the matter, upon leaving the firm of Lubullelah & Associates, then on record for the appellants, the appellants had not been informed that the main suit had been heard on 17th December 2019; that as a result, when Mr. Lubulellah appeared for mention of the matter on 4th March 2020, he sought leave to file submissions, which was allowed; and that the failure to attend court on 17th December 2020 was occasioned by a sincere set of mistakes on the part of the appellants' counsel. The appellants prayed that the mistakes of counsel should not be visited upon them, and that their application be allowed as prayed.

7. The respondent opposed the application by an affidavit sworn by Haggai Chimei, Advocate, on 3rd June 2020. It was averred for the respondent that the appellants were in contempt of the court's orders issued on 9th April 2020; that he had reported to work on 2nd May 2020 but was sent away; that the court was functus officio and the application was an abuse of the court process as the appellants had already filed a notice of appeal instead of seeking review; that the appellants were given ample opportunity to participate but deliberately failed to comply with pre-trial directions; and that the appellants' counsel had applied and been given time to file submissions and cannot turn around and allege that they mistakenly failed to file a defence.

8. On his part, the respondent filed an application dated 20th May 2020, brought under rules 12 and 13 of the ELRC Act, seeking to hold the Chief Executive Officer (CEO) of Kenyatta National Hospital in contempt of court for failing to comply with the court's judgment. The respondent averred that the appellants ignored the judgment dated 9th April 2020; that he reported to work as ordered on 2nd May 2020 but was denied access by the CEO; that court orders are binding; and that non- compliance undermines judicial authority.

9. The appellants opposed the application, the CEO denying meeting the claimant on 2nd May 2020. They averred that the Hospital's Legal Office only became aware of the judgment on 4th May 2020 due to Covid-19 disruptions; that the claimant was unclear on his reporting date, whether it was 30th April or 2nd May 2020; and that the judgment lacked a penal notice, meaning no formal warning was issued regarding contempt consequences.

10. The ELRC heard both applications together. In the ruling dated 23rd October 2020 which is the subject of this appeal, the ELRC dismissed the appellants' application. It held that the appellants had filed a notice of appeal, making a review application improper; that they were aware of the proceedings before the ELRC and had the opportunity to participate but failed to do so; that their claims of ignorance of the case were an afterthought; and that the appellants' lamentations about not being aware of the claim were the sort of technicalities cured by Article 159 of *the Constitution*.

11. The ELRC also dismissed the respondent's application for orders of contempt against the 1st appellant and its CEO, Dr. Evanson Kamuri. In declining to hold Dr. Kamuri in contempt, it found that the Hospital became aware of the judgment on 2nd May 2020; that the confusion regarding the respondent's reporting date made enforcement unclear; and that no penal notice was served and the CEO was therefore not in contempt. The ELRC therefore adjusted the judgment timelines, setting new deadlines for compliance, by extending the payment date of the respondent's benefits to 31st December 2020; it ordered that the respondent reports to work on 2nd November 2020, accompanied by his lawyer to avoid further disputes; and directed that the parties bear their own costs of the applications.

12. Aggrieved by the ruling, the appellants filed the present appeal, raising nine grounds in their Memorandum of Appeal dated 20th April 2021. They contended that the learned judge erred in law and fact in: failing to set aside the ex parte judgment; violating the appellants' right to be heard protected under Article 50 of *the Constitution* by allowing his discretion to review and or set aside the court's judgment to be fettered; arriving at the finding that the mistake of counsel ought to be visited upon an innocent litigant even when the mistake has been adequately explained; holding that a notice of appeal amounts to a substantive appeal and divests a party of the right to seek review of the decision intended to be appealed against; misdirected himself in law in failing to find that parties are bound by their pleadings; descending to the realm of the dispute and actively taking part in the dispute by crafting and granting orders which had not been sought by the respondent; in failing to find that he had conflated matters and made a determination on issues not pleaded and thus not properly before him, which issues had been brought without any amendment having been sought by the respondent; and in failing to find that no summons had been extracted and served on the appellant to warrant the filing of a statement of response.

13. The appellants filed submissions dated 30th May 2022 in support of their appeal. They submitted that the ex-parte judgment was improperly entered against them; that the respondent initially sought relief against interdiction but later, without amending his claim, shifted to seeking reinstatement, which the court granted without hearing the appellants; and that they were not properly served and were unaware of the hearing date during which the matter proceeded ex parte due to a miscommunication within their legal team. They emphasised that the failure to attend court was due to an advocate's mistake, which should not be unfairly used against them.

14. The appellants further submitted that the court erred by refusing to set aside the judgment despite the presence of triable issues in their defence; that the court incorrectly ruled that filing a notice of appeal barred them from seeking a review, contrary to legal precedent; and that the ELRC erred by granting orders not sought in the original pleadings as the claim initially challenged the respondent's interdiction, not termination. They further alleged bias, arguing that the judge disregarded key arguments while favouring the respondent's position. They urged this Court to set aside the ex parte judgment and allow them to defend the suit on merit, citing procedural irregularities, prejudice suffered, and the failure of the lower court to exercise its discretion judiciously.

15. The appellants relied on the decisions in Mbogo & Another v Shah [1968] EA 93 and United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd (1985) EA 898 with respect to the circumstances under which an appellate court can interfere with a trial court's exercise of discretion; and Pithon Waweru Maina v Thuka Mugiria [1983] eKLR 14 and Patel v E.A. Handling Services Ltd (1974) EA 75 for the proposition that the discretion to set aside ex parte proceedings and judgement is to avoid injustice or hardship resulting from accident, inadvertence and excusable mistake or error, which was the case in this matter.

16. The appellants further submitted that it is settled law that the mere fact of filing a notice of appeal does not divest a litigant of the right to seek review, as the notice of appeal does not amount to an appeal as contemplated under Order 45 of the Civil Procedure Rules. They relied for this submission on the decision of this Court in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR.

17. The respondent opposed the appeal by way of submissions dated 30th July 2021. He submitted that the appellants had been served in accordance with rule 13 of the ELRC (Procedure) Rules 2016; that they should have filed their response to his claim within 21 days; that rule 22 of the said Rules allowed the ELRC to proceed ex parte where a party does not appear; and that the ELRC rightly ruled in his favour.

18. He further submitted that the appellants failed to demonstrate sufficient grounds for setting aside the ex parte judgment; and that the appellants were aware of the proceedings but failed to attend court, file a response, or present a defence within the prescribed timelines. The respondent asserted that his claim was properly before the ELRC and the judgment granting him reinstatement and benefits was based on the facts and applicable law.

19. It was his submission that the appellants' application for review was properly dismissed as they had already filed a notice of appeal, thereby losing the right to seek review. Further, that the appellants' claim of mistake by counsel was not a valid excuse for non-compliance with court procedures; that the trial court's discretion in refusing to set aside the ex parte judgment was exercised fairly and judiciously as the appellants failed to demonstrate prejudice or any meritorious defence, and he urged this Court to dismiss the appeal and uphold the ELRC ruling.

20. The respondent also relied on the case of Pithon Waweru Maina v Thuku Mugiria (supra) as well as Shah v Mbogo (1967) EA 116; and Patriotic Guards Ltd v James Kipchirchir Sambu [2018] eKLR to support his position, and prayed that the appeal be dismissed with costs.

21. At the hearing of the appeal on 17th March 2025, learned counsel, Mr. Wakwaya and Mr. Arwa appeared for the appellants while Mr. Malenya appeared for the respondent.

22. In highlighting the appellants' submissions, Mr. Wakwaya submitted, first, that the learned judge erred in holding that the filing of a notice of appeal automatically divested a party of the right to pursue a review. His submission was that a notice of appeal is not, in itself, an appeal within the meaning of the law and does not therefore preclude the filing of a review application.

23. It was his submission, secondly, that the trial judge failed to apply the correct legal principles in determining the appellant's application for review; that the ELRC did not consider whether the appellant had a triable defence, failed to appreciate that the appellant's non-participation was due to the mistake of counsel, and did not properly evaluate the grounds supporting the review application. It was argued for the appellants that in failing to address these critical issues, the trial court erred both in law and fact by declining to set aside the judgment.

24. The third issue raised by the appellants related to the respondent's claim before the ELRC. Mr. Wakwaya submitted that the claim before the trial court changed substantially without due process; that while the claim as initially filed concerned interdiction, the judgment rendered addressed a case of unlawful termination. According to the appellants, this shift occurred without any formal amendment to the pleadings or notice to the appellant; but that when the issue was raised before the ELRC as a basis for review, the court declined to entertain it. Mr. Wakwaya urged this Court to find that the ELRC failed to exercise its discretion judiciously and to allow the application for review to enable the appellants fully participate in the hearing and determination of the claim before the ELRC.

25. In highlighting the respondent's submissions dated 30th July 2021, learned counsel, Mr. Malenya, submitted that the ELRC delivered judgment on 9th April 2020, reinstating the respondent to employment; that instead of complying with the judgment, the appellants filed a notice of appeal and subsequently a review application; that a litigant must elect either to appeal or to seek review and cannot pursue both remedies simultaneously; that although a notice of appeal may not amount to an appeal, it nonetheless initiates the appellate process.

26. It was further submitted for the respondent that the appellants, having sought the exercise of judicial discretion, had come to court with unclean hands; that since the date of the judgment, the respondent had been unlawfully kept out of employment and had not been paid any salary, despite the orders of reinstatement issued by three judges of the ELRC; and that the appellants had continuously disregarded court orders, including interim orders restraining them from proceeding with disciplinary processes. Mr. Malenya submitted that the appellants had participated in the trial proceedings, were represented by counsel and even filed submissions, and therefore could not validly claim non-participation in the proceedings before the ELRC. He urged this Court to dismiss the appeal.

27. It was submitted for the respondent, in the alternative, that should this Court consider remitting the matter for retrial, the respondent should be reinstated to the payroll and paid his salary, taking into account the protracted nature of the case which commenced in 2016, the respondent's age of 55 years, and the prejudicial delay that would ensue. He also submitted that the sum of Kshs. 3.5 million deposited as security for costs be considered for release to the respondent in satisfaction of part of his claim.

28. In his submissions in response, Mr. Wakwaya disputed the submissions for the respondent that the appellants had failed to comply with the orders of the ELRC, noting that no replying affidavit or supporting documentation had been filed by the respondent before the ELRC to demonstrate non-compliance, pointing out the inconsistency in the respondent's claim that the appellants had not complied with court orders while simultaneously acknowledging the deposit by the appellant of Kshs. 3.5 million as security for costs.

29. He maintained that the appellants had sought the trial court's discretion on legitimate grounds, and that mistakes of counsel should not be visited upon the litigant. He submitted further that there was an order of stay of execution granted in Civil Appeal (Application) No. E085 of 2021 which stayed the judgment of the ELRC, and it was therefore unfair to accuse the appellants of disobedience in the face of a valid court order. He observed, finally, that counsel for the respondent had implicitly conceded the appellants' right to be heard, and he prayed that the appellants be given the opportunity to defend the claim on merit.

30. We have considered the record of appeal and the submissions of the parties, both oral and written. The appeal before us relates to the exercise of discretion by the trial court in declining to either set aside or review an ex parte judgment entered in favour of the respondent following a hearing on 17th December 2019. We are called upon, therefore, to consider and determine whether the learned judge erred in

holding that the filing of a notice of appeal barred the appellants from seeking review; and whether the trial court failed to exercise its discretion judiciously in declining to set aside the ex parte judgment.

31. In dismissing the appellants' application for review, the ELRC held that the application was incompetent as they had already filed a notice of appeal. This conclusion by the trial court goes against the jurisprudence, now settled, that a notice of appeal is not a bar to filing an application for review- see Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others (supra). The appellants challenge of the ruling of the ELRC on this basis is therefore well grounded.

32. The second issue relates to the question whether the trial court properly exercised its discretion in declining to set aside the judgment entered in favour of the respondent. In Shah v Mbogo & Another [supra] cited by the respondent, the Court emphasized that the discretion to set aside an ex parte judgment should be exercised to avoid injustice or hardship resulting from inadvertence or excusable mistake or error. In this case, the appellants attributed their failure to attend court and file responses to confusion arising from a failure by their counsel to properly hand over following the departure of one of them, Mr. Wabuge, from the firm on record for the appellants, Lubulellah & Associates; and disruptions occasioned by the Covid-19 pandemic.

33. We note from the appellants affidavits in support of their application that immediately they learnt of the judgment, they made every effort to regularize their position by filing their application, offering at the outset to meet the costs of the application and the ex parte judgment. This, in our view, was a matter that the trial court should have considered and exercised its discretion in favour of the appellants.

34. More importantly, we note that the appellants brought to the attention of the trial court, in their application and affidavit in support, that it had entered judgment for the appellant on a prayer that had not been sought in the initial claim before it; that the respondent had initially sought orders in respect of his interdiction; but that at the hearing of the claim on 17th December 2019, he had been allowed to amend his claim, in the absence of the appellants, to seek reinstatement, which the trial court granted in the judgment dated 9th April 2020.

35. It is trite law that parties are bound by their pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Similarly, a court is bound by the pleadings of the parties and must determine the dispute within the pleadings placed before it- see Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR. In our view, by failing to consider this aspect of the appellants' application, the trial court exercised its discretion improperly and arrived at a wrong conclusion.

36. We further note that the appellants had annexed to their application a draft Statement of Response. They submitted that the draft statement showed triable issues, and that the ELRC was required to interrogate it; determine whether it raised triable issues and, if so, allow the appellants an opportunity to ventilate the defence in line with Article 50 of *the Constitution*.

37. We observe that in its ruling, the ELRC made no reference to the draft Statement of Response, which the appellants submit was in breach of established principles regarding setting aside of ex parte judgments. In CMC Holdings Limited v James Mumo Nzioki [2004] eKLR, this Court stated:

> " The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues."

38. The Court went on to cite this Court's holding in Tree Shade Motors Limited vs D T Dobie & Company (K) Limited & Joseph Rading Wasambo, [1998] KECA 40 (KLR), which involved an application to set aside a default judgment, in which the Court stated:

> "The learned judge did not look at the draft defence to see if it contained a valid or reasonable defence to the plaintiff claim. Where a draft defence is tendered with the application to set aside the default judgment, the Court is obliged to consider it to see if it raises a reasonable defence to the plaintiff's claim. If it does, the defendant should be given leave to enter and defend."

39. In the circumstances, we are satisfied that the appellants' appeal is merited. Indeed, the respondent tacitly concedes this by the submission that should we be minded to allow the appeal and remit it to the trial court, we should order that he be paid the sums deposited as security for costs. Given our findings in this matter, we are unable to make the order sought by the respondent which, in our view, in any event, has no foundation.

40. We accordingly allow the appellants' appeal and make the following orders:

    i. The ruling and order of the ELRC dated 23rd October 2020 be and is hereby set aside;

    ii. The ex parte judgment dated 9th April 2020 is also hereby set aside;

    iii. The appellants are hereby granted leave to file and serve their response to the respondent's statement of claim within 14 days of the date hereof;

    iv. The matter is hereby remitted to the ELRC for hearing and determination before a judge other than Ongaya, J;

    v. Each party shall bear its own costs of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY, 2025.

D. K. MUSINGA (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.