



**Ochieng' v Awanad Enterprises Limited & 2 others (Civil Appeal
E054 of 2021) [2024] KECA 409 (KLR) (26 April 2024) (Judgment)**

Neutral citation: [2024] KECA 409 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E054 OF 2021
MSA MAKHANDIA, KI LAIBUTA & GV ODUNGA, JJA
APRIL 26, 2024**

BETWEEN

LABAN OWINO OCHIENG' APPELLANT

AND

AWANAD ENTERPRISES LIMITED 1ST RESPONDENT

PILI MANAGEMENT CONSULTANTS LIMITED 2ND RESPONDENT

HEZRON AWITI BOLLO 3RD RESPONDENT

*(Being an appeal against the Ruling and Orders of the Employment
and Labour Relations Court of Kenya at Mombasa (Byram
Ongaya, J.) dated 18th June 2021 In E.L.R.C. Cause No. 66 of 2019)*

JUDGMENT

1. By a Memorandum of Claim dated 27th April 2019, the appellant, Laban Owino Ochieng, sued the respondents and the Habo Group of Companies (Habo) jointly and severally claiming Kshs. 27,605,707/30 being the commission allegedly payable to him at the rate of 3% of all proceeds of the respondents' project; general damages and compensation; and costs of the suit.
2. The appellant's case was that he was engaged by the 3rd respondent, Hezron Owiti Bollo, on 15th August 2011 as an engineer/general manager to undertake general project management of the respondents projects at a monthly salary of Kshs. 76,080; that he was entitled to a commission at the rate of 3% of all proceeds derived from the respondents' projects; and that the 3% commission became due and payable on successful completion of each project.
3. In his Memorandum of Claim, the appellant stated that, on 15th November 2011, the 2nd respondent, Pili Management Consultants Limited, entered into a contract with Fubeco China Fushun for the construction of go-downs, offices and apartments on LR No. 15137 situate along Mombasa Road,



- Nairobi, at a cost of Kshs. 793,267,451/08; that in accordance with his terms of employment by the 1st respondent, the appellant was instructed to act as a consultant and Project Manager on behalf of the 2nd respondent in relation to the project aforesaid and report to the 3rd respondent; that the project was completed and handed over to the 2nd respondent in 2017; that due to certain “frustrations,” the appellant tendered resignation vide a letter dated 30th April 2012 pursuant to clause 7 of his contract, but retained project management consultancy portfolio until 2017 when the project was completed and handed over; and that the respondents refused, failed or neglected to pay his commission on the said project. It is noteworthy that the contract alluded to is not part of the record of appeal as put to us.
4. The respondents and Habo Group of Companies filed separate defences, all dated 31st October 2019. In summary, their defences were that the appellant abandoned and absconded from duty with effect from 30th April 2012 following his purported resignation from employment; that the appellant’s suit was incompetent and barred by statute; that the claim against them was *res judicata* in view of the fact that the appellant had filed Mombasa ELRC Cause No. 22 of 2019 – *Laban Owino Ochieng’ v Awanad Enterprises Limited, Pili Management Consultants Limited and Hezron Awiti Bollo* – which was dismissed by James Rika, J. on 27th September 2019 on the grounds that the same was statute barred and offended section 90 of the [Employment Act, 2007](#); that the appellant was not entitled to 3% commission as claimed; and that they (the respondents) did not by any means frustrate the appellant in the performance of his duties. In addition to their defences, the respondents gave notice of their intention to raise a preliminary objection or apply to have the appellant’s claim struck out on the grounds that it disclosed no reasonable cause of action; that it was barred by statute; that it was *res judicata*; and that it was an abuse of the court process.
 5. On 11th September 2020, the respondents filed separate Motions pursuant to section 90 of the [Employment Act, 2007](#) (the Act) and rule 17 of the Employment and Labour Relations Court (Procedure) Rules praying that the appellant’s claim against them be struck out with costs on the grounds that the appellant had previously sued the respondents in Mombasa ELRC Cause No. 22 of 2019, which was determined against the appellant vide the ruling dated 27th September 2019; that the appellant’s claim was not only *res judicata*, but also statute barred by dint of section 90 of the [Act](#); and that therefore the court lacked jurisdiction to entertain the claim.
 6. In the absence of the respondents’ respective Motions and affidavits in support thereof, we only gather from the impugned ruling that the three deponents merely deposed to the grounds on which the three applications were made. In reply thereto, the appellant filed a replying affidavit sworn on 7th April 2021 stating that his claim was based on a contract of employment dated 15th August 2011, and which remained valid until 2017; that Mombasa ELRC Cause No. 22 of 2019 was solely based on the Chief Magistrate’s lack of jurisdiction to hear the suit; that the date of termination of his employment was a triable issue which could not be dealt with in an interlocutory application; that the nature of the relationship between the appellant, the 2nd and 3rd respondents could only be determined on evidence, but not in an interlocutory application; that the issue as to whether the appellant was still in employment from 2011 to 2017 was a contested issue of fact that could only be determined on full hearing; that his claim was not *res judicata*; that whether his letter of resignation was effected or rejected was a contested issue of fact that could only be determined after a full hearing; and that the ELRC had the requisite jurisdiction to entertain his claim. He urged the court to dismiss the respondents’ Motions with costs.
 7. It is noteworthy that the suit in the Chief Magistrate’s Court was initially filed by the appellant in CMCC No. 24 of 2019 and subsequently placed before the ELRC administratively, and registered as Mombasa ELRC Cause No. 22 of 2019 in the absence of a formal transfer by an order of the court.



8. In its ruling dated 18th June 2021, the ELRC (Byram Ongaya, J.) struck out the appellant’s suit with costs to the respondents. According to the learned Judge, Rika, J. had correctly held that the appellant’s suit was barred by statute of limitation, and that the learned Judge’s decision was binding on him.
9. Dissatisfied by the ruling and orders of the ELRC, the appellant moved to this Court on appeal on a whopping 11 grounds set out on the face of his memorandum of appeal dated 12th July 2021 essentially faulting the learned Judge for holding that his claim was *res judicata*; finding that the same was statute barred; and for failing to exercise his judicial discretion in a fair manner.
10. When the appeal came up for hearing before us on 31st October 2023, learned counsel for the respondents, Mr. Amuga, drew the Court’s attention to the respondents’ Notice of Motion dated 5th May 2023 by which they sought orders to strike out the appellant’s record of appeal pursuant to rule 84 of the [Court of Appeal Rules, 2010](#) (rule 86 of the [2022 Rules](#)) on the grounds that the record of appeal was filed and served out of time; and that the appeal was incompetent. They urged us to strike out the record of appeal with costs to the respondents. The Motion was supported by Mr. Amuga’s annexed affidavit sworn on 5th May 2023 substantially deposing to the grounds on which it was made. In addition, counsel deposed that the record of appeal containing the memorandum of appeal dated 12th July 2021 was served upon his firm on 27th April 2023, but that it was not clear when the record was lodged in Court.
11. We take note of the fact that the appellant did not file any reply to the respondents’ Motion. Be that as it may, counsel for the appellant, Ms. Naswa (holding brief for Mr. Mosi) and Mr. Amuga for the respondents, urged us to hear and determine the Motion together with the appeal, and render one conclusive decision so as to avoid delay in determination of the substantive appeal.
12. The procedural approach that best commends itself to us is that we first hear and determine the respondents’ Motion and, depending on our decision thereon, we may proceed to pronounce ourselves on the merits of the appeal. It is noteworthy, though, that none of the learned counsel filed any written submissions in respect of the Motion. Neither did they make any substantive oral submissions thereon. In the absence of any reply by the appellant, we only have the respondents’ contention that the record of appeal was served out of time, and without any indication as to when it was filed.
13. Be that as it may, the record of appeal as put to us lends clarity to the issue as to whether the appellant complied with the mandatory provisions of rule 86 of the [2022 Rules](#). Even though the record of appeal bears no stamp, and is not accompanied by a copy of a payment receipt as evidence of the date of filing, it nonetheless contains a certificate of delay dated 15th July 2022 and issued on 25th July 2022 after which the appellant had sixty (60) days within which to file the record of appeal and serve the same on the respondents or their counsel within seven (7) days next following as required under the mandatory provisions of rules 84(1) and 92(1) of the [Court of Appeal Rules, 2022](#).
14. Rule 84(1) reads:
 - “ 84.
 - (1) Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged—
 - a. a memorandum of appeal, in four copies;
 - b. the record of appeal, in four copies;



- c. the prescribed fee; and
- d. security for the costs of the appeal:

Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with sub-rule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy.”

15. With regard to the period within which the record of appeal duly filed should be served, rule 92(1) provides:

92.(1) The appellant shall, before or within seven days after lodging the memorandum of appeal and the record of appeal in the appropriate registry, serve copies thereof on each respondent who has complied with the requirements of rule 81.

16. The appellant having obtained his certificate of delay on 25th July 2022, he ought to have filed his record of appeal on or before 25th September 2022 as required under rule 84(1) and served the same on the respondents on or before 2nd October 2022 as mandated under rule 92(1) of this *Court's Rules*. Instead, the appellant had his record of appeal served on 27th April 2023, more than six (6) months later, and without leave of the Court.

17. This Court sitting in Nakuru in *John Mutai Mwangi & 26 others v Mwenja Ngure & 4 others* [2016] eKLR held that:

“The filing of a record of appeal is required to be done within 60 days of the lodgment of the notice of appeal by dint of Rule 82 [now rule 84] of the *Court of Appeal Rules*. That timeline is strict and is meant to achieve the constitutional, statutory and rule-based objective of ensuring that the Court processes dispense justice in a timely, just, efficient and cost-effective manner.”

18. In the same vein, the Court reasoned as follows in *MAE Properties Limited v Joseph Kibe & Another* [2017] eKLR:

“We have said on numerous occasions that the Rules of Court exist for the purpose of orderly administration of justice before this Court. The timelines for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before us. The Rules are expressed in clear and unambiguous terms and they command obedience...

Failure to comply with the timelines set invites sure consequences.”

19. The appellant’s disobedience of, and failure to comply with, the mandatory provisions of rules 84(1) and 92(1) of the *Court of Appeal Rules* invites the inevitable consequence of rendering the appeal herein incompetent. Accordingly, the appeal is hereby struck out with costs to the respondents. In the circumstances, we need not pronounce ourselves on the merits of the appeal, the same having fallen by the wayside. Orders Accordingly.



DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL, 2024.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

*I certify that this is the true copy of the original
signed*

DEPUTY REGISTRAR

