Mbugua v Nairobi Water and Sewerage Co Ltd (Civil Appeal E684 of 2021) [2024] KECA 1231 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1231 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E684 OF 2021

SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA

SEPTEMBER 20, 2024

BETWEEN

BERNARD NDUNGU MBUGUA ..... APPELLANT

AND

NAIROBI WATER AND SEWERAGE CO LTD ..... RESPONDENT

(Being an appeal against the ruling of the Employment and Labour Relations Court of Kenya at Nairobi (M. Onyango, J.) dated 18th September 2019 in ELCR Cause No. 464 'B' of 2014)

JUDGMENT

1. A sketch of the background to this appeal demonstrates why the appeal barks up a wrong tree.

2. Bernard Ndungu Mbugua, the appellant, was successful in his claim for unlawful termination of employment against Nairobi City Water & Sewerage Co. Ltd, the respondent, ultimately obtaining the following orders from Hon. Maureen Onyango, J. in a judgment dated and delivered on 12th July 2019:

> "a) That the terminal dismissal be and is hereby reduced to normal termination of employment.
>
> b. That the respondent is hereby ordered to pay the Claimant's terminal dues in accordance with his terms of service.
>
> c. That there shall be no orders as to costs."

3. Following that decision was a court appearance on 7th November 2019, a mention, in which a Mr. Owuor holding brief for Mr. Ndungu on record for the appellant explained it to be for purposes

of "tabulation of decretal award" so that the appellant could execute. The trial judge then made the following order:

> " Parties to tabulate and approach court only if they disagree."

4. The appellant subsequently approached the trial Court through a motion dated 9th March 2020 and amended on 6th April 2020 whose main prayer was that the Court be pleased to grant orders to confirm and/or endorse the computation of the award due to the appellant.

5. In a ruling dated 18th September 2020, the trial Court declined the said motion for the reason that the award had been computed at Kshs.310,345.15 and the decretal sum paid to S. Ndungu & Company Advocates, then counsel for the appellant. It is not contested that the said firm represented the appellant until when the firm of Maosa & Co. was granted leave to come on record in its place on 25th February 2020.

6. Emerging from material placed before the trial Court is that in a letter of 2nd September 2019, the firm of S. Ndungu & Co. Advocates, writing on behalf of the appellant, asked the respondent to furnish it with a calculation of their client's terminal dues for verification and approval. In a response, the respondent wrote on 2nd October 2019 in which it tabulated the dues to be Kshs.310,343.75 and signed off by making the following promise:

> " The company is preparing payment in satisfaction of amount which shall be availed shortly."

7. A reply was in a letter erroneously dated 11th September 2019 in which the firm of S. Ndungu & Co. Advocates called for payment of the said Kshs.310,345.75 and gave its bank details. A cheque for that sum was eventually sent to the said firm of advocates by the respondent through a letter of 11th November 2019 and received by the firm on 12th November 2019.

8. Dissatisfied with the ruling of 16th September 2020, the appellant did two things: filed a notice of appeal dated 29th September 2020 and lodged with the trial Court on 30th September evincing his intention to appeal against the said decision; and a few days later, through an application dated 3rd November 2020, moved the trial Court for review of its decision.

9. In a decision dated 8th October 2021, the trial Court dismissed the motion for review holding as follows:

> " 14. I have perused Court record in this matter and note that the Claimant/ Applicant has in fact preferred an Appeal against the impugned ruling of 18th September, 2022 and lodged with the Employment and Labour Relations Court on 30th September 2020.
>
> 15. The instant Application therefore fails on this limb by dint of the provisions of Rule 33(1) of the Employment and Labour Relations Court (Procedure) Rules 2016 which provide that an application for review may only be made where no appeal has been preferred by the Applicant. There is no indication that the notice of appeal has been withdrawn or that the Applicant has abandoned the appeal. This Court can therefore not proceed to discuss the merits of the application."

10. For now, we observe that as it is apparent that this appeal had not been instituted on the date the motion for review was argued and ruling delivered, the correctness of the decision of 8th October 2021 is doubtful (see the reasoning of this Court in Multichoice (Kenya Ltd vs Wananchi Group (Kenya)

Limited & 2 Others [2020] eKLR). That said, we have a proper appeal before us challenging the ruling of 18th September 2020 on the following six grounds: -

i. That, the learned trial judge of the superior court erred in law and fact when she disallowed the appellant's application for computation of dues due to him, and in essence acted contrary to the existing proceedings of the court.

ii. That, the learned trial judge of the superior court erred in law and fact when she disallowed the appellant's application for computation of his dues yet in the proceedings of 7th November, 2019, the court had directed that parties to tabulate the dues, with liberty to approach the Court in case of disagreement.

iii. That, the learned trial judge of the superior court erred in law when she made a conclusion that the decretal sum had already been settled; and yet the appellant was never engaged in the exercise of the computation as per the directions of the Court.

iv. That, the learned trial judge of the superior court erred in law when she discriminated against the rights of the appellant; and in the process denied his economic rights.

v. That, the learned trial judge of the superior court erred in law and fact when she ruled that the appellant's application had been overtaken by events.

vi. That, the learned trial judge of the superior court erred in law when she confirmed the respondent's computation of the appellant's dues without following due process as laid down in the Labour Regulations.

11. At plenary hearing, learned counsel Mr. Maosa represented the appellant while Mr. Macharia, learned counsel appeared for the respondent.

12. In his short address, counsel Maosa simply submitted that: the trial Court erred in law in failing to give consideration to the substantive arguments raised before it; erred in law and fact in failing to appreciate that his client had laid sufficient grounds to warrant grant of the orders sought; and that the decision of the Court was against the weight of evidence.

13. On his part, Mr. Macharia underscored that the computation of the terminal dues had been accepted by counsel then on record for the appellant, and payment made to and accepted by that counsel. Mr. Macharia's position was that the appellant's application had been overtaken by events and money having been paid to his advocates, the appellant was barred by statutory estoppel under section 120 of the *Evidence Act* from taking a contrary position.

14. In the ruling sought to be impugned, the trial Court stated it to be respect to the motion dated 6th March 2020 and amended on 6th April 2020 and also makes reference to a further application dated 9th May 2020. The latter motion simply sought to have the other two applications heard on priority basis and so what was truly before the trial Court were the two substantive motions of 9th March 2020 and 6th April 2020, while the motion of 6th April 2020 was an amendment to the motion of 9th March 2020. We are unable to trace an order granting leave for the amendment and the learned trial Judge proceeded as though the motion of 9th March 2020 had not been amended. Yet as will be apparent shortly, the outcome of this appeal would not be any different if the trial Court had considered the two as separate motions or that of 6th April 2020 as amending and therefore replacing that of 9th March 2020.

15. In the application of 9th March 2020, the appellant sought two main orders: that the court do confirm and/or endorse the computation of the award due to the claimant and to then make a further order on the final award due to the claimant. In the second application of 6th April 2020,

the appellant sought orders to enforce the decree granted to him and issuance of a Garnishee order for attachment of the respondent's funds held at the Co- operative Bank of Kenya Limited Account number 01136001361403, Nanyuki Road Branch, Lunga Lunga Road, in Industrial Area Nairobi.

16. These applications were made on the backdrop of a judgment of the trial Court delivered on 1st July 2019 in which the Court's ultimate order, it bears repeating, was:

> " For this reason, I reduce the summary dismissal to normal termination of employment and order that the respondent pays him terminal dues in accordance with his terms of service."

17. The trial Court itself did not compute what those terminal dues were and on 2/11/2019 made a further order that:

> " Parties to tabulate and approach court only if they disagree."

18. Clearly the issue of computation of what would be due to the appellant had been left to a consensual agreement between the parties with a default positon that the court would be approached to do so in the event of disagreement. We have narrated how the respondent's counsel gave a proposed computation to the appellant's advocates then on record, a computation of Kshs.310,343.75, which was accepted by the advocates and on the basis of which a payment was made through a cheque of 9th October 2019 and received by the said advocates on 12th November 2019.

19. Confronted with this evidence through a replying affidavit of Patrick Maina sworn on 5th May 2020 in response to the two applications, the appellant swore a supplementary affidavit on 19th May 2020. In that affidavit, he makes some dispositions worthy of note:

> " 4. Thatinstead of computing my dues, the legal officer of the respondent conspired with my previous advocate S. Ndungu & Co. Advocates to settle on a paltry sum of Kshs.310,000/= which sum has, nonetheless never reached me to date.
>
> 5. That, by way of a Notice of Motion dated 4th December, 2019, the Legal firm of Kinyua Njagi & Company Advocates got leave of the Court to take over the conduct of my above matter in place of the Legal firm of S. Ndungu & company advocates.
>
> 6. That, in my supporting affidavit, I did complain at paragraph 5, thereto that the said advocates, S. Ndungu & Company advocates had secretly negotiated with the Legal officer of the Respondent so as to be paid a partly sum of Kshs.310,000/= in satisfaction of the award, and which sum as aforesaid at paragraph 5 above, has never reached me to date courtesy of the private arrangement between my former advocate, S. Ndungu & Company advocates and the Legal officer of the respondent.
>
> 7. That, at paragraph 6, 7, 8, and 10 of my said affidavit in support of the motion averred at paragraph 5 above, I personally wrote a letter to the respondent disassociating myself with the conspiracy and arrangement to pay Kshs.310,000/= and I indeed advised the respondent not to draw a cheque for the said alleged amount."

20. While the appellant stated that he had written to the respondent disassociating with the settlement of Kshs.310,000 and asking the respondent not to draw the cheque for the said sum, the appellant did

not place any proof of the letter before the trial Court at the time of the applications and it is rather curious that the appellant produced a letter dated 23rd October 2019 to that effect for the first time in an affidavit sworn on 3rd November 2020 made in support of the review application, after the trial Court had made its determination.

21. So that at the time of determining the two motions of 9th March 2020 and 6th April 2020, the material before the trial Judge was that an agreement had been reached between the appellant's advocate and the respondent as to the terminal dues payable to the appellant and payment made to the appellant's advocate. How then can the trial Judge be faulted for holding that:

> " This therefore means that by the time the present counsel for the claimant came on record, the decretal sum had already been settled.
>
> For the foregoing reasons, the application by the claimant is overtaken by events."

22. We perceive that the appellant is aggrieved by the settlement reached on his behalf by his previous advocates. It is to those advocates that any grievance should be directed and not at the impugned ruling. As stated at the beginning of this decision, the appellant is barking up the wrong tree.

23. The appeal is without merit and is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER 2024.

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

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

Signed

Deputy Registrar