



**Khan v International Commercial Company (K) Ltd (Civil Appeal
124 of 2018) [2023] KECA 181 (KLR) (17 February 2023) (Judgment)**

Neutral citation: [2023] KECA 181 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 124 OF 2018
K M'INOTI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 17, 2023**

BETWEEN

KAYUM KHAN APPELLANT

AND

INTERNATIONAL COMMERCIAL COMPANY (K) LTD RESPONDENT

(Being an appeal against the ruling/orders of the Employment and Labour Relations Court of Kenya at Nairobi (Onesmus Makau, J.) delivered on 14th February 2018 in Employment and Labour Relations Court Case No. 66 of 2013)

JUDGMENT

1. To understand the dispute that has given rise to this appeal, it is apt to briefly outline the events leading to the Employment & Labour Relations Court issuing directions on February 14, 2018 on how the matter giving rise to this appeal would proceed.
2. The parties herein filed interlocutory applications and exchanged a number of letters, which we do not consider necessary to cite. However, it is worth mentioning that, as a result of a letter of complaint from the appellant on how the proceedings were being handled by the court, the Judge who was then handling the case, Monica Mbaru, J recused herself on September 29, 2017 and directed that the case be allocated to another Judge.
3. On December 1, 2017, the case was placed before Maureen Onyango, J who was the presiding Judge of ELRC. The record of the proceedings captures the following:

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- “(a) Kayum Khan (appellant) informed the court that, the case was for mention for purposes of allocation to another Judge after the recusal of the trial Judge. He also indicated that, there was a complaint that the respondent’s counsel was



refusing to receive letters from him, but that issue had been resolved and the only issue left, was allocation of the case to another Judge.

- b. Ms. Effendy for the respondent stated that: the purpose of the mention was to address the issue of a letter made against her conduct in the matter; that there were several letters which had been written, which amounted to trial by letters; there was a number of applications pending for hearing that were filed on June 5, 2017, June 24, 2017, July 26, 2017 and August 29, 2018; and that the numerous applications were an abuse of the court process and; the pending interlocutory applications should be disposed so that the trial could proceed.
- c. The appellant who was appearing in person responded and stated that: the issues raised by the respondent's counsel should have been raised by way of a notice of motion application; he could not defend himself without filing grounds of opposition;
and that the question of the respondent's counsel refusal to receive documents was very serious."

4. Upon hearing the parties, Maureen Onyango, J, made a terse ruling as follows:

"Matter will be heard by Court No 3. All the applications will be consolidated with the claim and heard together. Parties will not be allowed to file further applications pending the hearing of the case. The case is fixed for hearing on February 5, 2018."

5. Pursuant to the orders issued by Maureen Onyango, J. on December 1, 2017, this matter was listed before Radido, J on January 18, 2018, who directed that the file be placed before the presiding Judge, Maureen Onyango, J On January 22, 2018, the parties appeared before Maureen Onyango, J who noted that the case had already been allocated a hearing date on February 5, 2018 in court No 3, and directed that the matter proceeds on that day.
6. On February 5, 2018 parties appeared before the Hon. deputy registrar. The matter was fixed for hearing on February 14, 2018.
7. On February 14, 2018, the parties appeared before Makau, J, and it is important that we capture verbatim the proceedings of that day as follows:

"Effendy:

There are two applications that need to be heard.

1. Notice of motion dated June 5, 2017 to strike out defence.
2. Notice of motion dated June 27, 2017 to strike out the amended claim.

Kayum:

I am opposed to the suggestion by the defence counsel about these 2 applications (sic). My notice of motion dated August 29, 2017 because my rights were violated. Today I have notice of motion dated January 17, 2018, which the P. J. directed that I be heard by Court 3. I have a preliminary objection for the notice of motion by the respondent.

Court:



The Court will focus on finalizing the suit i.e. dispute between employer and employee. I will fix hearing date from (sic) the applications, which challenge pleadings so that after the issue of the pleadings is settled, we can focus on trial which is already part heard. The notice of motion dated June 5, 2017 by the claimant seeking to strike out the defence and the notice of motion dated June 27, 2017 seeking to strike out the amended claim will be heard on priority basis. The submissions have been filed for the claimant's motion. Respondent is given 14 days to file and serve the motion dated June 27, 2017 and thereafter to file submission and serve within 14 days after service. Mention for highlighting on March 20, 2018."

8. Aggrieved by the directions given by Makau, J, the appellant lodged a notice of appeal and filed a memorandum of appeal listing 18 grounds and 6 prayers. It is not necessary to recite the 18 grounds as the appellant in his written submissions dated September 24, 2018 has condensed them into 5 grounds as follows: that the learned Judge erred in fact and in law by failing to consider and omitting to record the fact that any trial further to the orders of the presiding Judge (Maureen Onyango, J) was academic and a waste of judicial time; failing to hear the application for stay of proceedings pending appeal; failing to guard the appellant's rights thus causing an injustice; failing to give priority to the application dated August 29, 2017 that was predicated on violation of the appellant's fundamental rights; and conducting proceedings in a biased manner.
9. We have carefully read the record of appeal and the submissions by the parties. The appellant's submissions clearly show that the appellant's main bone of contention is the learned Judge's (Makau, J) directions on how the court would hear the interlocutory applications and the main suit. The appellant has gone to great lengths to demonstrate how his constitutional rights were violated, and that the learned Judge was not impartial in handling the matter.
10. Upon considering all the grounds, this appeal succeeds or fails on our determination of the issue as to whether the learned Judge exercised his discretion properly in issuing the directions that he gave on February 5, 2018. At the risk of repetition, the learned Judge gave directions as follows:

The Court will focus on finalizing the suit ie dispute between employer and employee. I will fix hearing date from the applications, which challenge pleadings so that after the issue of the pleadings is settled we can focus on trial which is already part heard. The notice of motion dated June 5, 2017 by the claimant seeking to strike defence and the notice of motion dated June 27, 2017 seeking to strike out the amended claim will be heard on priority basis. The submissions have been filed for the claimant's motion. Respondent is given 14 days to file and serve the motion dated June 27, 2017 and thereafter to file submission and serve within 14 days after service. Mention for highlighting on March 20, 2018."

11. We note that the dispute between the appellant and the respondent relates to an employee/employer relationship. The learned Judge indicated that the court would focus on finalizing the suit. It is the appellant's suit that was being given priority, and we are at a loss on how the constitutional rights of the appellant were violated. It is the first time that the parties were appearing before the learned Judge. From the appellant's submissions, he has strong views on how the case should have proceeded.
12. Parties must appreciate that the Judge is the master of the proceedings. Courts cannot be run at the whim of the parties. If parties were given the liberty to determine which application should be heard first, how the proceedings will be conducted, when the proceedings will be stayed or the orders that a Judge should make, then that would amount to promoting anarchy in an adversarial system like ours. There is a reason why the court mechanism has an appellate structure. Parties should focus on the disputes that led them to court and, if aggrieved, they are at liberty to invoke the appeal mechanism.



13. Looking at the grounds that the appellant has raised, it is important that we state that Article 160 of our Constitution vests judicial authority on the judiciary, and that such authority shall only be subject to the Constitution, and the law and shall not be subject to control or directions of any person or authority. No party should attempt, as the appellant seems to do, to give directions on how court proceedings should be conducted, or which application should be heard first. That is an issue that is subject to the directions of a Judge. If every direction given by a Judge was to be the subject of an appeal, this will end up clogging the wheels of justice and parties will lose focus on the dispute that took them to court in the first place.
14. Looking at the proceedings in the court and directions that were given by the learned Judge, we cannot see any violations of rights, bias, or impartiality as alleged by the appellant. Under Article 159(2) (c) of the Constitution, the court has a fundamental duty to ensure that disputes are expeditiously heard and determined through, among other things, not allowing the core issues to be clogged by a multiplicity of peripheral applications.
15. In conclusion, it is necessary that we state that the Constitution protects the rights of all persons, and the courts frown on any person who violates the rights of another. The reverse is also true: that no party should try to use the Constitution to frustrate the free flow of court proceedings. Judges should remain firm and only disqualify themselves when it is absolutely necessary on the well-known principles of recusal of a Judge. A recusal because of mere dissatisfaction by one of the parties, will clog the wheels of justice and promote forum shopping.
16. In view of the foregoing, it is our finding that all the grounds raised by the appellant have no merit and this appeal fails. Accordingly, we dismiss the appeal with costs to the respondent.

Dated and Delivered at Nairobi this 17th day of February, 2023.

K. M'INOTI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

