Khan v International Commercial Company (K) Ltd (Civil Appeal 63 of 2018) [2023] KECA 171 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 171 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 63 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 (Maureen Onyango, J.) delivered on 1st December 2017 in Employment and Labour Relations Court Case No. 66 of 2013)

JUDGMENT

1. The brief background to this appeal is that the appellant had filed case No. ELRC No. 66 of 2013 in the Employment and Labour Relations Court (ELRC) in Nairobi. The plaint and the defence, are not part of the record before us, but they are not material for purposes of this appeal.

2. The record shows that in the course of the hearing of the case in the trial court, the two parties filed interlocutory applications and also exchanged a number of letters which, we do not deem necessary to cite. However, it is worth mentioning that, as a result of a letter of complaint on how the proceedings were being handled by the court, the Judge who was then handling the case, Monica Mbaru, J. recused herself from the case on 29th September 2017 and directed that the case be allocated to another Judge.

3. On 1st December 2017, the case was placed before Maureen Onyango, J. who was the presiding Judge of ELRC. The record of the proceedings captures the following:

> "(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 5th June 2017, 24th June 2017, 26th July 2017 and 29th August 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., the presiding Judge of ELRC 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 5.2.2018."

5. Aggrieved by the order for directions that was made by the learned Judge, the appellant filed a notice of appeal on 8th December 2017 and served it on the respondent's advocate on 13th December 2017. The appellant has listed 21 grounds of appeal, which we need not recite but will revisit later in the judgment if it becomes necessary.

6. This appeal was listed for hearing on 17th October 2022 via the Go To Meeting virtual platform. When this matter was called out, we noted that, in addition to the appeal, there were three pending applications as follows:

a. Notice of motion dated 5th April 2018 by the respondent to strike out the notice of appeal and the record of appeal.

b. Notice of motion dated 7th February 2022 by the appellant to strike out the respondent's submissions and list of authorities, on the ground that they were filed out of time.

c. Notice of motion dated 26th April 2022 seeking that, this appeal be heard together with appeal No. 124 of 2018, between the same parties and which are from the same Case No. ELRC No. 66 of 2013.

7. Upon hearing the parties on how to proceed with the applications, we directed, and Mr. Thuo for the applicant agreed, that the notice of motion dated 7th February 2022 was not necessary as he could address the issues raised therein in the course of the hearing of the appeal. Consequently, that application was marked as withdrawn with no orders as to costs. As for the notice of motion dated 26th April 2022, Mr. Thuo agreed that it was not necessary as the appeals were indeed listed to be heard consecutively. In view of this, the application was also marked as withdrawn with no orders on costs.

8. Upon the withdrawal of the two applications, we were left with the notice of motion dated 5th April 2018 to strike out the record of appeal. We shall first determine the application to strike out the record of appeal and depending on the outcome, we shall then deal with the appeal if it becomes necessary.

9. Having given the background, we shall now deal with the notice of motion dated 5th April 2018. The application is expressed to be brought under rules 75(4) and 84 of the *Court of Appeal Rules*, 2010, sections 75 and 76 of the *Civil Procedure Act* and order 42 of the *Civil Procedure Rules* and all other enabling provisions of the law. It seeks the following main prayer:

> " That the record of appeal dated 5th March 2018 filed by the appellant against the order of Hon. Lady Justice Maureen Onyango, delivered on 1st December 2017 be struck out."

10. The application is supported by the affidavit sworn on 4th May 2018 by Saadia Karimbux Effendy, advocate for the respondent. The main issues raised in the grounds and supporting affidavit are that: section 75 of the *Civil Procedure Act* and order 42 of the *Civil Procedure Rules*, list the orders in which an appeal to the Court of Appeal lies as of right; in all other orders that are not listed, an appellant is required to seek leave of the court; no such leave was obtained; and therefore the appeal is incompetent and should be struck out.

11. In reply to the application, the appellant filed a replying affidavit sworn on 17th January 2018 stating: that the application is defective as it was filed after the expiry of 30 days contrary to the provisions of rule 84 of the *Court of Appeal Rules*; rule 42 of the *Civil Procedure Rules* applies to the High Court only and not the ELRC; the appeal is based on violations of the constitutional rights of the appellant thus leave was not necessary; that the orders that were issued are oppressive to the applicant; and that this Court should invoke its inherent powers and overriding objectives to hear and determine the appeal on merit.

12. We have carefully considered the application, the rival affidavits, the documents, and the submissions by the parties. This application succeeds or fails on only one question: The applicability of the *Civil Procedure Rules* in cases and applications before the ELRC. The point of departure in determining this question is Article 162 (2) of the 2010 *Constitution*. It provides that Parliament shall establish other courts with the same status of the High Court to hear and determine disputes relating to:

    i. employment and labour relations; and

    ii. the environment and the use and occupation of, and title to, land.

13. Pursuant to Article 162 (2) of *the Constitution*, Parliament created the ELRC. Though having the same status as the High Court, the ELRC Court is a court with distinct jurisdiction as held by the Supreme Court of Kenya in *Republic v Karisa Chengo & 2 Others* eKLR. Indeed, section 27 of the ELRC Act contemplates that the Chief Justice is to make rules to guide the operations of the court, which have already been published. Since rules for guiding the operations of the ELRC are already in place, then it follows that those are the rules guiding the operations of that court and a party will only fall back on the Civil Procedure Rules, where the ELRC rules provide for that. A good example of the applicability of the *Civil Procedure Rules* under the ELRC court is under section 13 of the ELRC Act which provides that a judgment, award, order or decree of the Court shall be enforceable in accordance with the rules made under the *Civil Procedure Act*.

14. Having carefully read the ELRC Act, there is no rule providing that leave was required and indeed the respondent has not pointed out any rule in the ELRC rules that provides that the appellant needed to

seek leave before filing this appeal. The respondent cannot rely on the blanket provisions of section 75 of the *Civil Procedure Act*, as the basis for the striking out of this appeal.

15. Indeed, Section 17 of the ELRC Act provides that an appeal from the ELRC court shall lie to the Court of Appeal against any judgment, award, order or decree issued by the court in accordance with Article 164(3) of *the Constitution*.

16. Although it is debatable, whether the directions of Maureen Onyango, J. amount to an order of the court for the purposes of appeal, any directions issued by a court ought to be adhered to by both parties of the suit. Furthermore, section 3 of the ELRC Act provides that parties have an obligation to assist the court to further the principal objective and, to that effect, to participate in the proceedings of the court and to comply with directions and orders of the court.

17. In Civil Application No. Nai 43 of 2012, the Court of Appeal in dealing with an application arising from the Employment and Labour Relations Court observed as follows:

> " ...section 75 of the *Civil Procedure Act*, (Chapter 21 of the Laws of Kenya) lists the orders out of which appeals lie to this Court as of right. In any other case under the *Civil Procedure Act* not provided for, an appeal only lies with leave of the court. Such leave must be sought and obtained in the court of the first instance. If the leave is refused, then this becomes a ground of appeal. Otherwise all other statutes, independent of the *Civil Procedure Act* and Rules have provisions for appeals." (Emphasis ours)

18. In view of the foregoing, we reach the inevitable conclusion that this application to strike out the appeal has no merit, and it is hereby dismissed with costs to the appellant.

19. Having disposed off the application to strike out, we now turn to the merit of the appeal. The appellant has listed 21 grounds in his memorandum of appeal, which we need not recite in full as some are repetitive and cross-cutting. In his written submissions dated 13th September 2018, the appellant has argued the grounds under the following heads: violation of his constitutional rights of access to justice; failure to facilitate priority hearing of violation of his constitutional rights; jurisdiction; violation of independence of courts; omitting to meet constitutional standards of determination of a matter; fundamental defects in decision making process; partiality in irregular and incompetent fixing of a mention date and conduct of proceedings; contravention of statutes, code of conduct and rules of procedure; and bias.

20. Indeed, we note that in his submissions, the grounds have been condensed into the following seven grounds: that the learned Judge: violated *the constitution*; violated the appellant's rights and fundamental freedoms under the bill of rights; assumed jurisdiction she did not have, thus weakening the appellant's case; displayed bias, partiality and misuse of court authority; interfered and intermeddled with the case in transit to another Judge; and failed to declare if she had any contact with the respondent on its representation.

21. At this point, and at the risk of repetition, it is important we remind ourselves of the order that the learned Judge had made, which is the subject of this attack. The Judge held as follows when the matter was mentioned before her:

> " .... Matter will be heard by Court No. 3. All applications pending will be consolidated with claim and be heard together. Parties will not be allowed to file any other applications pending the hearing of the case. The case is fixed for hearing on 5. 2.2018."

22. All the grounds of appeal will succeed or collapse on only one question: did the learned Judge, who was at the time the presiding Judge of the ELRC, exercise her discretion properly, and did she violate the fundamental rights of the appellant? We have already set out the history of this matter and noted that the matter was being mentioned before Maureen Onyango, J. as Monica Mbaru, J., who was previously handling the case, had recused herself on the application of the appellant.

23. The office of the presiding Judge is created under Article 165 (2) of *the Constitution*. Section 2 of the *Judicial Service Act* (Cap 185 B) defines the principal Judge of the High Court and courts of equal status as the head of a superior Court, other than the Supreme Court or the Court of Appeal. Section 5(4) of the ELRC Act, provides that the principal Judge shall have supervisory powers over the court and shall be answerable to the Chief Justice. The principal Judge is therefore in charge of the administration of the court in consultation with the chief registrar and the Chief Justice.

24. Though the appellant has made many allegations of violations of his fundamental rights, breach of rules of procedure, bias and partiality, there is not even an iota of evidence to support those allegations. As the presiding Judge, the learned Judge issued directions to facilitate the quick hearing of the appellant's case. The learned Judge did not deal with any issues that were raised in the interlocutory applications or in the main suit. The learned Judge simply noted that, there were too many pending interlocutory applications and directed that they be heard together with the main suit. We note that to facilitate disposal of the main suit, she directed that no further applications be heard. She then proceeded to allocate the matter to court No. 3 and gave a hearing date that was less than two months away.

25. Although a lot of arguments were made on the directive that no further application should be filed, no party has submitted that indeed, they intended to file an application or had filed one and were denied a chance to be heard because of the directions that had been issued by the learned Judge. Once the case was allocated to another Judge, that Judge being of equal status was at liberty to proceed with the case as per the directions or vary them as the court may deem fit.

26. It is our finding that the directions issued by the learned Judge were in accordance with the law and in her capacity as the presiding Judge discharging administrative duties. In particular, it is a fundamental principle of judicial authority under Article 159 (2) (c) of *the Constitution* that justice shall not be delayed, including by a multiplicity of unnecessary applications, like some that we have had to deal with in this appeal. Accordingly, the attacks, some very personalized based on an alleged breach of constitutional rights, bias, partiality, and breach of procedural and substantive law are totally without merit.

27. We quote with approval, the decision of this Court in *Lighting Company Limited v. Benzene Holdings Limited t/a Wyco Paints* [2016] eKLR, on the extent of inherent powers of the Court. The Court quoted the authors of Halsbury's Laws of England, 4th Edn. Vol. 37 Para. 14:

> " The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that, it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its

proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." See also Meshallum Waweru Wanguku (*supra*)." (Emphasis added).

28. In conclusion, it is our finding that this appeal is non - meritorious and we dismiss it with costs to the respondent. It is so ordered.

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

.....

JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR