Makokha v Mumias Sugar Company Limited (Civil Appeal 59 of 2018) [2023] KECA 338 (KLR) (17 March 2023) (Judgment)

Neutral citation: [2023] KECA 338 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 59 OF 2018

PO KIAGE, F TUIYOTT & JM NGUGI, JJA

MARCH 17, 2023

BETWEEN

JOEL A MAKOKHA ..... APPELLANT

AND

MUMIAS SUGAR COMPANY LIMITED ..... RESPONDENT

((Being an Appeal from the judgment and decree of the HighCourt of Kenya at Kisumu, Employment and Labour Relations Court (Nduma, J.) dated 15th March, 2018 in HC ELRC APPEAL NO. 4 OF 2017)

JUDGMENT

JUDGMENT OF TUIYOTT,JA

1 1. Joel Makokha (Makokha), the appellant herein, was until sometime in April 2006 an employee of Mumias Sugar Company Limited (Mumias), the respondent, when Mumias accepted his request to exit employment under a Voluntary Early Retirement Scheme (the Scheme) designed by Mumias. In a claim Makokha commenced at the High Court at Kakamega, later transferred to the subordinate Court there, Makokha sought the sum of Kshs. 2,165,555 from Mumias alleged to be due to him as the retirement package under that scheme.

2. In resisting that claim, Mumias filed a statement of defence, in which it averred, inter alia;

> "On a purely without prejudice basis to the generality foregoing, the defendant avers that if the plaintiff was entitled to the alleged or any retirement package, which is denied, then he duly received from the defendant his final dues after the company had made deduction on account of income tax, Sukari Sacco Society balance on the strength of irrevocable order by him to the defendant, as well as other recoveries, payments and unrecovered balances

which were due from the plaintiff. Full particulars whereof are well within the plaintiff's knowledge."

This averment, as will be seen presently, turns out to be of great significance.

3. The claim went on to hearing in proceedings before the subordinate court in which only Makokha testified. His testimony was taken on 5th December, 2012 before Hon. Shitubi CM who then, after the close of the plaintiff's case, reserved the matter for defence hearing on 20th February, 2013. The record shows that on 26th February, 2013, Mr. Nyikuli, counsel for Mumias was absent as a result of which the hearing was rescheduled to 2nd April, 2013. On that date, hearing was by consent of counsel for the parties put off to 8th May, 2013.

4. On 8th May, 2013, Mr. Nyikuli, for Mumias told court;

> "I have not seen any witnesses for the defence. We informed the defendant of today's date. I close the defence case."

5. On that basis, and after receiving submissions by both sides, the learned trial magistrate rendered a decision on 26th June,2013 in which he found for Makokha in the sum of Kshs. 1,928,961.30/=.

6. In an application dated 23rd September, 2013, Mumias moved that court for several orders but in the main sought a review of the orders of 8th May, 2013 and that it be allowed to be heard. The learned trial magistrate found the application to be unmeritous, reasoning;

> "Looking at the Statement of Defence filed by the Defendant, the Defendant at Paragraph 6 averred on a without prejudice basis that the Plaintiff received his retirement package as the Defendant made deductions to income tax and Sukari Sacco on the strength of an irrevocable order.
>
> The gist of all that is that at the time that the case came up for hearing on 8th May, 2013 when the Defendant closed its case without offering evidence, it had knowledge of all these facts. The Plaintiff had contested them. It merely required to have sought an adjournment to provide the evidence."

7. Aggrieved by the ruling of the trial magistrate, Mumias preferred an appeal against it to High Court, and which was transferred to the Employment and Labour Relations Court (the ELRC) at Kisumu. In a Judgment dated 15th March, 2018, Justice Mathews N. Nduma allowed the appeal and made the following orders: -

"(i) The appeal is allowed and the judgment of the lower court set aside in respect of Kshs. 1,919,970 already paid to Sukari SACCO on behalf of the Respondent.

(ii) Each party to bear their own costs of the Appeal."

8. Makokha's views that decision and the final orders to be controversial and unacceptable and is now before us on appeal. Although Makokha puts forward 9 grounds of appeal, Mr. Mwebi appearing for him together with Mr. Onsango, asked us to consider those grievances under three headlines (which I paraphrase): -

(i) the learned Judge erred in law in overturning a judgment which was not the subject of the appeal and which was not appealed against.

(ii) there was no basis in law for the learned Judge to admit new evidence and proceed to use it to reach the decision he did.

(iii) the learned Judge erred in law in disregarding the appellant's submissions.

9. Submitting in support of those grounds, counsel for Makokha argue that in his decision, the learned Judge appreciated that the appeal before him arose from the Ruling on the application for review and not from the judgment of the trial court. That all that Mumias was asking for was the re-opening of the defence case so as to tender further evidence. It is emphasized for Makokha that as there was no appeal against the judgment of the trial court, then the most the learned Judge could have done was to simply give direction or directions for the taking of the said evidence and thereafter for the trial court to reconsider the judgment it had delivered on the basis of the further evidence.

10. Makokha asserted that the learned Judge appreciated that the application for review was without merit yet proceeded to set aside and overturn the judgment of the trial court on an alleged double payment. The approach taken by the learned Judge is faulted as the evidence of double payment was not tendered before the trial court, tested on oath, and admitted as evidence to enable the Judge use it as a basis to set aside the judgment.

11. This Court is told that the learned Judge found that the trial court correctly and reasonably applied its mind to the facts and the applicable law before it and arrived at a just decision; Makokha did not authorize Mumias to pay the loan on his behalf to the Sacco; and the loan was a private contract between Makokha and Mumias. It is submitted that Mumias had opportunity to present the issue of payment at trial but did not thus the first appellate court could not properly come up with the issue of double payment and overturn the judgment of the lower court. Having found that there was no ground for review within that parameters of Order 45 (1) of the Civil Procedure Rules, then the only option open to the learned Judge was to dismiss the first appeal.

12. Mr. Ombito, counsel for Mumias did not appear at plenary hearing but had filed written submissions on behalf of his client. In them he argues that his client had not filed an appeal against the judgment of the trial court and was therefore not precluded from applying for the review of the Judgment.

13. On the substance of the impugned judgment, counsel argues that the learned Judge had wide discretion to make orders he thought would meet the ends of justice. Mumias applauds the following passage from the decision;

> "The court appreciates that the loan owed to the SACCO was not counter claimed by the Appellant and ordinarily ought not to be arbitrary set-off from the decretal sum. The loan is a private contract between the Respondent and the SACCO and ought to be treated as such. The law of equity however frowns at unjust enrichment and the learned magistrate erred in not taking into account the remittance by the Appellant to the SACCO for the benefit of the Respondent. This was a fact, which the Appellant had no opportunity to present at the trial and the learned magistrate ought to have taken it into account in the application for review. Furthermore, the fact of double payment was discernible on the face of the record. the court therefore sets aside the award of Kshs. 1,919,970 to the Respondent, it being a double payment, and therefore amounts to unjust enrichment."

14. Mumias contends that other than the fact that Makokha did not seriously oppose the evidence of double payment, the learned Judge found that his sense of justice was offended by being asked to overlook such mischief and open fraud. In this regard, Mumias relied on the letter dated 11th September, 2013 from Sukari Sacco to it.

15. Mumias contends that Makokha, keen to cover his inequitable and fraudulent enrichment by use of the court process, did not raise this ground on the first appeal. It is argued that Section 71 (A) of the

Civil Procedure Act provides that the onus is on an appellant to show that the decision appealed from is contrary to law and this being a second appeal, the same is on a question of law only. We are urged to find that on this ground alone the appeal should fail as *"no compound question of law has been raised to merit this Court's determination"*.

16. Mumias pitches for this Court to find that under Article 159 of the Constitution, a court is clothed with power to attain substantive justice as opposed to procedural technicalities and urges us to uphold the learned Judge's finding that;

> "However, in the application for review it became apparent that the Appellant had arbitrarily remitted Kshs. 1,919,970 to Sukari SACCO to settle the Respondent's account. The Respondent while not wholly denying the fact, protested that he had not authorized the Appellant to repay the loan on his behalf."

17. This being a second appeal our role is circumscribed thus; the Court confines itself to matters of law only unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse. See. Kenya Breweries Limited vs. Godfrey Odoyo (2010) eKLR; Pithon Waweru Maina vs. Thuka Mugiria (1983) eKLR

18. To understand the first grievance of Makokha one has to reproduce the application for review filed by the Mumias before the subordinate court: -

"1. THAT this application be certified as urgent and be heard exparte in the 1st instance.

2. THAT leave be granted to allow for the change of representation hereby for the Defendant/ Applicants as per the attached notice of change hereby and upon leave being granted the said notice to be deemed duly filed upon appropriate payment.

3. THAT there be temporary stay of execution hereby pending of this application/suit.

4. THAT the Hon. Court to review its orders of 8/5/2013 and its consequential directions (of closing the defendant's case without evidence) and proceed to allow the defendant to be heard.

5. THAT there be any other orders deemed necessary to be granted by the Hon Court."

19. The substantive prayer that fell for the trial court's determination was prayer 4 in which the court was asked to review its order of 8th May, 2013 and its consequential directions closing the case by Mumias without evidence and, to proceed to allow Mumias to be heard. It has to be remembered that by the time the application was made, there was already a Judgment for the sum of Kshs. 1,919,970 in favour of Makokha made on 26th June, 2013. The review application, curiously, did not seek the setting aside or review of the substantive decision, the Judgment. This oversight by Mumias fits into a pattern of lapses committed by it in the defence of this matter.

20. In the appeal preferred against the decision of the trial court, Mumias sought the intervention of the ELRC for an order that "the ruling and the orders of the lower court delivered on 29/01/2014 be set aside, dismissed and/or varied and that there be an order on costs" The superior court below, in allowing the appeal, made the following order,

"Accordingly, the court enters judgment as follows: -

(i) The appeal is allowed and the judgment of the lower court set aside in respect of Kshs 1,919,970/ = already paid to Sukari Sacco on behalf of the respondent.

(ii) Each party to bear their own costs of the Appeal".

21. The complaint by Makokha is that the dispositive orders of the ELRC not only set aside but reversed a judgment that was not the subject of the appeal before it. And there is merit in the argument. The thrust of the review application by Mumias was that the order closing its case be set aside and it be given an opportunity to be heard in its defence. Mumias never even sought that the trial court sets aside its judgment, let alone substitute it with other final orders. The eventual order made by the ELRC therefore went beyond what Mumias had sought before it and trial. That said, there could be a strong argument that had the ELRC allowed the appeal, then the natural consequence would be that the judgment of the trial court would be set aside. It would however not mean that the evidence to be adduced by Mumias would be accepted by the trial court without question. The evidence would have to be subjected to the test of cross-examination and weighed against the plaintiff's case. Whether the end result would be the same as the decision reached by the superior court below would be a call to be made by the trial court. In that way I have little hesitation in agreeing with counsel for Makokha that the first appeal court overstepped its remit when it set aside the judgment of the trial court and proceeded to substitute it with its own judgment.

22. ELRC justified its decision thus;

> "19. Upon a careful analysis of the appeal record, comprising the proceedings, and judgment in the lower court, this court is of the considered view and finding that the Learned Magistrate correctly and reasonably applied her mind to the facts before court, appreciated the law applicable and arrived at a fair and just decision in her judgment. However, in the application for review it became apparent that the Appellant had arbitrarily remitted Kshs. 1,919,970 to Sukari SACCO to settle the Respondent's account. The Respondent while not wholly denying the fact, protested that he had not authorized the Appellant to repay the loan on his behalf.
>
> 20. The court appreciates that the loan owed to the SACCO was not counter claimed by the Appellant and ordinarily ought not to be arbitrarily set-off from the decretal sum. The loan is a private contract between the Respondent and the SACCO and ought to be treated as such. The law of equity however frowns at unjust enrichment and the learned Magistrate erred in not taking into account the remittance by the Appellant to the SACCO for the benefit of the Respondent. This was a fact, which the Appellant had no opportunity to present at the trial and the Learned Magistrate ought to have taken it into account in the application for review. Furthermore, the fact of double payment was discernible on the face of the record. The court therefore sets aside the award of Kshs.1,919,970 to the Respondent, it being a double payment, and therefore amounts to unjust enrichment."

23. On my part I would be reluctant to be as unequivocal that a case for unjust enrichment had been made out against Makokha or in the very least his explanation as to why he resisted the argument of double payment was not plausible.

24. Right from the time Mumias filed its statement of defence it partly defended the claim on the alleged payment it had made to Sukari Sacco to pay off a loan of Makokha (see paragraph 3 of this decision where the averment is reproduced). Makokha reacts to that averment in the reply to defence as follows: -

> "In reply to paragraph 6 of the Statement of Defence the Plaintiff denies that he received any final dues from the Defendant and denies signing an irrevocable order to the Defendant to effect deduction from his final dues to Sukari Sacco or any other organization and will invite strict proof thereof from the Defendant."

25. Makokha is categorical that he did not authorize the payment to the Sacco from his dues. The matter comes up for a second time at the hearing where Makokha explains;

> "I never signed anything authorizing them to pay terminal benefits to Sukari Society. I had a loan but we had made arrangements for payment.
>
> We had agreed that I be paying Kshs. 33,000/= per month."

26. He reiterates that in cross-examination.

27. While there is the letter from Sukari Sacco dated 11th September, 2013 confirming that it had received payment of Kshs 1,133,333.15/= towards repayment of Makokha's loan, there was no evidence put forward that the payment was authorized by Makokha or that Mumias was otherwise obligated to make that payment without the consent of Makokha. In a word, I am unable to find any evidence that debunks Makokha's explanation that the payment was not authorized by him. In the face of this I am not too certain myself that Makokha can be accused of unjust enrichment when his testimony and explanation that he had agreed to pay the Sacco in monthly instalments of Kshs. 33,000/= was not disproved. There may be something to be said in favour of Makokha regarding the decision by Mumias to force a bullet payment of his debt to the Sacco when he had made arrangements for payment in instalments. The argument of unjust enrichment ought to have been made by Mumias before closing its case for court to decide the point against the explanation given by Makokha.

28. From my analysis above, it is evident that Mumias was well aware that part of its defence was that it had made payment on behalf of Makokha as it pleaded it in its statement of defence and raised it during the hearing of the plaintiff's case. The evidence it sought to introduce through the application for review was within its knowledge right from the time it filed its defence. For that reason, the following reasoning of the trial court cannot be faulted;

> "The gist of all that is that the time the case came up for hearing on 8th May 2013 when the defence closed its case without offering evidence, it had knowledge of all these facts. The Plaintiff had contested them. It merely required to have sought an adjournment to provide the evidence".

29. The provisions for review set out in Order 45 Rule 1(1) of the Civil Procedure Rule are all too clear;

> ''(1) Any person considering himself aggrieved
>
> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
>
> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay"

30. The evidence of payment to the Sacco was not new at all and if new was available to Mumias at that time of hearing or was, in the very least, obtainable if Mumias had exercised due diligence. As correctly appreciated by the ELRC court the review application could not pass the explicit test set out in Order 45 Rule 1(1). In this decision I have also sought to demonstrate that there was no justification for the ELRC then to invoke the principles of equity in favour of Mumias when it was not plain that the equity

of the moment lay with reversing the judgment of the trial court and further, when Mumias had not taken its chance before the close of its case at trial to properly raise the argument of unjust enrichment.

31. For the reasons given, I propose that the judgment of the ELRC be set aside with the result that the ruling of the trial court dated 26th June, 2013 is hereby restored. I will also propose that just as in the first appeal, each party bears its own costs.

JUDGMENT OF KIAGE, JA

32. I have had the benefit of reading in draft the judgment of my learned brother Tuiyott, JA and I agree fully with both his reasoning and conclusions.

33. It would seem to me that the learned Judge of the ELRC was not altogether correct to find, on the bare facts of the case, that the appellant was the beneficiary of double payment, and was thus guilty of unjust enrichment. I think that, given uncontroverted assertion by the appellant that he had made arrangements to pay the loan he owed Sukari Sacco by monthly installments, it was not the business of his former employer to upend that arrangement and volunteer to pay in a single shot, whatever monies then outstanding to the Sacco. I would in fact take judicial notice, that the attractiveness of Sacco loans lies in flexible, member-centric repayment terms consistent with the ethos of putting people first. That loan was a matter between the appellant and his Sacco, and the employer should have kept well- off, unless invited or otherwise instructed by the appellant.

34. Other than the unjustified tag of unjust enrichment that the learned Judge placed upon the appellant, what he did to redress that perceived inequity, is even more troubling. He decided, on an appeal from the refusal by the trial magistrate to review judgment, mounted on the limited grounds specified by the respondent, to take the drastic step of setting aside the judgment itself. Now, the respondent had not directly sought to set aside that judgment. Nor did it frontally attack it as improper per se.

35. That being the case, I would think that even had the learned Judge been right to think the judgment inequitable by reason of double payment (and I have found, with respect, that he was not), it was not open to him to grant orders that the respondent had not sought. I would go as far as to say that apart from parties being bound by their pleadings, we, as Judges, do not have any generalized, roving or unconstrained power to issue any and every order to correct perceived injustices. We operate only within jurisdiction as donated by statute or rules, and it is perfectly permissible, indeed absolutely necessary, to avoid the temptation to cure every ill that we see, unless we are properly moved so do to and within our proper remit.

36. I need say no more in further agreement with Tuiyott, JA.

37. As Joel Ngugi, JA also agrees, the appeal is allowed along the lines proposed by Tuiyott, JA.

JUDGMENT OF JOEL NGUGI, JA

38. I have had the advantage of reading, in draft, the judgment prepared by my brother, Tuiyott, JA. I gratefully adopt his description of the case, and for the reasons he gives, I would allow the appeal along the same orders he suggests.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF MARCH, 2023.

F. TUIYOTT

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.