



**Onyango v Maseno West Sacco Society (Civil Appeal 89 of 2018)  
[2023] KECA 601 (KLR) (26 May 2023) (Judgment)**

Neutral citation: [2023] KECA 601 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT KISUMU  
CIVIL APPEAL 89 OF 2018  
PO KIAGE, M NGUGI & F TUIYOTT, JJA  
MAY 26, 2023**

**BETWEEN**

**JOHNSON ODUOR ONYANGO ..... APPELLANT**

**AND**

**MASENO WEST SACCO SOCIETY ..... RESPONDENT**

*(An appeal from the judgment of the High Court of Kenya at Kisumu  
(M. N. Nduma, J.) dated 6th June, 2018 in ELRC No. 20A OF 2013)*

**JUDGMENT**

**Judgment Of Mumbi Ngugi, JA**

1. The present appeal arises from the judgment of MN Nduma J sitting in the Employment and Labour Relations Court (ELRC) in Kisumu dated June 6, 2018 in which the ELRC dismissed the appellants claim for unlawful termination of employment.
2. The appellant had, in a Memorandum of Review dated February 28, 2018 filed under Rule 32 of the Industrial Court (Procedures) Rules sought review of a judgment rendered by M Onyango J on June 8, 2017 with respect to his claim. The appellant had alleged in his claim that he was employed by the respondent on February 5, 1996 as a book keeper. He had subsequently risen to the position of a manager but was summarily dismissed on October 7, 2008. The appellant alleged that his summary dismissal was wrongful and unfair in that he was not given a show cause letter nor was he invited to a disciplinary hearing to explain himself. His dismissal, he contended, contravened the *Employment Act*.
3. In the decision dated June 8, 2017, M Onyango J declared ‘that the appellant was unfairly suspended from employment’ and ordered the respondent to ‘immediately reinstate the Claimant back to work as the Chief Executive Officer of Lake Victoria North Water Services Board’. The court further restrained the ‘respondent’ from taking any further disciplinary action against the claimant.



4. The application for review, which was not opposed by the respondent, was placed before Nduma J. The applicant argued before Nduma J that in her decision, M Onyango J had addressed the issue of his 'suspension' instead of his summary dismissal as claimed in his Memorandum of Claim. The court had also made an order for his re-instatement to a position that he did not hold in a company that he did not work for.
5. The judgment of Nduma J indicates that while he sets out the prayers sought in the application for review, he went on to determine and render a judgment on the appellant's claim that had already been determined by M Onyango J. He took note of the provisions of section 43, 44(1), 44(3) and 47(5) of the Employment Act 2007 and stated that one needs to rationalize these provisions to accurately apportion the burden and standard of proof in an employment dispute. He found, further, that it was crucial for the appellant to present some evidence to show that he was summarily dismissed without a valid reason and that the dismissal did not follow a fair procedure. He concluded that the appellant had tendered no evidence to establish his claim, and it was therefore not proved on a balance of probabilities. He dismissed the appellant's claim.
6. In his memorandum of appeal before us dated July 25, 2018, the appellant raises six grounds of appeal. At the core of his appeal, however, a decision in respect of which is dispositive of the matter, is the contention that the learned judge erred in failing to appreciate that what was before him was an unopposed application to correct the judgment of a fellow judge, and in sitting as an appeal court on the judgment of a fellow judge. The appellant asks this Court to properly address his prayers in his claim before the ELRC for his unpaid salaries and his shares in the respondent; three (3) months' salary in lieu of notice, and the costs of the suit.
7. At the hearing of the appeal, Mr Ojuro, learned counsel for the appellant, submitted that Nduma J had sat on appeal on the decision of a judge of concurrent jurisdiction. He observed that upon noticing a problem with the decision of M Onyango J, the appellant had applied for review of the decision. Nduma J had, however, rendered a judgment dismissing the appellant's claim.
8. There was no appearance for the respondent at the hearing of the appeal.
9. I have considered the appellant's memorandum of appeal against the decision of the ELRC dated June 6, 2018 that is the subject of this appeal. I have also considered the judgment of M Onyango J dated June 6, 2017 that was the subject of the application for review before Nduma J. The appellant had lodged a claim of unfair dismissal against the respondent. In her decision, however, M Onyango J addressed the issue of suspension, which she declared unfair. She further proceeded to lift 'the suspension' and to make an order for the 'reinstatement' of the appellant as 'the Chief Executive Officer of Lake Victoria North Water Services Board'. It is apparent from the record that the trial court made an error in its judgment. One gets the impression that the judgment on the appellant's claim somehow got mixed up with a judgment on another matter. This error, which was apparent on the record, is what was placed before Nduma J for review in the appellant's application dated February 28, 2018.
10. The ELRC did not, however, direct its mind to the application for review. Instead of rendering a ruling on that application, it proceeded to consider the claim and render a judgment thereon, dismissing the claim.
11. Ordinarily, an application for review should have been placed before the judge who had rendered the judgment review of which an applicant was seeking. It is not clear from the record whether M Onyango J was still in the station, but it seems reasonable to assume she was not. It was therefore proper for Nduma J to deal with the application.



12. However, from the record, the ELRC did not consider the application for review. It, instead, as the appellant complains before us, by rendering another judgment on the claim, implicitly set aside the decision of Onyango J, effectively sitting on appeal on the decision. This is not within the jurisdiction of a court of concurrent jurisdiction to do.
13. In *Stephen Mwaura Njuguna v Dougals Kamau Ngotho & Another [2012] eKLR* this Court held that:  

' The learned judge had no jurisdiction to hear and determine a matter that was decided by a fellow judge of concurrent jurisdiction. He could not for instance set aside a judgment of Muga Apondi J a Judge who has the same jurisdiction as himself. Such setting aside could only be done by an appellate court but not by a Judge of the High Court as the appellant sought.'

See also *Joseph Ndirangu Waweru t/a Mooreland Mercantile Co & another v City Council of Nairobi [2015] eKLR*
14. The appellant's claim had been addressed by Onyango J, though the judgment made by the learned Judge does not accord with the facts that were before the ELRC. Nduma J erred in rendering another judgment instead of considering the application for review that was before him. That being the case, I find that the appeal is merited, and I would allow it.
15. Regarding the appropriate orders to make, the appellant asks this Court to consider the prayers that he had sought in his claim before the ELRC. However, I take the view that justice would be better served if the matter were remitted to the ELRC so that it can consider the application that had been placed before Nduma J with respect to the judgment of M Onyango, J
16. Accordingly, I would allow the appeal and set aside the judgment of Nduma J dated June 6, 2018. I would direct that the appellant's claim be placed before the ELRC for hearing of the appellant's application for review dated February 28, 2018 before any judge other than M Onyango, and Nduma JJ.
17. As the appeal was necessitated by errors on the part of the ELRC, I would not make any order regarding costs.

### **Judgment Of Kiage, JA**

18. I have had the benefit of reading in draft the judgment of my learned sister Mumbi Ngugi, JA and I am in full agreement with her reasoning, the conclusion she reaches, and the order she proposes.
19. As Tuiyott, JA is also in agreement, the final orders in the appeal are as proposed by Mumbi Ngugi, JA.

### **Judgment Of Tuiyott, JA**

20. I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA, with which I am in full agreement and have nothing useful to add.

**DATED AND DELIVERED AT KISUMU THIS 26<sup>TH</sup> DAY OF MAY, 2023**

**MUMBI NGUGI**

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**JUDGE OF APPEAL**

**P.O.KIAGE**



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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR.**

