Wanyama v South Nyanza Sugar Company Ltd (Civil Appeal 81 of 2019) [2023] KECA 609 (KLR) (2 June 2023) (Judgment)

Neutral citation: [2023] KECA 609 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 81 OF 2019

F SICHALE, FA OCHIENG & WK KORIR, JJA

JUNE 2, 2023

BETWEEN

FREDRICK WANJALA WANYAMA .... APPELLANT

AND

SOUTH NYANZA SUGAR COMPANY LTD .... RESPONDENT

(An Appeal from the Judgment, Order and Decree of the Employment and Labour Relations Court at Nakuru (M. Mbaru, J.) dated 22nd November 2018) in E&LRC Cause No. 3 of 2015)

JUDGMENT

1. The judgment of Mbaru, J in Nakuru Employment & Labour Relations Court (ELRC) Cause No 3 of 2015 dismissing a petition lodged by the appellant, Fredrick Wanjala Wanyama, against the respondent, South Nyanza Sugar Company Limited, is the subject of this appeal. Before the ELRC, the appellant filed a memorandum of claim dated February 15, 2015 and amended it on February 24, 2017. However, the ELRC relied on the memorandum of claim dated February 15, 2015 in determining the case citing the failure by the appellant to serve the amended memorandum of claim upon the respondent. In dismissing the claim, the trial Judge found that the claim for reinstatement and payment of terminal dues was made prematurely because the cause of action had not arisen.

2. As per the Memorandum of Appeal dated March 3, 2019, the appellant seeks to overturn the judgment of the trial court on the grounds that the learned Judge erred in law and fact by failing to consider the Amended Memorandum of Claim despite the appellant having served the same; failing to consider that the respondent unprocedurally terminated the appellant's employment; failing to consider all the circumstances of the case and thereby arriving at the wrong decision; according undue weight on the legal principles and evidence led by the respondent; and failing to consider judicial precedent and relevant laws.

3. In brief, the appellant's case at the trial was that he was employed as a security manager by the respondent between May 16, 2012 and October 10, 2014 when he was interdicted. According to the appellant, the respondent interdicted him without conducting a detailed inquiry, without sufficient cause and without following due process. The appellant further contended that he was not accorded fair hearing and his appeal against the dismissal was also not considered. The appellant averred that his interdiction occasioned him loss of credibility as he had worked in the security sector for over 28 years. He argued that his interdiction continued to hinder his chances of securing a new employment opportunity. The appellant consequently sought financial compensation as follows:

    a. Retained half salary due since 2014 to January 2016 at Kshs 94, 580 per month;

    b. Salary annual increment @ 15% effective 1st July every year;

    c. Medical expenses allowance inpatient Kshs1, 210,000;

    d. Outpatient Kshs 200,000

    e. House allowance Kshs 15,000 per month;

    f. Telephone allowance Kshs 5,500 per month;

    g. Extraneous allowance Kshs 10, 000;

    h. Transport allowance Kshs 10,700;

    i. General damages;

    J Costs of the suit;

    k. Interest.

4. In his testimony, the appellant stated that his misery started in July 2014 when the respondent floated a tender for the disposal of scrap metals. The appellant averred that in August 2014 one Mr. Rodgers Otieno Odera was arrested collecting scrap metals from the respondent's premises without proper documentation. That as part of his duties, he investigated the incident and even became a prosecution witness against Ojuok Ogutu Paul in a criminal case arising out of the illegal collection of scrap metals. That in a surprise turn of events he was treated as a suspect and issued with a Notice to Show Cause dated October 10, 2014 on allegation that he had committed gross misconduct with a colleague by soliciting a bribe. It was on that basis that he was interdicted.

5. On its part, the respondent denied the claim and stated that the appellant was only interdicted during the pendency of investigations into the matter. The respondent stated that the appellant's interdiction was extended and a communication was sent to him to that effect. Further, that during his interdiction, the appellant was called upon to defend himself and that his evidence was considered by the relevant department of the respondent.

6. When this appeal came up for virtual hearing before us on February 27, 2023, the appellant's counsel was not in attendance and the appellant opted to rely on the submissions filed on March 1, 2022 by his advocates, Messrs Bench & Co. Advocates. Through those submissions, counsel asserted that the appellant filed a Memorandum of Claim dated February 15, 2015 and amended it on February 24, 2017. Counsel referred us to pages 107 and 108 of the record of appeal and submitted that according to the respondent's Staff Administration Code, the interdiction of the appellant was not to last beyond 28 days. Counsel argued that after the lapse of that period, the respondent took no further action either to extend the period or reinstate the appellant to his position. Counsel also held the view that since one

Ojuok Ogutu Paul had been charged for the theft of scrap metals in Migori Criminal Case No 690 of 2014, then the issue giving rise to interdiction was deemed to have been investigated.

7. Counsel also submitted that the appellant should have been called before a disciplinary committee and given a chance to defend himself and to appeal if he was aggrieved by the decision of the disciplinary body. Counsel also submitted that there were no previous warnings or complaints about the appellant and therefore the decision to interdict him smacked of malice and bad faith. Counsel asserted that despite the respondent forming an *Ad Hoc* Disciplinary Hearing Committee, with Guidelines and Terms of Reference, no hearing took place before that body. According to counsel, these facts were placed before the trial court but the learned Judge failed to take them into consideration thereby arriving at a wrong conclusion.

8. Counsel also submitted that the trial court erred when it held that the Amended Memorandum of Claim was not served when, according to counsel, there were numerous affidavits of service and mention notices which were served upon the respondent. Counsel contended that since the respondent never appeared despite being served with a hearing notice, there was no evidence that was tendered to counter that of the appellant and therefore the appellant's claim ought to have been allowed as it remained uncontroverted. Counsel also faulted the trial court for failing to consider the claimant's certificate of urgency dated January 26, 2016 in relation to the termination notice received on January 19, 2016.

9. Counsel for the appellant relied on Section 43(1) of the *Employment Act, 2007* which imposes an obligation on the employer to provide proof of the reasons for terminating an employee, which reasons must then be assessed by the court to establish whether or not they are valid. In his view, the respondent had not tendered such evidence and therefore the case should have been held against the respondent. It was also submitted that the respondent was in breach of Section 41(1) of the *Employment Act* which stipulates that an employee is to be given a hearing before termination under the terms and conditions of employment. Counsel relied on the case of *KUDHEIHA v Nairobi Club*, Cause No 77(N) of 2005 and urged that the appellant ought to be reinstated. Reliance was also placed on the cases of *Jane Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR and *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others* [2014] eKLR among other decisions to submit that interdiction must meet the requirements of substantive and procedural fairness and that an employee ought not be placed on interdiction longer than is necessary as that would amount to constructive dismissal. In the end, counsel urged the Court to allow the appeal and make awards in favour of the appellant, as prayed in the Statement of Claim.

10. Mr. Kaminza Charles Zakayo appeared for the respondent and started by submitting on the question as to whether the trial court considered the Amended Memorandum of Claim. He pointed out that at paragraph 25 of the judgment, the learned Judge held that the evidence tendered was at variance with the pleadings, and that such a finding was based upon a consideration of the Amended Memorandum of Claim.

11. The second issue submitted upon by counsel was whether the Amended Memorandum of Claim was served. On this, counsel submitted that as held by the trial court, the appellant did not serve the Amended Memorandum of Claim despite there being an express order by the court directing service. He further noted that even on appeal, the appellant has not tabled any evidence in support of his claim of service so as to enable this Court reach a different finding. Counsel urged us to find that the pleading was not served as was required.

12. Finally, Mr. Kaminza addressed grounds 3, 4, 5 and 6 of the appeal. In urging this Court to reject those grounds, counsel relied on the cases of *Independent Electoral and Boundaries Commission & Another*

v Stephen Mutinda Mule & 3 others [2014] eKLR and *Stephen Onyango Achola & Another v Edward Hongo Sule & Another* [2004] eKLR to submit that parties are bound by their pleadings and that any evidence addressing an issue not raised in the pleadings cannot be addressed by a court. Referring to the facts of this case, counsel submitted that the appellant's claim was in respect to interdiction yet the evidence on record was for unfair termination. Counsel added that even if the claim was about unfair termination, the evidence adduced is at variance with the pleadings. Counsel therefore urged us to find that the trial court was right to dismiss the appellant's claim.

13. Counsel cited *Chaterhouse Bank Ltd (Under Statutory Management) v Frank Kamau* [2016] eKLR to urge that even in instances where a respondent adduces no evidence, the burden of proving a case still lies on the claimant and that that burden must be discharged. Counsel submitted that the issues of unfair termination and unfair interdiction were not proved by the evidence adduced by the appellant; and the appellant was not to enjoy an automatic success on his claim by virtue of non- appearance or non-prosecution of the case by the respondent. It was urged that the appellant ought to have adduced sufficient evidence to support his claim, in the absence of which the trial court cannot be faulted for dismissing the claim. In conclusion, counsel urged us to dismiss this appeal with costs.

14. This is a first appeal and Rule 31(1)(a) of the *Court of Appeal Rules, 2022* requires of us to independently re-appraise the evidence and arrive at our own conclusion. In doing so, we must however appreciate the fact that where oral evidence was taken by the trial court, then unlike the trial court, we lack the benefit of assessing the demeanor of the witnesses during adduction of evidence. We need not say more on this.

15. We have duly considered the Record of Appeal and the submissions of both parties. In our view, the question is whether the appellant proved the claim that he had presented to the court. We will also address the issue of costs.

16. At the centre of this appeal is the issue of what the appellant's claim was. According to the appellant, he had initially lodged a claim of wrongful termination but through the Amended Memorandum of Claim, he changed his cause of action to wrongful interdiction. The respondent on the other hand is of the view that the appellant's cause of action was wrongful termination. The trial court at paragraphs 18 to 29 of its judgment laid down the procedural posture of the pleadings filed before it and finally noted that the Amended Memorandum of Claim by the appellant was never served on the respondent despite there being an express court order to effect service. We have reviewed the judgment of the trial court and we note that the appellant's claim was dismissed on the ground that the claim was filed prematurely, before the cause of action arose.

17. In our view, the issue can be properly determined once it is understood what a cause of action is. A cause of action arises out of the occurrence of a factual situation which entitles a party to seek redress from the court. The factual aspect of the situation so occurring is what the claimant or plaintiff or petitioner pleads. It is what is stated in a pleading to be the cause of action that the party who instituted the case will endeavour to prove by adducing evidence. In order to fully address this issue, we also need to determine whether the trial court was right to strike out the amended claim for not being served on the respondent.

18. The following statutory provisions are relevant in this case. Section 100 of the *Civil Procedure Act* gives the court general power to amend proceedings in the following terms:

> "The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall

be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

19. Additionally, Rule 5(1) of Order 8 of the *Civil Procedures Rules* states that:

> "For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

20. From the foregoing statutory provisions, we have no doubt that amendment of pleadings with leave must be dispensed with within the terms of the order granting the permission. It is also clear that the granting of leave to amend one's pleadings is a discretionary matter and so is the assessment of the effect of failure to adhere to such orders as issued to facilitate the amendments. The record shows that on February 20, 2017, the trial court ordered that an Amended Memorandum of Claim be filed and served before March 10, 2017. The court further ordered that an amended response be filed before March 24, 2017. On March 24, 2017 when the matter came up again before the trial court, it was ordered that the appellant serves the Amended Memorandum of Claim, despite the appellant stating that he had served. It can only be deduced that the court's order on this date was due to the appellant's failure to satisfy the court that service had been effected. From the record still, we have not come across any evidence to show that the Amended Memorandum of Claim was indeed served.

21. It is not in doubt that a memorandum of claim is what stands before a court and defines the case of the claimant. An amended memorandum of claim supersedes the original pleading. In this matter, however, the conditional order of the trial court issued on 20th February 2017 was not adhered to. The trial court exercised its discretion in disregarding the amended memorandum of claim. The principles which govern an appellate court, when it is called upon to set aside or vary the orders which the trial court had issued, in exercise of its discretion, are well established. Those principles were reiterated in *United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

> "The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

22. In this case, we find no impropriety in the manner in which the trial court exercised its discretion in this case when ignoring the Amended Memorandum of Claim. Furthermore, from the judgment, the trial court gave reasons as to how it reached its decision, being that the terms of the order allowing the amendment were not complied with by the appellant despite the court expressly reminding the appellant to effect service.

23. The next issue is whether the evidence on record proved the appellant's claim. Based on our finding on the first issue, the appellant's cause of action is as contained in the initial Memorandum of Claim lodged on January 15, 2015 wherein the claim was for unfair dismissal. The appellant's service

was subsequently terminated and this fact communicated to him on January 19, 2016, while his interdiction was on October 10, 2014. From the record, the appellant gave his oral evidence on October 18, 2018. The gist of his evidence was that he was unfairly interdicted and later dismissed in 2016.

24. We note two issues with the appellant's case. First, he lodged a claim before the trial court for unfair dismissal before he was dismissed. Second, his evidence is at variance with the cause of action. The trial court dismissed his case for being filed prematurely.

25. In *Attorney General & another v Andrew Maina Githinji & another* [2016] eKLR a cause of action was defined as follows:

> "
>
> " 8. "A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint."
>
> That definition was given by Pearson J in the case of Drummond Jackson v Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read v Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as: -
>
> > "Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court".
>
> Lord Diplock, for his part in Letang v Cooper [1964] 2 All ER 929 at 934 rendered the following definition: -
>
> > "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person."
>
> I am sufficiently persuaded by those definitions and I adopt them."

26. We agree with the definitions cited therein. It is further clear that a cause of action can only arise after occurrence of a wrong complained of. In this case, the appellant was apprehensive of a looming wrong but the same was not ripe. On the other hand, even if we were to assume, which we decline to, that as at the time of judgment the pre-empted wrong had occurred, the appellant still has to deal with the variance in his evidence. As at the time of hearing of this case, the appellant had been dismissed, however, his evidence was that of interdiction and very little to do with the dismissal. The appellant's case was therefore a convoluted case; the end desire was clear but so ought to have been the cause of action and the factual information on how it occurred. This was not the case and just like the trial court, we find that the claim was prematurely filed.

27. The final issue is who bears the cost of this appeal. The norm is that costs follow the event. However, considering the historical perspective and the circumstances of this case, the appellant lost his job from the respondent. He is an individual litigating against a corporate entity and he has been in the corridors of our judicial system since 2015 which has all come at a cost. The record further reveals no malice on how he has handled himself in this case whereas the respondent has skipped court on numerous occasions therefore contributing to the delay occasioned in the matter. It is therefore in the interest of justice that each party herein pay their own costs.

28. The upshot of the foregoing is that this appeal is without merit and is hereby dismissed. Each party to bear own costs.

DATED AND DELIVERED AT NAKURU THIS DAY 2ND OF JUNE, 2023

F. SICHALE

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JUDGE OF APPEAL

F. OCHIENG

……………………….

JUDGE OF APPEAL

W. KORIR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR