KCB Bank Limited v Inyangu (Civil Application E460 of 2022)
[2023] KECA 913 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KECA 913 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E460 OF 2022

HM OKWENGU, JM MATIVO & GWN MACHARIA, JJA

JULY 24, 2023

BETWEEN

KCB BANK LIMITED ..... APPLICANT

AND

DAVID MUGASIA INYANGU ..... RESPONDENT

(Being an application for stay of execution of the Judgment & Decree of the ELRC Court Nairobi (M. Mbaru, J.) delivered on 24th November,2022 in ELRC No. E641 OF 2021)

RULING

1. The application before us is the notice of motion dated December 8, 2022 brought pursuant to section, 1A, 1B and 3A of the *Civil Procedure* Act and rule 5(2)(b) of the *Court of Appeal Rules*, seeking stay of execution of the judgment and decree of the Employment & Labor Relations Court (M. Mbaru, J.) delivered on December 24, 2022 pending the hearing and determination of the intended appeal.

2. The dispute herein arose after the respondent filed a claim in the Employment and Labour Relations Court (ELRC), seeking a declaration that the applicant violated his fundamental rights and freedoms as enshrined in the *Constitution*; a declaration that the appellant was bound to recognize him as a permanent and pensionable employee, having worked for it continuously for over five years; a declaration that the fixed terms issued to him were null and void; an order that his termination was unfair and unjust; compensation for unlawfully held salary, unpaid overtime, unlawfully withheld annual leave allowances, denied leave days, denied payment of bonuses and *ex-gratia*, denied pension contributions, payment of 12 months' salary, payment of 1 month's salary in *lieu* of notice and payment of damages; that he suffered from underpayments, defamation and discrimination; compensation for violation of his rights; general damages; and costs of the suit.

3. It was his case that he had been employed by the applicant on fixed terms though his pay slip indicated that he was a casual employee; and that he worked for the appellant for five years before his termination

on May 25, 2021. He averred that there was constructive dismissal after he reacted against the applicant, after it illegally changed his role.

4. The trial court (Mbaru, J.) in its judgment held that the rights of employment are protected and the applicant was bound under section 26 of the *Employment* Act to apply terms and conditions under Collective Bargaining Agreement (CBA) or on terms favorable to the respondent. The basic minimum conditions of employment ought and should have been as set out in the CBA or such other favorable terms and conditions, and anything short of this was unlawful. The court went on to state that the available redress where an employer engages in unfair labour practices was payment of damages. The court then issued a declaration that the applicant violated the respondent's fundamental rights and freedoms as enshrined in the *Constitution* ; a declaration that the applicant discriminated against the respondent, and was bound to apply the negotiated terms and conditions of employment secured under the CBA with Bank Fraud Investigation Unit (BIFU); and that the claimant suffered underpayments and was entitled to unpaid balances from his wage. The respondent was awarded general damages at Kshs. 500,000/-; wage difference from the year 2018 to 2May 5, 2021-total sum to be calculated by the Labour Officer, Nairobi based on the CBA pay wage for a clerk and the wages earned by the claimant at Ksh. 32,481.00 annual leave allowances of Kshs. 33,281.16; leave allowance at Kshs. 119,984.67; pension contributions Kshs. 278,800; costs of the suit at Kshs. 100,000.00 all inclusive; and that the appellant do issue the respondent with a Certificate of Service. It is this decision that the applicant seeks to challenge by way of an appeal to this court.

5. The application is supported by grounds stated on the face of the motion and the supporting affidavit sworn by Lillian Sogo, the head counsel, litigation with the applicant, on December 7, 2022. She avers that the intended appeal is arguable as the learned judge erred in law and fact by holding:

> that the applicant was bound to apply the negotiated terms and conditions of employment secured under the CBA with BIFU, in total disregard of section 48(1) of the *Labor Relations* Act; that the respondent was discriminated against; that the respondent was entitled to annual leave, leave days and pension contributions; and that the learned judge erred in converting the respondent's employment contract from a fixed term contract to a permanent and pensionable contract. It is argued that if the orders sought are not granted, the respondent shall proceed to execute the judgment which will render the intended appeal nugatory. The argument is hinged on the assertion that the respondent does not have any known assets or source of income from which the applicant can recover the decretal amount if the appeal succeeds.

6. The application is opposed by the respondent *vide* his replying affidavit sworn on December 16, 2022. He deposes that the notice of appeal is improperly on record as it had not been authorized for e-service as at the time of making the application. This, it is argued, is because the applicant had not paid the requisite filing fee for lodging a notice of appeal. The heading of the impugned notice of appeal was also wrong as his (applicant's) name is not 'David Mugas Iyangu' as indicated. The applicant has therefore abused the court process in a deliberate attempt to delay and obstruct justice, consequent to which its documents should be struck out with costs.

7. The respondent also filed a supplementary replying affidavit and a further affidavit sworn on January 5, 2023 and February 13, 2023 respectively, which are a reiteration of the contents of the replying affidavit. He also exhibited annextures in support of the averments in the replying affidavit. He additionally filed a letter addressed to the Deputy Registrar, Court of Appeal, dated December 14, 2022, whose subject and content is to urge the striking out of the application on account that it was filed prematurely as no notice of appeal has been lodged in the registry.

8. The application was canvassed by way of written submissions with limited oral highlights. Learned counsel, Ms Muthee held brief for Mr Munge for the applicant. There was no appearance by the respondent who we were informed was acting in person. We did confirm that he was served with the hearing notice, as a result of which the court decided to rely on the filed pleadings and written submissions on record.

9. The written submissions for the applicant are dated December 20, 2022. It is submitted that the applicant should not be denied the right to file an appeal, as it is tantamount to a denial of the right to hearing. Reliance was placed on the case of *Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi & 3 Others* (2017) eKLR and *Moroo Polymers Limited v Wilfred Kasyoki Willis* (2019) eKLR, which held that "non- compliance with rule 75 of this Court' *Rules* does not, *per se*, shut out a litigant from the seat of justice." It is argued that the applicant has an arguable appeal, as the respondent was awarded the sum of Kshs. 1,032,065.83 with an order that the Labour Officer do tabulate the amount payable to a clerk under the CBA, compare it with what the respondent was paid and give the figure of the difference of the sum of underpaid. Thus, there was a high likelihood that the sum awarded to the respondent would increase, and since there was no order of stay, there was imminent risk of execution. Furthermore, the respondent has no known assets or source of income from which the decretal amount could be recovered should the appeal succeed. In this regard, reliance was placed on the case of *The Star Newspaper & Another v Muhoho* (Civil application E036 of 2021) [2022] KECA 581 (KLR) April 28, 2022) (Ruling). The court was urged to allow the application.

10. The respondent's submissions are dated December 21, 2022. It is submitted that the notice of appeal on record is not valid as no court fee was paid for it, and it was not lodged within 14 days of the judgment. Further that it was not served within 7 days of its lodgment, thus violating rules 77(2), 79(1) and 110(1) of the *Court of Appeal Rules*. The case of *Daniel Nkirimpa Monirei v Sayialel Ole Koilele & 4 Others* [2016] eKLR was relied on for the proposition that lodging an appeal out of time was not a procedural technicality which can be cured by the court invoking the overriding principles. The case of *Halai & Another v Thornton & Turpin (1963) Ltd* [1990] eKLR was also invoked for the proposition that the court had no jurisdiction to entertain the application in the absence of a notice of appeal. Finally, it was the view of the respondent that the application is frivolous, vexatious and devoid of merit and ought to be dismissed with costs.

11. Upon a query from the court on the issue of the validity of the notice of appeal, Ms Muthee conceded that it was filed under the wrong provisions of the rules and had indeed misnamed the respondent. She was quick to add that an application seeking amendment of the errors had been filed but it had not been allocated a serial number. She hoped that the said application would succeed after which the issue of the validity of the notice of appeal would be resolved.

12. We have considered the application, the affidavits in support of, and in opposition to, the application, the rival submissions, cited authorities and the law.

13. Before we delve into the merit of the application, we think that it is paramount we first address ourselves to whether there is on record a valid notice of appeal, and if not, how the invalidity impacts on the application.

14. Rule 77 of this Court's *Rules* provides that:

    (1) A person who desires to appeal to the Court shall give notice in writing, which shall be lodged in two copies, with the registrar of the superior court.

    2. Each notice under sub-rule (1) shall, subject to rules 84 and 97, be lodged within fourteen days after the date of the decision against the decision for which appeal is lodged.

2. Each notice of appeal under sub-rule (1) shall state whether it is intended to appeal against the whole or part only of the decision and, where it is intended to appeal against a part only of the decision, shall-

   a. specify the part complained of,

   b. the address for service of the appellant; and

   c. the names and addresses of the persons intended to be served with copies of the notice.

   .....

(6) A notice of appeal shall be substantially in the Form D in the First Schedule and signed by or on behalf of the appellant.

15. A perusal of the record shows that the applicant, aggrieved by the judgment of ELRC dated November 24, 2022 filed a notice of appeal dated December 5, 2022. There is the contention that the same was never properly filed; we shall circle back to this aspect at a later point. The applicant then filed an application dated January 3, 2023, seeking leave to amend the said notice of appeal together with a prayer for extension of time to file the amended notice of appeal. The applicant subsequently filed a notice of intention to withdraw an application dated January 9, 2023 which was seeking leave to withdraw the earlier application dated January 3, 2023.

16. As pointed above, when she was queried by the court, Ms Muthee was candid enough to admit that the first notice of appeal was defective on account that it was filed under the wrong rule and it misnamed the respondent, but added that the applicant had since filed another application seeking amendment of the notice which was yet to be allocated a case number. We can thus reasonably conclude that as at the time of hearing this application, there was no application on record seeking to amend the notice of appeal dated December 5, 2022. What this implies is that the defective notice of appeal is the only one on record.

17. The provisions of rule 77 are couched in mandatory terms. The applicant was required to lodge the notice of appeal with the Registrar of ELRC within fourteen (14) days from November 24, 2022. It would appear the applicant complied. However, a cursory look at the said notice shows that it is neither dated, sealed or signed by the Deputy Registrar, making it difficult to deduce when it was lodged with the registry.

18. Rule 10 of this Court's *Rules* provides some guidance in answering the question as to when a document is deemed to have been lodged. It provides for the endorsement of documents presented to the Deputy Registrar and requires that:

> "Whenever any document is lodged in the Registry, a sub-registry or in the registry of a superior court under or in accordance with these rules, the Registrar or deputy registrar or registrar of the superior court, as the case may be, shall cause the document to be endorsed showing the date and time when it was so lodged."

19. It is common ground that no such endorsement was made on the notice in question. It does not bear the endorsement of the date and time that it was received by the Deputy Registrar as envisaged by rule 10. The applicant was silent on this defect and did not rebut the respondent's averments that the notice, on the face of it, is incurably defective.

20. The applicant also misnamed the respondent. It is common ground that the effect of filing a notice of appeal and serving it, is to put the court and the litigants on notice that litigation has not ended.

Misnaming of a party goes to the core of the purpose of a notice of appeal. Under the current circumstances, the respondent as named does not exist. Even if we were to proceed and determine the application herein in favor of the applicant, would the respondent be bound by the stay issued when it does not concern or address him? The answer is definitely in the negative.

21. The applicant is of the view that the misnaming of the respondent is a mere technicality. It takes refuge in article 159 of the *Constitution*, and further placing reliance on the case of *Andrew Toboso Anyanga v Mwale Nicholas Scott Tindi & 3 others* [2017] eKLR. The case is clearly distinguishable from the instant circumstances. In that case,the applicant sought leave to file and serve a notice of appeal out of time. However, that is not what is before us; Ms Muthee stated that there was an intention to file such an application, and as such, we are not confronted with any material urging us to regulate the impugned notice of appeal.

22. Whilst we agree with the above decision to the extent "that the filing of a notice of appeal under the wrong rules is a mere procedural technicality in terms of article 159(2) (d) of the *Constitution* which should not deny the applicant a right to file an appeal", the circumstances of this case clearly demonstrate that the applicant's advocate acted under a genuine mistake of the operative procedural rules. We can accept that filing under the wrong provision is excusable, but that is not the only reason why the notice of appeal is being deemed as defective.

23. In our view, the failure to lodge the notice of appeal is a fatal defect. In the case of *Daniel Nkirimpa Meniere v Sayialel Ole Koilel & 4 Others* [2016] eKLR, it was held that under rule 77 (1), the appellant must not only be seen to have lodged the notice of appeal, but must also have served it upon the respondent; that a notice of appeal which bears no rubberstamp of the High Court and/or one which lacks any other endorsement by the Registrar of the High Court is fatally defective. The court went on to add that such a notice cannot be said to have been duly lodged and termed it a glaring deficiency in authentication.

24. We cannot belabour the point that it is a proper notice of appeal that gives this court the jurisdiction to determine the instant application and the appeal. In citing the Supreme Court decision in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission and 7 others* [2014] eKLR, this Court had this to say in *Apungu Arthur Kibira v Independent Electoral and Boundaries Commission and 2 others* [2018] eKLR:

> " A notice of appeal is a primary document to be filed outright whether or not the subject matter under appeal is that which requires leave or not. It is a jurisdictional pre-requisite."

25. Similarly, in *Safaricom Limited v Ocean View Beach Hotel & 2 others* [2010] eKLR, Omolo, JA. stated as follows:

> " At the stage of determining an application under rule 5(2)(b) there may or there may be no actual appeal. Where there is no actual appeal already lodged, there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under rule 5(2)(b) because as I have already pointed out, the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal, as manifested by lodgment of the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the Court."

26. It follows therefore, that in the absence of a proper notice of appeal on record, the applicant herein is yet to express its intention to appeal. As already stated in the *Apungu* case (*supra*), a proper notice

is a jurisdictional pre-requisite and its absence cannot be regarded as mere technicality of procedure, curable by invoking the provisions of article 159(2) (d) of the *Constitution*. It is trite law that article 159(2) (d) is not a *panacea* for all procedural ills.

27. Having found that there is no notice of appeal properly on record, we find and hold that we have no jurisdiction to determine the applicant's motion and we hereby dismiss it with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

J. M. MATIVO

.....

JUDGE OF APPEAL

G.W NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR