



Koech & 4 others v County Public Service Board & another (Civil Appeal 19 of 2018) [2022] KECA 875 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KECA 875 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPEAL 19 OF 2018
HM OKWENGU, A MBOGHOLI-MSAGHA & KI LAIBUTA, JJA
JULY 22, 2022**

BETWEEN

**SAMMY CHERUIYOT KOECH 1ST APPELLANT
JANET CHERONO SOY 2ND APPELLANT
GIDEON KIPLANGAT BETT 3RD APPELLANT
FAITH QUEEN CHEBET 4TH APPELLANT
LEONARD KIPNGENO KORIR 5TH APPELLANT**

AND

**COUNTY PUBLIC SERVICE BOARD 1ST RESPONDENT
BOMET COUNTY GOVERNMENT 2ND RESPONDENT**

(An appeal against the Ruling and Order of the Employment and Labour Relations Court at Kericho (Marete, J.) dated 15th December 2017 In Kericho ELRC Case No. 51 of 2017)

JUDGMENT

1. The appellants herein filed suit against the respondents in Kericho ELRC Case No. 51 of 2017 vide a Statement of Claim dated 10th November 2017. The appellants averred that they were employees serving in the Bomet County Government and that they represented 3,500 of their colleagues. Their claim was to the effect that they were wrongfully terminated from employment without being given reasons for the same and without being given a fair hearing; and that their removal violated Constitution, Employment Act and Fair Administrative Action Act.
2. The appellants also filed a Notice of Motion application seeking orders staying any intended or actual administrative action to lay off the Bomet County Government Staff affected by the circular dated 6th November 2017 until the suit was heard and determined; orders staying any orders of any nature which



purported to lay off or terminate employment service of the claimants; preservatory orders for status quo until the matter was heard and determined; and an injunction prohibiting the respondents from recruiting and hiring other employees until the matter was heard and determined.

3. The 2nd respondent filed a replying affidavit and later filed written submissions in opposition to the application. The 2nd respondent's submissions were to the effect that Rule 9 of the court's rules sets out the procedure for filing a representative suit, and that the claimants had failed to comply with the rules. The authority on record only relates to the six claimants and not 3,500 employees as alleged. There is no letter of authority signed by all the other employees affected by the circular, and the Statement of Claim is not accompanied by a schedule of the names, addresses, description, and the details of wages due, or the particulars of any other breaches or the reliefs sought by each claimant affected by the circular and alleged to be parties to the case.

The failure to comply with Rule 9 rendered the claim fatally incompetent and incapable of being cured by amendment or submissions at the stage the cause had reached. Counsel for the 1st respondent made similar oral submissions when the matter came up on 5th December 2017.

4. Counsel for the claimants, in rebuttal, submitted that Rule 9(2) and (3) and the preliminary objection thereof ought to be read alongside Article 159(2) (d) of the Constitution.
5. In his ruling, the learned judge held that the preliminary objection raised by the respondents was sustainable as the claimants had brought a suit in contravention of the rules of procedure, and that such rules are mandatory in nature and intent; that Rule (2) and (3) is intended to clearly express the extent of the claim and therefore serve as a notice to the respondent of the extent of the expected liability, eliminates ambush and warns the respondent of the areas to address in defence; and that his would not fall into the criterion of undue regard to technicalities envisaged by Article 159(2) (d) of Constitution. The learned judge allowed the preliminary objection, dismissed the application, and held that the effect of allowing the preliminary objection is that the claim is struck out.
6. Dissatisfied with the ruling, the appellants filed the present appeal. There are a total of 14 grounds of appeal but, in our view, all may be reduced to one ground, to wit, whether the trial court was right in upholding the preliminary objection, and in striking out the appellants' claim.
7. The appellants seek orders setting aside the ruling of the ELRC; a declaration that the appellants were hired legally and procedurally; orders compelling the respondents to issue confirmation letters to the claimants on permanent and pensionable terms; an order for the case to start de novo; that costs of and incidental to the claim and this appeal be awarded to the appellants together with interest at Court rates from the date of the award; and any such further orders as the Court may deem necessary.
8. Parties have filed their respective submissions and cited some authorities which we have considered. On the issue of whether non-compliance with Rule 9 (2) and (3) is fatal to the suit, Counsel for the appellant submitted that the list of employees on whose behalf the claim was filed was admittedly not attached to the Statement of Claim, but was filed separately and was part of the record of the superior court, but the learned judge disregarded it. According to him, this procedural lapse was a technicality curable under the provisions of Article 159 (2) (d) of the Constitution.
9. Counsel submitted that the court, after recognising that the consent document was signed by six claimants, ought to have examined the issues raised by the six appellants in their claim conclusively before proceeding to strike out the entire claim. Their claim was properly before court and should have been heard on merit. Counsel referred to *Halsbury's Laws of England* 3rd Edition Volume 30 at page 38 for the proposition that the jurisdiction to strike out pleadings ought to be exercised with extreme caution and only in obvious cases, and where a matter of general importance or serious question of law



would arise on the pleadings, the court will not strike out the pleadings unless it is clear and obvious that the action will not lie.

10. Counsel also cited *DT Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1 for the proposition that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment; *Coast Projects Ltd v MR Shab Construction (K) Ltd* [2004] 2 KLR 119 where it was held that summary procedure is a radical remedy and a court of law should be slow in resorting to this procedure, which can only be applicable in plain, clear and obvious cases; and Hon Martha Wangari Karua v Independent Electoral Boundaries Commission & 3 others Nairobi Election Petition No. 1 of 2017 for the proposition that courts must always strive to render justice to the parties without much regard to procedural technicalities where the dispute is clearly discernable from the pleadings on record.
11. On the other hand, both respondents sought the dismissal of the appeal. Counsel for the 1st respondent submitted that no notice of appeal was served on the respondent or contained in the bundle of documents as served; and that, in any event, the said notice granting the court's jurisdiction should be strictly limited to the respondent's preliminary objection and the court's ruling on the same. He further submitted that, new issues have been introduced by the appellants in paragraph 20 – 35 of its submissions without leave of the court, and which are outside the scope of the pleadings, statement of claim and memorandum of appeal.
12. Regarding whether the court erred by dismissing the claim, counsel relied on *Harrison Otiende & 5 others v Badari Sacco Limited & 3 others* [2019] eKLR where this Court held that Rule 9 (2) of the ELRC *Rules*, as read with its proviso, reserves the ELRC's discretion to dispense with the letter of authority required to bring a representative suit. In that case, this Court found that it was not demonstrated that the discretion was sought or that the discretion was wrongly exercised, and thereby upheld the superior court's decision to strike out the suit for not attaching a letter of authority in compliance with Rule 9 (2).
13. Counsel for the 1st respondent contended that the appellants' advocate did not bring to the attention of the ELRC the alleged authority now being waved before the Court, and that the consent in the appellants supplementary bundle of documents related to the execution of necessary pleadings only for the prosecution of the case, but was not an authority to act by the 1st appellant as known in law and in the ELRC Rules.
14. Counsel argued that the integrity of the record is suspect, as such documents may have been inserted at the appellate level to discredit the judge, since these documents could have been introduced by way of a further affidavit.
15. Counsel cited the case of *Trusted Society of Human Rights Alliance v Mumo Matemu & 5 others* [2014] eKLR for the proposition that a suit is a solemn process owned solely by the parties, and this is the reason why there are laws and rules under the Civil Procedure Code and other Rules regarding parties to suits and one who can be a party to a suit; and that these rules of procedure act as safety nets for filtering matters before it.
16. Counsel cited *Raila Odinga & 5 Others v. IEBC & 3 Others* [2013] eKLR where the Supreme Court held that Article 159(2) (d) of the *Constitution* is not a panacea for all procedural shortfalls, and is applicable on a case-by-case basis. Counsel also relied on *Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited)* [2014] eKLR where this Court shared similar sentiments.



17. The duty of this Court as a first appellate court is to reconsider the evidence adduced before the trial court and reevaluate it to draw its own independent conclusions, and to satisfy itself that the conclusions reached by the trial judge are consistent with the evidence. See *Peter M. Kariuki v Attorney General* [2014] eKLR.
18. The 1st respondent alleges in submissions that the appellants had not served upon it the notice of appeal. However, there is on record an affidavit of service dated 14th February 2018 sworn by Wesley Kiprotich Ngeno indicating that the 1st respondent was indeed served. The 1st respondent's failure to have the notice and record of appeal struck out for want of service of the notice of appeal further reinforces this position. We are satisfied that the notice of appeal was duly served.
19. Rule 9 of the ELRC Rules provides that:
- “(1) A suit may be instituted by one party on behalf of other parties with a similar cause of action.
 - (2) Where a suit is instituted by one person, that person shall, in addition to the statement of claim, file a letter of authority signed by all the other parties:

Provided that in appropriate circumstances, the Court may dispense with this requirement.
 - (3) The statement of claim shall be accompanied by a schedule of the names of the other claimants in the suit, their address, description, and the details of wages due or the particulars of any other breaches and reliefs sought by each claimant.”
20. The appellants pleaded in their Statement of Claim that they are representing 3,500 of their colleagues affected by the circular of 6th November 2017. The appellants relied on the consent attached to the affidavit of the 1st appellant as sufficient in place of the letter of authority envisaged in Rule 9(2). However, the Consent has only been signed by the six appellants and not all of the 3,500 employees affected as pleaded in the Statement of Claim. On the other hand, the schedule of the claimants pointed to by the appellants only lists 86 persons. Even dispensing with the form of the Consent, it does not meet the requirements of Rule 9(2) which requires all the claimants to sign the letter of authority, unless the court dispenses with this requirement. No evidence has been tabled to indicate that leave of the court was sought to dispense with that requirement. This Court in *Harrison Otiende & 5 others v Badari Sacco Limited & 3 others* [2019] eKLR, reaching a conclusion that an authority and Consent was defective and an affront to Rule 9 of the ELRC Rules, held that:
- “Given the proviso to sub rule (2) aforesaid, the ELRC reserves the discretion to dispense with the letter of authority. It has not been demonstrated that such dispensation was sought and wrongly denied by the court, nor has it been demonstrated that the discretion was wrongly exercised. It is to be remembered that this Court can only interfere with a trial court's exercise of discretion in cases where it is shown to have been wrongly exercised.”
21. The appellants have invoked Article 159(2) (d) of *Constitution* to argue that the non-compliance with the Rule in issue should not render their claim and application fatal. However, Article 159(2) (d) does not act as a cure for all procedural shortfalls, more so the non-compliance with procedural rules that aid in bringing clarity and efficiency to the conduct of suits. In *Telkom Kenya Limited v John Ochanda*



eKLR, this Court held that:

“We are content to state that the constitutional provision is not meant to whitewash every procedural failing and it is not meant to place procedural rules at naught. In fact, what has befallen the respondents is proof, if any were needed, that there is great utility in complying with the rules of procedure. Such compliance is neither anathema nor antithetical to the attainment of substantive justice. As has been said before, the rules serve as handmaidens of the lady Justice.”

22. This is an affirmation that any litigant who takes the rules of procedure for granted would have himself to blame for any attendant consequences.

23. In deserving cases, where a preliminary objection has been raised and which goes to the root of the cause of action, the courts should not shy away from upholding the law. In the timeless case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696 at page 700, it was observed,

“... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....” As per LAW,J.JA.

24. After considering the record before us, the rival submissions and the authorities cited, we find that the application and the claim did not comply with Rule 9 of the ELRC Rules. The learned Judge cannot be faulted for upholding the preliminary objection, and therefore the appeal has no merit. It is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

