Kenya Game Hunting & Safari Workers Union v Micato Safaris Ltd (Civil Appeal 194 of 2016) [2022] KECA 1178 (KLR) (21 October 2022) (Judgment)

Neutral citation: [2022] KECA 1178 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 194 OF 2016

K M'INOTI, HA OMONDI & KI LAIBUTA, JJA

OCTOBER 21, 2022

BETWEEN

KENYA GAME HUNTING & SAFARI WORKERS UNION ..... APPELLANT

AND

MICATO SAFARIS LTD ..... RESPONDENT

(Being an Appeal against the Ruling and Order of the Employment and Labour Relations Court at Nairobi (AbuodhaJ. Nelson, J.) delivered on 17th June, 2016InE.L.R.C Cause No. 2437 of 2012)

JUDGMENT

1. The appellant (Kenya Game Hunting and Safari Workers Union) and the respondent (Micato Safaris Ltd) have a valid recognition agreement, and have previously concluded several Collective Bargain Agreements (CBAs) for the benefit of the respondent's unionisable employees who were members of the appellant union.

2. During the period between October and November 2014, the appellant and the respondent engaged in joint conciliation meetings for the review of the May 1, 2012 to April 30, 2014 CBA, but reached a deadlock in March 2015 with regard to general wage increase and house allowances. This prompted the appellant to move the Employment and Labour Relations Court at Nairobi in ELRC Cause No 2437 of 2012 to adjudicate over the resultant trade dispute and break the impasse.

3. To guide the process, the Central Planning and Monitoring Unit (the CPMU) of the Ministry of Labour, Social Security and Services lodged its report, findings and recommendations on: employment and annual labour cost trends; employment and annual wage bill trends; the respondent's financial position; challenges facing the respondent company; analysis of the issues in dispute; and its observations.

4. Having considered the report in its ruling dated June 17, 2016, the ELRC (Abuodha J. Nelson, J) directed that the issues that were the subject of the CBA period of 2012-2014 be revisited during the bargaining of the CBA for the next cycle, that is to say, 2014-2016. In reaching his decision, the learned judge observed that:

> "The Central Planning & Monitoring Unit report has made the following important observations. First, the wage differential between the management and unionisable staff is minimal. Further, the difference between the wages offered by the respondent and its counterparts in the sector and the industry in general is also minimal. The report has noted that the respondent was struggling to keep the company afloat due to negative travel advisories."

5. Dissatisfied by the directions of the ELRC, the appellants moved to this court on appeal on 6 grounds set out in its memorandum of appeal dated August 10, 2016, namely that the learned judge erred in law: by failing to observe the parties negotiation records and the CPMU report recommendations; by saying that the three employees whose wage was increased together with the management, were non-members of the union; by failing to deal with the issues in the dispute; and by his evaluation and analysis of pleadings and evidence adduced, and in failing to consider the appellant's records.

6. By a notice of motion dated September 8, 2016, and made under rules 1(2), 42(1) and 84 of the *Court of Appeal Rules*, 2010 the respondent prayed that the appeal be struck out; and that the costs of the application and of the appeal be borne by the appellant.

7. The respondent's motion was supported by the annexed affidavit of Winnie Maina (the respondent's Human Resource Manager) sworn on September 8, 2016, and was made on the grounds that:

> "(a) The record of appeal is incurably defective in that -
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> i. The memorandum of appeal annexed is drawn in a format which is unknown in law.
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> ii. There are no pleadings of the superior court annexed in the record.
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> iii. The record does not contain the written submissions filed in the superior court.
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> iv. The record contains fresh documents which did not form part of the record of the superior court and further, which are not required in a record of appeal.
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> v. The notice of appeal was not served on the respondent and only came to the knowledge of the respondent when it was served as annexed in the record of appeal.
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> vi. The record does not contain a certificate of correctness.
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> b) The defective record of appeal and the memorandum of appeal violate the respondent's right to fair hearing.
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> c) Striking out the incompetent record of appeal is necessary to prevent an abuse of the process of this honourable court and for the ends of justice."

8. The application was opposed as evidenced by the replying affidavit of Josphat Mailu Ndolo (the appellant's General Secretary) sworn on June 9, 2017. According to Ndolo, "human beings are bound to error," but that they had corrected the record of appeal as ordered by the court. To this end, the appellant filed a supplementary record of appeal on June 21, 2017.

9. Be that as it may, this court exercises great caution not to shut the door to the seat of justice in determination of an application to strike out an appeal on account of formal or technical infractions, particularly in a case where such an application is heard together with the main appeal with the consent of the parties. Indeed, article 159(2) (d) of the *Constitution* requires the court to administer justice without undue regard to procedural technicalities. That said, we take to mind this court's majority decision of Ouko & Jamila Mohamed, JJ.A. in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] eKLR where they had this to say:

> " Deviations from and lapses in form and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness."

10. While article 159(2) (d) is by no means a panacea to incurable defects in a record of appeal, the nature of the trade dispute and of the appeal at hand impels us to determine the substantive appeal on its merits. Moreover, the formal defects of the record of appeal as put to us do not go to the jurisdiction of the court and have largely been cured through the supplementary record of appeal. In our considered view, the procedural infractions complained of do not in any way cause injustice by way of injurious prejudice to the respondent. Accordingly, we are not inclined to elevate those infractions to such a level as to sacrifice justice on the altar of strict adherence to the rules of procedure. In the circumstances, we disallow the respondent's motion and proceed to determine the appeal on its merits.

11. Turning to the merits of the appeal, this being a first appeal, it is our duty, in addition to considering submissions by the appellant and learned counsel for the respondent, to analyze and re-assess the report and other evidence on record and reach our own conclusions in the matter. This approach was adopted by this court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co* [1968] EA p123.

12. In *Selle's* case (ibid), the court held that:

> " An appeal to this court from a trial by the High Court (as well as the ELRC) is by way of retrial, and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions …."

13. Having considered the record of appeal, the written and oral submissions of the appellant's representative and of the learned counsel for the respondent, we are of the considered view that the appeal herein stands or falls on our findings on three main issues, namely: whether, in his directions, the learned judge considered the record of previous negotiations leading to previous CBAs; whether

the learned judge effectively dealt with the substantive issues in the dispute; whether the learned judge properly evaluated and analysed the pleadings and evidence put before him; and what orders ought we to make in determination of this appeal.

14. On the first issue, we find nothing to suggest that the learned judge did not take cognisance of success in previous negotiations leading to various CBAs, the only exception being the 2012-2014 negotiations from which the dispute at hand arose. But for the general allegation that he "... did not consider previous negotiation records," the appellant does not elaborate what, in those records, could have led to a different finding and directions.

15. On the second and third issues, we do not agree with the appellant that the learned judge erred in failing to consider and effectively deal with the substantive issues in dispute, or that he failed to consider the pleadings and evidence put to him, including the recommendations contained in the CPMU report by which he was properly guided.

16. Paragraphs 7 to 12 of the impugned ruling speak for themselves. The learned judge had this to say in paragraph 11:

> " 11. The court has considered submissions by the disputants and has also had the benefit of reviewing the technical reports submitted by [the] Central Planning & Monitoring Unit. Whereas the court is usually not bound by technical reports but where they are credible and give a professional and technical analysis of the issue in dispute they become persuasive authority on the issue in dispute which in absences of other factors to the contrary, will be relied on."

17. Read with paragraphs 7, 8, 9, 10 and 12, the content of which we need not replicate here, paragraph 11 settles the second and third issues. This leaves us with the question as to what orders ought we to make in determination of this appeal. Having considered the record of appeal together with the written and oral submissions of the parties, we find that this appeal fails. Accordingly, we hereby order and direct that:

    a. The respondent's notice of motion dated September 8, 2016 be and is hereby dismissed;

    b. The appellant's appeal be and is hereby dismissed;

    c. The ruling of the ELRC (Abuodha J. Nelson, J) dated June 17, 2016 be and is hereby upheld; and

    d. Each party shall bear their own costs of the application and of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

J. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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DR. K. I. LAIBUTA

JUDGE OF APPEAL

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR