



REPUBLIC OF KENYA



**Sana Industries Limited v Nzioki (Employment and Labour Relations Appeal E061 of 2024) [2025] KEELRC 209 (KLR) (31 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 209 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E061 OF 2024**

**JW KELI, J  
JANUARY 31, 2025**

**BETWEEN**

**SANA INDUSTRIES LIMITED ..... APPELLANT**

**AND**

**REGINA KANINI NZIOKI ..... RESPONDENT**

*(Being an Appeal against the Ruling and order of Honourable C.K. Kisiangani delivered on 7th February, 2024 at Ruiru Law Courts arising from Ruiru MCELRC No.E007 of 2023)*

**JUDGMENT**

**Representation:**

For Appellant / Applicant: - Wambugu & Muriuki Advocates

For Respondent: - Kagethe Waitere & Company Advocates

1. The appellant being dissatisfied by the Ruling and Order of Honourable C.K. Kisiangani delivered on 7<sup>th</sup> February 2024 at Ruiru Law Courts filed a memorandum of appeal dated 3<sup>rd</sup> March 2024 and received in court on 7<sup>th</sup> March 2024 together with a record of appeal received in court on the 30<sup>th</sup> September 2024 seeking the following reliefs: -
  - a. The Appeal be allowed and the Ruling and Order of Hon. Kisiangani delivered on 7th February 2024 be set aside in its entirety.
  - b. In place of the said ruling, this Honourable Court be pleased to find as follows:
    - i. That the suit herein was subjudice Milimani MCELRC E543 OF 2023 at the time of filing.



- ii. That by virtue of there being two suits over the same subject matter, both suits are fatally defective for being an abuse of process of court.
  - iii. That to that extent, the suit being RUIRU MCELRC E007 OF 2023 be and is hereby dismissed, and all consequential orders therein, including the default judgment entered on 28th September, 2023 be set aside.  
In the alternative,
  - iv. The default judgment entered on 28th September, 2023 be and is hereby set aside.
  - v. The Memorandum of Response dated 31st July, 2023 by the Appellant be and is hereby deemed to be properly filed and served.
  - vi. The suit being Ruiru MCELRC E007 of 2023 is hereby reopened for hearing inter parties and Appellant be and is hereby granted leave to defend the proceedings on merit.
- c. Costs of this suit be borne by the Respondent.
2. Grounds of the appeal
1. That the learned trial magistrate erred in failing to uphold the Appellant's inherent right to be heard before a matter is decided against it.
  2. That the learned trial magistrate erred in law and in fact in failing to hear the Application seeking to arrest Judgment in the first instance despite the same having been filed timeously.
  3. That the learned trial magistrate acted unfairly and in a biased manner against the respondent.
  4. That the learned trial magistrate erred in law and in fact by ignoring compelling evidence presented before it to the effect that the Respondent had filed multiple law suits against the claimant, over the same subject matter, and which then confused the Appellant who only filed a response to one of the suits, only to discover later that there were in fact two separate suits.
  5. That the learned trial magistrate erred in fact and in law by ignoring the fact that at the time when the suit was due to file responses, RUIRU LAW COURTS was in actual process of transitioning from manual filing of documents to e filing of documents, which then led to further delay in filing the responses by the appellant, a cogent and justifiable excuse to warrant exercise of discretion in favour of the appellant.
  6. That the learned trial magistrate erred in failing to advance the right to a fair hearing but instead dwelling excessively on procedural technicalities.
  7. That the learned trial magistrate erred in failing to uphold the settled principles governing applications to set aside default judgment.
  8. That the trial magistrate erred by ignoring the Notice of Preliminary Objection dated 8th September, 2023, despite the same having been brought to her attention prior to delivery of the default judgment.
  9. That the learned trial magistrate erred in fact and in law by ignoring the cogent evidence presented before her.



## **Background to the appeal**

3. The Respondent filed a statement of claim dated 29<sup>th</sup> March 2023 against the Appellant seeking terminal dues and compensation for unlawful termination of employment.
4. The respondent entered an appearance and filed a notice of preliminary objection dated 8<sup>th</sup> September 2023 on the basis of the suit being subjudice on account of similar suit between the parties in Milimani Commercial Magistrates court being MCELRC E541 OF 2023.
5. The court perused the proceedings before the trial court. On the 12<sup>th</sup> of June 2023, the advocate for the claimant informed the court that they had served the respondent and had no appearance. The trial court ordered the case to proceed for a hearing undefended on the 15<sup>th</sup> of August 2023.
6. On the 15<sup>th</sup> August 2023 the trial court having recorded no appearance for the respondent/appellant proceeded to hear the claimant's case. The claimant sought to file written submissions. Judgment was delivered on the 28<sup>th</sup> of September 2023. On that date, the respondent was represented and sought for a 30-day stay pending application dated 5<sup>th</sup> September 2023 and sought for leave to amend the same application. The claimant told the trial court they had not been served with any application. Stay of 30 days was granted.
7. The respondent filed a response to the application dated 18<sup>th</sup> October 2023. Parties filed written submissions. The trial court Hon Kisiangani issued a ruling on the 7<sup>th</sup> February 2024 dismissing the application for lack of merit with costs.

## **Decision**

8. The duty of the court sitting as the first appellate court is as stated in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] KECA 208 (KLR) thus, "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. "The court was duly guided.

## **Whether the appeal is merited.**

9. The appeal was canvassed by way of written submissions which the court noted.
10. The trial court found that there were no sufficient reasons given why the court should set aside the judgment as the pleadings were served. It also found the excuse for delay based on transition of the court to e-filing was not satisfactory. On the issue of subjudice the trial court stated there was no evidence that the suit in Milimani proceeded to judgment hence not subjudice.
11. The court having perused the pleadings finds that the trial court ought to have given weight on the issue of a prior existing suit between the parties in Milimani on the same issues filed by the respondent. The trial court ought to have given the appellant the benefit of the doubt having filed a response in the duplicate suit. That was a demonstration of intention by the appellant to defend the suit filed in Ruiru law courts by the fact of having filed response in the suit at Milimani law courts. It was not in dispute that the subsequent suit filed by the same respondent at Ruiru law courts, leading to the impugned judgment was a duplicate of the suit filed in Milimani Law Courts. The Appellant had shown interest in defending the suit as it was the same cause of action. Duplication of suits is abhorred as an abuse of court process. The transition of the court registry was also a plausible excuse. The appellant may have made mistakes but the claimant was not innocent by fact of duplicated suits. Section 20 of the



*Employment and Labour Relations Court Act* provides as follows:- “(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities”. The court is in favour of giving an opportunity to the applicant to be heard. In *Kenya Union of Sugar Plantation & Allied Workers v Busia Sugar Industries Limited* (Cause 56 of 2021) [2022] KEELRC 13365 (KLR) (2 December 2022) (Ruling) this court relied on the decision in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* [2013] eKLR where the Court of Appeal held: “[20] We are of the view that the learned judge misapprehended the reasons given for non-attendance which arose as a result of a mistake. In the case of: *Philip Chemowolo & another v Augustine Kubede*, [1982-88] KAR 103 at 1040 Apalo, JA (as he then was), posited as follows:-“Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline.” In the decision I further stated :-“The Court of Appeal (supra) further held: “[21]. In this case, the inconvenience caused to the respondents by the delay caused by the petitioner and his counsel’s failure to attend court on the June 10, 2013, could have been compensated with costs.” And further in paragraph 22 held:-“The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.” I found no reason to deviate from my decision in this matter. I uphold the decision to apply in determination of the appeal.

12. The court is to exercise caution in interfering with the discretion of the trial court as held in *Apungu Arthur Kibira v Independent Electoral Boundaries Commission and 3 others* (2019) e KLR, that the court would only interfere with the exercise of the discretion of another court where there is a plain and clear misapplication of the law. The court held that the decision of the trial court was not proportional as the claimant had duplicated claims before the court. The appellant had filed a defence in a similar suit hence indicating that it intended to defend the claim before the trial court. Further, any inconvenience to the respondent could have been compensated by costs.
13. The Court took into consideration the replying affidavit by the respondent in the application sworn on 1<sup>st</sup> November 2023 where she admitted to having filed an earlier case against the appellant on the same cause of action which was still in court at the time she filed the subsequent suit in a different court. The Court found that the Respondent was not an innocent litigant. On whether the suit at Ruiru Law courts was subjudice, the status of the Milimani suit is not before this court nor was its disclosed before the trial court. The court finds no basis to interfere with the position of the trial court on the issue.
14. The court upheld the decision of the Court of Appeal in *Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 others* to uphold that right to be heard of the appellant and further to hold that the trial magistrate misapprehended the reasons for lack of defence in the suit by the appellant being confusion caused by the claimant having filed another suit in a different court of which the appellant had filed defence. Further in any event any inconvenience to the claimant could have been addressed by way of costs.
15. In the upshot the court grants the alternative prayer sought in the appeal as follows:-
  - a. The default judgment entered on September 28, 2023 be and is hereby set aside.
  - b. The Memorandum of Response dated July 31, 2023 by the Appellant be and is hereby deemed to be properly filed and served.



c. The suit being Ruiru MCELRC E007 of 2023 is hereby reopened for hearing interparties before a different Magistrate and the Appellant be and is hereby granted leave to defend the proceedings on merit.

d. The decretal sum deposited in court be released to the appellant henceforth.

16. Cost of the appeal to the respondent.

17. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31<sup>ST</sup> DAY OF JANUARY, 2025.**

**J.W. KELI,**

**JUDGE.**

In the Presence of:

Court Assistant: Otieno

For Appellant : -Eredi

For Respondent: Muthini h/b Kangethe

