Watchdog Limited v Obwege & 6 others (Civil Appeal E145 of 2023)
[2025] KEELRC 241 (KLR) (31 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 241 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CIVIL APPEAL E145 OF 2023

JW KELI, J

JANUARY 31, 2025

BETWEEN

WATCHDOG LIMITED ..... APPELLANT

AND

PETERSON NYABUTO OBWEGE ..... 1ST RESPONDENT

PIUS MURUNGA SHIRONGO ..... 2ND RESPONDENT

FRANCIS KIVINDU MITHU ..... 3RD RESPONDENT

GEOFREY KATUMANGA INDECHE ..... 4TH RESPONDENT

VINCENT BARASA OMANYO ..... 5TH RESPONDENT

JOASH MA YIEKA MOSE ..... 6TH RESPONDENT

TITUS OKUMU ODUORI ..... 7TH RESPONDENT

(Being an appeal from the Ruling of the Honourable Ruguru. N. SPM delivered on 14th July 2023 in Milimani CMELRC No. 2315 of 2019)

JUDGMENT

1. The Appellant, namely Watchdog Limited being dissatisfied with the findings of the orders of Hon Ruguru. N. (SPM) delivered on 14th July, 2023, filed a memorandum of appeal dated 7th August 2023 seeking the following orders:-

    a. That the Appeal be allowed as prayed.

    b. That the findings and Ruling delivered on 14th July, 2023 by Honourable Ruguru N (SPM) be set aside in their entirety.

c. That this Honourable Court be pleased to order that the Chief Magistrate's Court set aside its judgement and any other consequential orders.

d. That this Honourable Court be pleased to order that the Appellant be allowed to file its Memorandum of Response to the Respondents Memorandum of Claim and be allowed to defend the suit.

e) That alternatively the Court do make such orders as it seems just to grant.

Grounds of the appeal

2. That the Learned Magistrate erred in law and in fact in making a Ruling against the Appellant and striking out the application dated 1st August, 2022 despite the same being supported by evidence.

3. That the Learned Magistrate erred in law and in fact in denying the Appellant an opportunity for fair hearing and putting their case upon merits of the matter and against rules of Natural Justice.

4. That the learned trial magistrate erred both in law and in fact by disregarding evidence that clearly showed that Respondents intentionally withheld material facts from the court.

5. That the learned trial magistrate erred in both law and fact by disregarding the fact that the appellant was not given an opportunity to cross-examine the author of the Affidavit of Service dated 4th March 2020.

6. That the learned trial magistrate erred in both law and fact by not allowing the Appellant to file its Memorandum of Response to the Respondent's Memorandum of Claim.

7. That the learned trial magistrate erred both in law and in fact by disregarding evidence that clearly showed that the default judgment entered against the Appellant was irregular and ought to have been set aside.

8. That the Learned Magistrate erred in law and in fact by failing to take into account the evidence adduced by the Appellant.

Background to the appeal

9. The claimants (now respondents) filed a suit against the appellant by way of a memorandum of claim dated 9th December 2019 seeking for damages for unlawful termination and terminal dues(page 39 RoA). There was no appearance by the respondent. Relying on affidavit of service dated 4th March 2020 filed by the Respondents, the trial court on the 3rd February 2021 certified the matter ready for hearing. The claimants' counsel informed the trial court they had not served the hearing notice for the date. The matter proceeded nevertheless. There was no evidence of subsequent notices for dates before court and the respondent was all along absent. The hearing Exparte was on 31st May 2021 with only one witness the 7th claimant who also produced the filed documents on behalf of all claimants and the case was closed. As per the trial court record, only the claimants were afforded an opportunity to file written submissions. Judgment was delivered in favour of the claimant on the 22nd of October 2024 by the trial court, Hon. AN Makau(PM).

10. The appellant filed an application dated 1st August 2022 disputing service of the summons and seeking to set aside the default judgment and at the same time notice to produce and cross-examine the deponent of the affidavit of service relied on by the trial court. The application and notice to produce were before Hon Ruguru who dismissed the application vide ruling dated 14th July 2023. There was no decision on the notice to produce and cross-examine. (page 137- 141 RoA was the ruling)

Decision

11. The duty of the court sitting as the first appellate court it was held in Selle v Associated Motor Boat Co. [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally." The court is duly guided.

12. The contested affidavit of service indicated that service was effected on a person called Munene who refused to sign(page 112). The said Munene filed an affidavit and denied the service (115-118 of RoA).The appellant filed notice to produce and cross-examine the deponent of the affidavit of service dated 25th November 2022.

13. The Appellant submitted as follows:- ''The Appellant.. filed a Notice to Produce and Cross examine (see page 123 of the Bundle of documents), however was denied an opportunity to cross examine the author of the affidavit of service (see paragraph *para_14 14* page 128 and page 148 of the bundle of documents) and noting that was the only evidence adduced by the Respondent to support their claim that they had served the Appellant and that the entire ruling was based on (see pages 139 and 140 of the bundle of documents). The Respondent's Affidavit of Service (see paragraph *para_2 2* page 112 of the bundle of documents) just states that the documents were delivered to Lavington along James Gichuru road. This does not meet the standards in a situation where someone declines to acknowledge service to confirm that indeed service. There is no description of the party who acknowledged the documents to ascertain that indeed the person who allegedly received the documents is the same person described save for just the name provided. Further, the location provided is a general area and does not conclusively narrow down the office location in fact, the Appellant's offices were not located along James Gichuru Road but rather Manyani Road. ... Cross-examination is a fundamental aspect of the adversarial process and is essential for testing the veracity of evidence. By denying the Appellant an opportunity to cross-examine the author of the affidavit of service that the Respondent relied on, the court denied itself an opportunity to verify the truth of the matter and satisfy itself whether service was actually effected noting that this is the only evidence that the respondents are relying on. Further, this undermines the fairness of the proceedings and leads to a miscarriage of justice.''

14. The respondents while acknowledging the service of summons was disputed submitted that there was no application to dispute service and relied on the decision in reMWO(MINOR) 2021e KLR where they submitted that Justice Maureen Odero stated in part,,'' if the appellant disputed the averments in the said affidavit of service then he ought to have summoned the process server for cross-examination in order to challenge the averments made by the process server...''

15. The Respondent states no application for cross-examination of deponent was made. The respondent ' the decision in Paul Odido v Abdul Hakim Abeid & 2 others (2021)e KLR and submitted there was no application. The court noted that the decision relied on Order 19 Rule 2 which stated that the application may be by chamber summons or oral. Before the trial court was a notice to produce and cross-examine the deponent of the affidavit of service, dated 25th November 2022. The court noted that a reading of the ruling dated 14th July 2023 the issue of the notice was not addressed. This court is not bound by the Civil Procedure Rules. Section 20 of the *Employment and Labour Relations Court Act*

provides:"(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.' The provision for the oral application meant that the application need not be in the format of chamber summons only. Perhaps that is why the trial court directed in its direction of 23 February 2023 for parties to file submissions in both applications of 1st August 2021 and the Notice to produce of 25th November 2022(page 148 of the RoA).

16. The Court holds that the trial court ought to have addressed merit of the Notice to Produce and Cross-examine the deponent of the affidavit of service, dated 25th November 2022 as per its directions on the 23rd February 2023 where it directed the parties to file submissions on both applications.

17. The court is guided to allow parties to be heard on merit unless there is evidence of overreach by a litigant as observed 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." 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 *para_22 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."

18. The court guided by the above decisions finds that the trial court erred in failing to address its mind on the Notice to produce and intention to cross-examine on the affidavit of service of the summons. Further, the court on perusal of the record did not find service of any hearing notices. Indeed in the proceedings on 3rd February 2021 when the matter came up for pre-trial the counsel for the claimant informed the trial court that they had not served notice as there was no appearance by the respondent.

19. The court holds that for failure to address the merit of the Notice to produce and intention to cross-examine the deponent of the affidavit of service dated 4th March 2020 benefit of doubt is to the appellant to effect that the service of summons to enter appearance was doubtful and there was no notice of hearing notice. The court finds that the appellant was not given a reasonable opportunity to be heard.

20. The appeal is allowed and following orders are issued:-

    a. The Ruling delivered on 14th July, 2023 by Honourable Ruguru. N.(SPM) is set aside in its entirety.

    b. The Judgment in Chief Magistrate's Court delivered on the 22nd October 2021 by Hon A.N. Makau (PM) and any other consequential orders are set aside.

    c. The Appellant to file its Memorandum of Response to the Respondents' Memorandum of Claim and the suit be heard denovo.

21. Each party to bear own costs in the appeal.

22. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 31 ST DAY OF JANUARY, 2025.

JEMIMAH KELI,

JUDGE.

In the presence of:

Court Assistant: Otieno

Appellant : - Ms. Ngene

Respondent: -Ms.Mburu