



REPUBLIC OF KENYA



Hatari Security Guards Limited v Akhonya (Employment and Labour Relations Appeal E035 of 2023) [2025] KEELRC 870 (KLR) (14 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 870 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E035 OF 2023**

**JW KELI, J
MARCH 14, 2025**

BETWEEN

HATARI SECURITY GUARDS LIMITED APPELLANT

AND

GEORGE M'MBOLO AKHONYA RESPONDENT

((Being an Appeal from the Ruling of the Honourable S.N Muchungi (PM) delivered at Nairobi on the 17th March, 2023 in Nairobi MCELRC E453 of 2020))

JUDGMENT

1. The Appellant, dissatisfied with the Ruling and Orders of the Honourable S.N Muchungi (PM) delivered at Nairobi on the 17th March, 2023 in Nairobi MCELRC E453 of 2020) between the parties filed a Memorandum of Appeal dated 23rd March, 2023 seeking the following orders:-
 - i. The Appeal to be allowed with costs.
 - ii. The Ruling on Hon. Selina N Muchungi delivered on 17th of March 2022 be hereby set aside
 - iii. That the exparte judgment delivered on the 9th of September 2022 be set aside.
 - iv. That this appeal acts as stay of execution of the judgment delivered on the 9th of September 2022.
 - v. That the claim be heard and ventilated on its own merits vide full trial.

Grounds Of The Appeal

2. The Learned Magistrate erred in law and fact by disallowing the Respondent/Applicant's application to have the exparte judgment set aside.



3. The Magistrate erred in law and fact by failing to take judicial notice and appreciate that the e-filing portal or e-filing mechanism of filing court documents was at the time a very new and unfamiliar phenomenon, with its fair share of gaps; and shortfalls and teething problems just like any new system.
4. The Magistrate erred in law and fact by failing to take judicial notice and appreciate that at the time the e-filing portal was rolled out, it wasn't fully fledged and it lacked some features and provisions to fully accommodate legal practice as it then was before the onset of the e-filing era, notable there was no provision for the filing of memorandum of appearance as a document in the drop down of uploading documents.
5. That the magistrate erred in fact and in law in failing to appreciate that at the time the case was instituted, the registry would require the uploading of the served document in this case, memorandum of claim for the case to be mapped in a particular law firm, which the Respondent advocate did upload for purposes of this case being mapped under their law firm portal, prior to filing of the defense and the other appurtenant documents.
6. That the magistrate erred in fact and in law in failing to appreciate that at the time the case was instituted, once a matter had been mapped in ones law firm then that was sufficient proof that you were in full conduct of the matter thus the reason why perhaps there was no provision for filing of a memorandum of appearance in the drop down of e-filing.
7. The Magistrate erred in law and in fact by observing that no reason was given for the failure to file the memorandum of appearance when in fact this reason was elaborately shared, succinctly and painstakingly described in the submissions a fact which couldn't have escaped the courts eye unless the submissions were not considered in arriving at this decision.
8. The Magistrate erred in law and in fact by totally failing to mention that there was a reason given for not filing the memorandum of appearance or discrediting the reason given.
9. The Magistrate erred in law and fact by failing to take judicial notice and appreciate that at the time the e-filing portal was being rolled out Covid - 19 was prevalent and physical service of documents was restricted and thus there was an e- service module on the e-filing platform to circumvent this challenge.
10. The Magistrate erred in law and fact by failing to recognize that the claimants were served with the response to their memorandum of claim via the e - service module on the e filing platform which at the time sufficed as effective service and its a misdirection to claim that the claimants were not served (Annexed is a screenshot as proof of the e-service having effected by the respondents to the claimant after filing).
11. The Magistrate erred in law and fact by failing to direct that the process server be cross-examined despite the same being specifically prayed for in the application to aid court in ascertaining the veracity of his claims of service.
12. The Magistrate erred in law and fact by failing to appreciate that the failure to file the memorandum of appearance under those circumstances was not deliberate but an excusable mistake or error and in any event, it is a lapse in form that does not go to the root of the suit on its own merits.
13. The learned magistrate erred in law and fact by allowing strictures and rules to hinder the achievement of substantial justice contrary to the spirit of *the constitution* as espoused by Article 159.
14. The learned magistrate erred in law and fact by not making an inquiry suo moto from an expert witness from the judiciary clothed with the institutional memory or history of the progression of the e filing portal to confirm the veracity of our averments.



15. The Magistrate erred in law and in fact by observing that the claimant was not obligated to serve the respondent by virtue of there being no memorandum of appearance yet the claimants acknowledged receipt of our defence..
16. The Magistrate erred in law and in fact by observing that the draft defense was not annexed to the application yet they confirmed that the same was on record and the contents of the same were accessible vide the filed defence yet there was no discrediting of the defense as having not raised serious triable issues.
17. The Magistrate erred in law and in fact by observing that the claimant was not obligated to serve the respondent with the pretrial notice and hearing notice, thereby in effect condemning the respondent unheard contrary to tenets of natural laws of justice.
18. The Magistrate erred in law and in fact by failing to observe that the registered email on the efilng portal for the respondents for purposes of service is kitikariukilawllp@gmail.com and not info@kkl.co.ke thus the claimant cant claim to have effected service through a non existent email from the one listed on the e filing portal.
19. The magistrate erred in fact and law by not appreciating that the cheques issued were in no way an acknowledgement of liability or agreeing to making payment of the impugned decretal but as intimated before court, the issuing of the post dated cheques was a way to deflate the pressure and the disruption of business brought about by the auctioneers threatening to execute pending the hearing of our application to have the judgment set aside..
20. The magistrate erred in law and fact by stating that the memorandum of appearance was filed after the judgment had been entered knowing very well that this action was taken pursuant to courts own directions to do so and the court is in err by clearly back peddling on its own directions.
21. The learned Magistrate erred by disallowing the suit to be heard on its merits and for the respondent case not to be ventilated through trial thereby occasioning a miscarriage of justice.

Background Of Appeal

22. The Claimant filed a claim against the Respondent vide a Memorandum of Claim dated 15th June, 2020 seeking the following orders:-
 - i. A declaration that the termination of the claimant’s employment by the respondent was unlawful, malicious, unprocedural and an infringement on his constitutional rights;
 - ii. Maximum compensation for wrongful dismissal;
 - iii. Special damages
 - a. One month’s pay in;ieu of Notice.....Kshs. 15,607.90/=
 - b. Damages for wrongful dismissalKshs. 187,284/=
 - c. Overtime.....Kshs. 441,288/=
 - d. Public Holidays.....Kshs. 65,397/=
 - e. Leave not granted.....Kshs. 66,614.40/=
 - f. House allowance.....Kshs. 63,109.80/=
 - g. Underpayments.....Kshs. 90,430.20/=



- h. Salary Arrears for October 2019.....Kshs. 15,607.90/=
 - i. Service gratuity.....Kshs. 75,638/=
 - iv. Interest on total
 - v. Certificate of service
 - vi. Costs of the cause
 - vii. Any other and further relief this Honourable Court may deem fit and just to award under the circumstances.
23. The Claimant filed his verifying affidavit, Witness statement, and list of documents all of even date together with the bundle of documents (see pages 35-83 of ROA).
 24. The claim was opposed by the Respondent who filed a Response to the Memorandum of Claim dated 27th January, 2021 (Pages 9-12 of ROA), Respondent's list of witnesses, Respondent's Witness Statement of Steve Mwangi and list and bundle of documents all of even date (Pages 15-34 of ROA).
 25. The claimant's case was heard on the 21st June, 2022 where the claimant testified in the case, produced his documents. (pages 2 of the Supplementary ROA dated 18th July, 2024).
 26. The Respondent were absent during the hearing and the case was heard ex-parte.
 27. The Trial Magistrate Court delivered an Interlocutory Judgment on the 9th September, 2022 in favour of the Claimant awarding him a total sum of Kshs. 848,477/= consisting of compensation for unlawful termination, Notice pay, overtime pay, unpaid leave days, underpayments and salary arrears (Judgment at pages 1-6 of the Supplementary ROA).
 28. Subsequently, the Respondent filed an Application under a Certificate of Urgency dated 21st November, 2022(Pages 145-154) seeking the following orders from Court:
 - i. That this application be certified urgent, heard on priority basis and service thereof be dispensed with in the first instance.
 - ii. That there be a stay of execution of the judgment and decree issued herein and or any further proceedings and or subsequent orders pending the hearing and final determination of this application.
 - iii. That the ex-parte judgment and consequential decree and orders thereto entered against the Defendant herein be set aside.
 - iv. That the Defendant be granted unconditional leave to defend this suit through trial.
 - v. That The costs of the application be provided for.
 29. The parties took directions on filing of written submissions on the Respondent's Application. The parties complied.
 30. The Trial Magistrate Court delivered its Ruling on the 17th March, 2023 dismissing the Respondent's Application with costs (Ruling at pages 8-10 of the Supplementary ROA).

Determination

31. The appeal was canvassed by way of written submissions. Both parties complied.



32. This being a 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.”
33. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: “I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

Issues for determination

34. The Appellant/Respondent submitted on the merits of the Appeal.
35. The Respondent submitted on the following issues, namely:-
- i. The Law on the issue of service;
 - ii. The law on Appeals on rulings based on discretion;
 - iii. The law on triable issues;
 - iv. The Question of the issued cheques/satisfied decretal sums;
 - v. Whether there is a defence on record; and
 - vi. Whether the Application had merit.
36. The court found the issue for determination was whether the appeal was merited.
37. Section 20 *Employment and Labour Relations Court Act* states:-“(1) In any proceedings to which this Act applies, the Court shall act without undue regard to technicalities.”
38. Rule 29 of Court (Procedure) Rules 2024 states:-“(1) If a party served with a statement of claim intends to respond, the party shall, within twenty-eight days from the date of service (or such shorter time as the Court may direct in urgent matters for reasons given in writing), enter appearance and file and serve a response to the claim.
2. A respondent’s statement of response shall contain—
 - a. the respondent’s name, telephone number, email address and postal address;”
39. The appellant in supporting affidavit of Stephen Mwangi stated it instructed an advocate who filed defence on the Judiciary efilng portal and the same was acknowledged by advocates of the plaintiffs(SM1 was was extract WhatsApp message of the Claimant’s advocate acknowledging receipt of their defence) that the official email of their advocates was kitikariukilaw.llp@gmail.com and not info@kkl.co.ke as purported by advocates for the claimant (SM2 was extract of efilng portal with the



- said email. That the claimant being aware of the office email effected service of notices on another email. The consequence being the appellant was kept in dark on the proceedings leading to default judgment.
40. The Respondent in replying affidavit by Wetaba Advocate in the application before the trial court asserted that there was no entry of appearance hence the filed defence had no legal basis. That there was no affidavit of service of the response under rule 11(6) of Court Rules. That the memorandum of appearance was filed after the judgment.
 41. The court perused the filed defence and found that appellant filed response to the claim dated 27th January 2021. There was no filed memorandum of appearance before. The court noted paragraph 2 of the response stated the address of the advocates of the respondent to be K&k Law LLP Advocates Westlands 68 Muthithi Road opposite Golden Tulip Hotel P.O Box 13211 -00100 Nairobi . In the WhatsApp communication between the respondent's representative and Wetaba advocate the advocate wrote that they had downloaded the document for the respondent(the response) from the e filing portal but denied service. Wetaba asked for the documents to be shared on his email.
 42. The trial court on hearing the application dated 21st November, 2022 seeking for setting aside the default judgment found there was no memorandum of appearance and defence and that the defence having been filed by advocates not properly on record. The trial Magistrate stated the filed defence ought to be expunged. The court further stated the draft defence was not annexed to enable the court decide on triable issues and further that the respondent had issued post- dated cheques towards settlements of the decree.

Decision

43. The court is not bound by technicalities (section 20 of the Employment and [Labour Relations Act](#) ,supra). The Civil Procedure Rules do not apply in such a case. Rule 29 of the Court (Procedure) Rules 2014 (supra) applied. It stated the party to enter appearance and filed response. The court returns that by stating the name of the advocates and giving address in the response was sufficient to comply with Rule 29. A defence was on record and the trial court ought not to have expunged it. The court finds that it is unfair to visit the mistake of advocate on the litigant in this case. The claimant's advocate had downloaded the defence from the e filing portal and was all along aware that the respondent had filed defence. The claimant had the physical address of the the said advocate and correct email on the portal and ought to have served hearing notice.
44. I find this was a classic case of mistake of an advocate as the claimant had filed witness statements and documents in defence of the claim. Its advocate made a mistake of failing to serve filed documents. The Respondent demonstrated unequivocal intention to defend the suit. The Court ought to aim to keep a party on the seat of justice and as guided by Article 159 of [the Constitution](#) pursue substantive justice. The trial court ought to have set aside the judgment and allowed the respondent to defend the case as there being a defence on record. For the foregoing reasons the appeal is allowed.
 - a. The Ruling by Hon. Selina N Muchungi delivered on 17th of March 2022 be hereby set aside.
 - b. That the exparte judgment delivered on the 9th of September 2022 is set aside and all consequential orders. The defence filed is deemed proper.
 - c. The claim be heard and ventilated on its own merits vide full trial by a different magistrate.
 - d. Each party to bear own costs in the appeal.
45. It is so Ordered.



DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 14TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In The Presence Of:

Appellant- Gaya/b Kurui

Respondent – absent

