



**Suen Real Estate Company Limited & Swaleh & Co. Advocates v Thoya
(Appeal E173 of 2024) [2025] KEELRC 803 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 803 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E173 OF 2024**

**M MBARÚ, J
MARCH 6, 2025**

BETWEEN

**SUEN REAL ESTATE COMPANY LIMITED & SWALEH & CO.
ADVOCATES APPELLANT**

AND

ALBERT IHA THOYA RESPONDENT

*(Being an appeal from the judgment of Hon. Nabibya M. L. delivered
on 15 August 2024 in Mombasa MCELRC No.E640 of 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 15 August 2024 in Mombasa CMELRC No.E640 of 2023. The appellant seeks that the judgment be set aside and the matter referred back for trial before another magistrate.
2. The grounds of appeal are that;
 1. The learned magistrate erred in law in failing to accord the appellant an opportunity to defend the claim thus infringing their right to a fair hearing contrary to article 50 of *the constitution*.
 2. The learned magistrate erred in law and fact in finding that the appellant failed to enter appearance and defend the claim.
 3. The learned magistrate erred in law in proceeding to deliver judgment despite a pending application seeking to strike out the 2nd appellant's name from the suit.
 4. The learned magistrate erred in fact in totally misdirecting herself in the evaluation of the evidence produced before her and arrived at a wrong decision thereby occasioning a miscarriage of justice.



3. The appellant's case is that the respondent filed a Memorandum of Claim dated 19 October 2023, and the appellant entered an appearance on 9 November 2023. A response was filed on 22 November 2023. The appellant also filed an application dated 6 December 2023 seeking to strike out the 2nd appellant as a respondent. On 23 November 2023 and 21 March 2024, the appellant's presence was noted by the court and directed that the application be addressed by way of written submissions, which were filed on 9 July 2024. Still, on 16 April 2024, the trial court proceeded to hear the main claim without first addressing the pending application dated 6 December 2023.
4. The appellant submitted that before its application could be heard, the trial court reserved a date for judgment and changed the CTS, indicating the mention date for judgment from 1 August 2024 to 15 August 2024.
5. The appellant was denied the right to be heard under Article 50 of *the constitution*. The procedures for the conduct of hearings before the court are regulated under the Employment and Labour Relations Court (Procedure) Rules. Rule 13 allowed the appellants to respond to pleadings before the hearing could commence. Rule 15 allowed for pre-trial directions before the hearing could begin, while Rule 17 allowed for the filing of interlocutory applications, such as the one dated 6 December 2023, seeking to remove the 2nd appellant as a respondent.
6. The trial court denied the appellants a fair hearing contrary to the rules of natural justice, and the orders sought should be issued.
7. The respondent submitted that the appellant filed a Supplementary Record of Appeal without leave of the court.
8. The appellants allege that the trial court denied them the right to a hearing, which is incorrect. Upon service of the claim, the appellants filed the response but failed to serve the respondent with it. No justification is given for the lapse. The respondent continued to serve the appellants in person for want of service of any appearance and response. Such did not violate Article 50 of *the constitution*.
9. The application dated 6 December 2023 bears the appellants' official email address. Under Order 5 Rule 22B of the Civil Procedure Rules, the appellants decided not to effect service upon the respondent.
10. Rule 13 of the Court Rules allows a respondent to enter a piece, file and serve a response. In this case, the appellants filed but failed to serve the respondent with the reaction or Notice of Appearance. Without such notice, the respondent proceeded with the hearing of the claim undefended as held in Daniel Motaung v Samasource Kenya EPZ Limited & 2 others Petition No.E071 of 2022. The appeal is without merit and cannot be salvaged under the provisions of Article 159 of *the constitution* and must be dismissed with costs.

Determination

11. The appellants contest that the trial court denied them the right to a hearing. Upon filing an application seeking to strike out the second appellant from the suit, a date was allocated, but instead, the trial court proceeded to hear the main claim without rendering a determination of this application.
12. Indeed, on the record, on 21 March 2024, both parties attended court and noted that the application dated 6 December 2023 should be heard through written submissions, with a date reserved for 16 April 2024.
13. On the due date, the record only notes MS Nyaga's attendance for the respondent, and the matter proceeded for formal proof. It was reserved for written submissions on 6 June 2024, when the



respondent attended, and given a mention date of 1 August 2024 and a judgment date of 15 August 2024.

14. It is not clarified why the date was mentioned on 1 August 2024.
15. In the judgment delivered on 15 August 2024, the learned magistrate held that;

... The respondents never filed their response, nor did they enter appurtenance consequence of which the claimant by the claimant remains uncontested. ...

On the record, there is a Memorandum of Appearance filed on 9 November 2023.

On the record, a response was filed on 22 November 2023.

The suit was defended, and the appellants made an appearance.

16. Whether the Memorandum of Appearance and response were served, these pleadings form part of the trial court records. Indeed, on 23 November 2023 and 21 March 2024, the appellant's advocates attended court, and it was agreed that applications dated 6 December 2023 should be heard through written submissions on 16 April 2024.
17. The appellant's presence and attendance were formalized, and the finding that no appurtenance was filed and no response was filed was in error. Even where the appellants failed to attend court on 16 April 2024 for the hearing of their application dated 6 December 2023, the matter at hand was not to proceed with the matter undefended through formal proof but to deal with the pending application by either a dismissal or appropriate directions before moving ahead with the main claim. The trial court needed to address the substantive issue scheduled for 16 April 2024, the application seeking to remove the 2nd appellant from the record.
18. That addressed the situation where, even where the matter was to proceed for hearing of the main claim in the absence of the appellants as respondents, upon the responses filed under Rules 13 and 21 of the repealed Court Rules, the trial court was under a duty to consider the evidence and responses submitted by the appellants. To proceed with the matter as undefended was in error.
19. The judgment delivered on 15 August 2024 was premature and devoid of the response filed by the appellants as respondents. It cannot stand on the face of the filed records whether these were served upon the respondent as the claimant. The trial court needed to consider these pleadings, particularly the pending application seeking to strike out the 2nd appellant as a respondent.
20. In the case of *Judicial Service Commission v Mbalu Mutava & another* [2015] KECA 741 (KLR), the court held that the right to fair hearing as a rule of natural justice must bear the traits of "fair play in action", "justice of the common law"; "common fairness" "fairness of procedure" or simply as "duty to act fairly."
21. This position is further clarified in the case of *Judicial Service Commission v Shollei & another* [2014] KECA 334 (KLR) that, The right to fair hearing in Article 50 relates to a hearing before a Court, i.e. a court of law or, if appropriate, another independent and impartial tribunal or body. In this case, the matter was before the court where the appellants sought to be heard on their civil claim and were justified to seek and have an application dated 6 December 2023 be heard on the merits before the court could proceed with the claim as undefended, which is addressed above, was in error.
22. On costs, the appellants have not explained why they were not in court on 16 April 2024 to defend the matter. The due written submissions were not filed until 6 June 2024. The delays in attending and seeking time to urge their case before the trial court are not explained. There will be no orders on costs.



23. In this regard, the appeal is with merit. The judgment in Mombasa CMELRC No.E640 of 2023 was entered in error and is hereby set aside. The matter shall be returned to the trial court for hearing and determination on the merits. Costs shall abide by the outcome of the trial court hearing and determination.

24. Mention the file before the ELRC Deputy Registrar on 13 March 2025 for placement as appropriate.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6TH DAY OF MARCH 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

