



**Esau & 14 others v Amiran Kenya Limited (Appeal E174 of 2024)  
[2025] KEELRC 1828 (KLR) (20 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1828 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E174 OF 2024**

**JW KELI, J  
JUNE 20, 2025**

**BETWEEN**

**IBRAHIM BARASA ESAU ..... 1<sup>ST</sup> APPELLANT  
CHRISTOPHER AZUNA ..... 2<sup>ND</sup> APPELLANT  
MAROA JOSEPH MWITA ..... 3<sup>RD</sup> APPELLANT  
REUBEN LUSASI ALUMASA ..... 4<sup>TH</sup> APPELLANT  
MOSES WEKESA WANYONYI ..... 5<sup>TH</sup> APPELLANT  
MICHAEL OTIENO ONDITI ..... 6<sup>TH</sup> APPELLANT  
FELICKS KIRUMA LIVULELE ..... 7<sup>TH</sup> APPELLANT  
BRIAN NYANDIKO OGECHI ..... 8<sup>TH</sup> APPELLANT  
NELSON BUNDALA CHOI ..... 9<sup>TH</sup> APPELLANT  
JOASH AMBULI ANDIYA ..... 10<sup>TH</sup> APPELLANT  
KEVIN ODONGO NYANGOYA ..... 11<sup>TH</sup> APPELLANT  
JOSEPH ADONGO JOMO ..... 12<sup>TH</sup> APPELLANT  
FRANCIS KIMAU WAMBUA ..... 13<sup>TH</sup> APPELLANT  
ZADOCK NEWTON OCHOLI ..... 14<sup>TH</sup> APPELLANT  
BONFACE MULI KAVITA ..... 15<sup>TH</sup> APPELLANT**

**AND**

**AMIRAN KENYA LIMITED ..... RESPONDENT**

*(Being an Appeal from part of the Ruling of the Honourable R. L. Musiega (SRM)  
delivered at Nairobi on the 11th of August, 2023 in MCELRC No. E900 of 2019)*



## JUDGMENT

1. The Appellants herein, being dissatisfied with the Judgment and Orders of the Honourable R. L. Musiega (SRM) delivered at Nairobi on the 11th of August, 2023 in MCELRC No. E900 of 2019 between the parties filed a memorandum of appeal dated the 13<sup>th</sup> of September, 2023, seeking the following orders:-
  - a. The suit be reinstated for hearing on merit.
  - b. The matter be heard by any other magistrate court apart from the Honourable R.L. Musiega.
  - c. Costs of the appeal be awarded to the Appellant.

### Grounds of the Appeal

2. The Honourable Magistrate erred in fact by failing to analyse the evidence on record and arrived at a wrong conclusion thereby dismissing the suit by the appellants herein;
3. The Honourable Magistrate erred in both law and fact by failing to allow the matter to proceed for hearing for interrogation of the issues raised.
4. The Honourable Magistrate erred in law by failing to properly apply the law to the facts thereby resulting in the dismissal of the suit.
5. The Honourable Magistrate by failing to consider the claimant's submissions thereby resulting in the wrongful striking out of the suit.
6. There was no evidence as to maintain the respondent's prayer for striking out of the claim by all the claimants as the court did.
7. The court failed to appreciate that section 48 of the Labour Institutions Act was binding on both the court and any other Labour officer in resolving employment disputes.
8. That there was no single provision of law that directed the striking out of the claimant's suit.

### Background to the Appeal

9. The Appellants filed a claim against the Respondent vide a memorandum of claim dated the 20<sup>th</sup> of May 2019 seeking diverse orders including one month's pay in lieu of notice; damages for wrongful dismissal; unpaid leave days; underpayment; house allowance; salary arrears for February 2019; overtime; rest days; and service gratuity (see pages 17-51 of undated ROA). The Appellants also filed their verifying affidavit, list of witnesses, witness statements and list of documents dated the 20<sup>th</sup> of May 2019 (pages 52-128 of ROA).
10. The claim was opposed by the Respondent who entered appearance and filed a Notice of Motion dated the 26<sup>th</sup> of October 2022 seeking that the entire suit be struck out for being res judicata since the matter was heard and settled before the Labour Officer (pages 129-130 of ROA). The Notice of Motion was supported by the Affidavit of one Gerald Muema dated the 26<sup>th</sup> of October 2022 (pages 1-14 of the Supplementary Record of Appeal dated the 20<sup>th</sup> day of March 2025). The Respondent also filed a Further Affidavit dated the pages 15-17 of Supplementary ROA).



11. The Appellants responded to the Notice of Motion application vide a Replying Affidavit dated the 16<sup>th</sup> day of March 2023 (pages 169-172 of ROA).
12. The Trial Court issued directions that the Notice of Motion application dated the 26<sup>th</sup> of October 2022 be disposed of by way of written submissions. Both parties complied.
13. The Trial Magistrate Court delivered the impugned ruling on the 11<sup>th</sup> of August 2023 allowing the Notice of Motion application dated the 26<sup>th</sup> of October 2022 and striking out the Appellant's suit.

### **Determination**

14. The appeal was canvassed by way of written submissions. The Appellants and Respondent filed.
15. 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.”
16. Further in on principles for appeal decisions in *Mbogo V Shah* [1968] EA Page 93 *De Lestang V.P (As He Then Was) Observed 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**

17. I have distilled the following issues for determination from the Appellants' submissions dated 3<sup>rd</sup> March 2025:
  - i. The law on res judicata and striking out of pleadings (grounds 1-3 of the memorandum of appeal).
  - ii. Whether it was appropriate to strike out the case without hearing the claimants' evidence.
  - iii. Whether termination of the matter was just.
  - iv. What was settled.
  - v. The absence of the provisions of law for dismissing the suit.
18. On their part, the Respondent raised the following issues for determination in their submission dated the 5<sup>th</sup> day of March 2025:
  - i. Whether the appeal was filed within the stipulated timelines.
  - ii. Whether the Trial Court erred in law by striking out the Appellants' claim.



19. The court identified the following as the issues for determination in the appeal:-
- a. Whether the trial court erred in holding the suit resjudicata
  - b. Whether the appeal was time barred?-

**Whether the trial court erred in holding the suit resjudicata**

20. The present matter was struck out at the interlocutory stage by the Honourable Trial Magistrate when he allowed the Respondent's Notice of Motion application, on the ground that the matter was res judicata, having been heard and determined by the Labour Officer and the Claimant paid his terminal dues.

21. The right of an employee who has been unfairly terminated from employment to complain is enshrined in Section 47 (1)-(4) of the [Employment Act](#) 2007 which provides that:-

“47. Complaint of summary dismissal and unfair termination

- (1) Where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 86.
- (2) A labour officer who is presented with a claim under this section shall, after affording every opportunity to both the employee and the employer to state their case, recommend to the parties what in his opinion would be the best means of settling the dispute in accordance with the provisions section 49.
- (3) The right of the employee to present a complaint under this section shall be in addition to his right to complain to the Employment and Labour Relations Court on the same issue and to the right to complain of any other infringement of his statutory rights.
- (4) The right of an employee to make a complaint under this section shall be in addition to any right an employee may enjoy under a collective agreement.”

22. The statute is categorical, as shown above, that the right to complain to the Labour Officer shall be in addition to the employee's right to file suit in the elrc on the same issue. This relates to a claim for summary dismissal or unfair termination.

23. On a claim for breach of a contract of employment, or a dispute as to the rights and liabilities of either party, Section 86 (1) of the same Act goes further to state that that:

“Subject to the provisions of this Act whenever—

- (a) an employer or employee neglects or refuses to fulfill a contract of service; or
- (b) any question, difference or dispute arises as to the rights or liabilities of either party; or



- (c) touching any misconduct, neglect or ill treatment of either party or any injury to the person or property of either party, under any contract of service, the aggrieved party may complain to the labour officer or lodge a complaint or suit in the Employment and Labour Relations Court.”

24. My understanding of the above sections is that a distinction is drawn between a claim for unfair termination/summary dismissal and one for breach of contract/a determination of rights and liabilities/a claim for neglect, ill-treatment/injury.
25. When a person is making a claim for unfair termination or summary dismissal, they may complain to the Labour Officer, and are still entitled to approach the Court on the same issue. As such a matter filed before the Labour Officer does not appear to be res judicata when filed in Court, where it relates to unfair termination/summary dismissal.
26. However, where the matter relates to breach of contract, or the parties wish for their rights and liabilities towards each other to be ascertained, or where it relates to neglect, ill-treatment or injury, the party is required to choose the forum that they wish to handle the matter, either the Court or the Labour Officer.
27. The present suit was brought to the Trial Court as a claim for unfair dismissal, hence not res judicata.
28. This position was taken by the Honourable Court in the case of *Benedict Odhiambo v Eldoret Water & Sanitation Company Limited* [2014] KEELRC 1126 (KLR) while considering whether proceedings before the Labour Officer were a sufficient reason why the Claimant had failed to file a case before the Court within 3 years. It held:-
- “Under section 47(1) of the *Employment Act*, 2007, a complaint of summary dismissal or unfair termination may be presented to a Labour officer within three months of the date of dismissal. Such right of the employee to complain to the Labour officer is in addition to the employee’s right to complain to this court as provided for in section 47 (3) of the Act. Thus, the court finds that the fact that the applicant had complained to the Labour officer at Eldoret was no bar to the applicant moving to the court by filing the relevant suit within the three years prescribed under section 90 of the *Employment Act*, 2007.”
29. On whether the dispute between the parties was actually determined by the Labour Officer, the Appellant admitted as much in paragraphs 4-5 of their Replying Affidavit sworn on 16<sup>th</sup> March 2023. He clarified that the Labour Officer only directed the payment of two items, but that the case before the court had diverse prayers.
30. It is not in dispute that the Labour Officer determined the parties dispute in part. In supplementary appeal the respondent produced affidavit sworn by Gerlad Muema on 26<sup>th</sup> October 2022 in the lower court and produced letters titled “full and final settlement letter” in which the claimants received the notice pay and payment in lieu of leave on condition that their contractual claims had been settled in full. Article 159 (2) (c) provides that :-“In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
- c. alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)”



31. The decision of the Labour Officer must therefore be respected. Since there was a letter signed by the parties, the parties are bound by the same to the extent of the two matters of leave and notice are determined. The Court of Appeal has held that a discharge voucher per se cannot absolve an employer from statutory obligations or preclude the court from looking into the fairness of the termination in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR:–“We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge.”
32. I find that the lower court should have determined the un-decided matters as concerns other statutory rights including the claim for unfair termination.

#### **Whether the appeal was time barred?–**

33. Preliminarily, the issue of whether the Appeal was filed out of time must be dealt with. This issue was raised by the Respondent in their submissions dated 5<sup>th</sup> March 2025. Rules 20 and 22 of the Employment and Labour Relations Court (Procedure) Rules envision that Appeals before this Court shall be heard by way of written submissions, so the matter was properly raised. The Appellant did not address this issue, by filing supplementary submissions on the same, or at all.
34. It is evident from the Court record that the impugned Ruling was delivered on 11<sup>th</sup> August 2023 while the Memorandum of Appeal was filed on 13<sup>th</sup> September 2023. The Memorandum of Appeal was therefore filed thirty-two (32) days after the delivery of the Ruling. Rule 12 (2) of the Employment and Labour Relations Court (Procedure) Rules 2024 provides that: “Where an appeal is from a magistrate’s court or where no period of appeal is specified in the written law referred to in subrule (1), the appeal shall be filed within thirty days from the date the decision is delivered.”
35. While the said Rules permit for extension of time under Rule 18 thereof, no application for extension of time was made by the Appellant herein, prior to filing the Appeal. . Faced with similar circumstances, the Honourable Supreme Court in the case of *Salat v Independent Electoral and Boundaries Commission & 7 others* (Application 16 of 2014) [2014] KESC 12 (KLR) (Civ) (4 July 2014) (Ruling) pronounced itself as follows:

“No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence. Consequently, this Court will not accept a document filed out of time without leave of the Court. It is unfortunate that Petition No. 10 of 2014 has been accorded a reference number in this Court’s Registry. This is irregular as that document is unknown in law and the same should be struck out. Where one intends to file an appeal out of time and seeks extension of time, the much he can do is to annex the draft intended petition of appeal for the Court’s perusal when making his application for extension of time; and not to file an appeal and seek to legalize it. Petition No. 10 of 2014 having been filed out of time and without leave (an order of this Court extending time), is expunged from the Court’s Record.” The court associates itself with the sentiments of the apex court as set out above.

36. The Memorandum of Appeal dated 13<sup>th</sup> September 2023 was time-barred and is hereby struck out. The appeal content was merited, save for having been brought to court outside the statutory 30 days



without leave of the court. The appeal is dismissed. The court to temper justice with mercy makes no order as to costs. The file is marked as closed.

37. It is so ordered.

**DATED, SIGNED, AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20<sup>TH</sup> DAY OF JUNE 2025.**

**J.W. KELI,**

**JUDGE.**

In the presence of:

Court Assistant: Otieno

Appellants – absent

Respondent: Mr. Otieno

