



**Mwinzi v Wagtech Africa Limited (Appeal E026 of 2025)
[2025] KEELRC 2146 (KLR) (18 July 2025) (Judgment)**

Neutral citation: [2025] KEELRC 2146 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E026 OF 2025**

**JW KELI, J
JULY 18, 2025**

**BETWEEN
ANTONINA MARCELA KUTHEA MWINZI APPELLANT
AND
WAGTECH AFRICA LIMITED RESPONDENT**

*(Being an Appeal from the Ruling of the Hon. P. Olengo (SPM)
delivered on 30th January, 2025 in MCELRC/E1309/2024)*

JUDGMENT

1. The Appellant herein, being dissatisfied with the Ruling of the Hon. P. Olengo (SPM) delivered on 30th January, 2025 in *MCELRC/E1309/2024* between the parties filed a memorandum of appeal dated the 31st of January 2025 seeking the following orders:-
 - a) The Ruling of the Learned Magistrate of the Subordinate Court delivered on the 30th January, 2025 in Chief Magistrate's Court at Milimani *MCELRC/E1309/2024* and the ensuing Order be and are hereby set aside.
 - b) An Order be and is hereby issued that the Respondent's Memorandum of Appearance dated 31/07/2024 but filed on 17/09/2024, Response to Memorandum of Claim and List of Witnesses both dated 18/09/2024, Witness Statement by Ruth Wambui and the List of Documents both dated 01/10/2024 having been irregularly filed out of time and without prior leave of the Honourable Court are null and void ab initio and are consequently struck off the Court Record.
 - c) An Order be and is hereby issued that the Appellant's Request for Formal Proof dated 20/09/2024 is merited hence allowed.



- d) An Order be and is hereby issued that the Lower Court File herein be referred back to the Honourable Subordinate Court with express directions that a date for Formal Proof be set on priority basis.
- e) Costs of the Appeal be and hereby awarded to the Appellant.

Grounds Of The Appeal

2. The Honourable Trial Magistrate erred in law and in fact in holding that there was no prejudice caused to the claimant by the action of the respondent to file its pleadings out of time and without prior leave of the Honourable Court.
3. The Honourable Trial Magistrate erred in law and in fact in holding that he had discretion to allow the Respondent's pleadings which were irregularly filed out of time and without prior leave of the Honourable Court to be deemed as properly filed.
4. The Honourable Trial Magistrate erred in law and in fact when he purported to exercise non-existent discretion to deem as properly filed pleadings, which the Respondent conceded were irregularly filed out of time and without prior leave of the Honourable Court, without the Respondent having filed the necessary application praying for leave to file its documents out of time or even for enlargement of the already expired time.
5. The Honourable Trial Magistrate erred in law and in fact by failing to uphold express provisions of statute.
6. The Honourable Trial Magistrate erred in law and in fact in failing to follow established binding precedents from superior courts of record.
7. The Honourable Trial Magistrate erred in law and in fact by failing to consider the Appellant's submissions in support of the Application for the respondent's irregularly filed documents to be struck off the court record.
8. The Honourable Trial Magistrate accordingly erred in law and in fact in making an order dismissing the Appellant's application to have the respondent's irregularly filed documents to be struck off the court record and thereby failing to uphold the Appellant's request for Formal Proof dated 20/09/2024.

Background To The Appeal

9. The Appellant filed a claim against the Respondent vide a memorandum of claim dated the 24th of July 2024 seeking the following orders:
 - a. A declaration that the summary dismissal of the Claimant by the Respondent was unlawful, wrongful and unfair.
 - b. A declaration that the Respondent's actions against the Claimant constitute unfair labour practices.
 - c. Payment to the Claimant of terminal benefits amounting to Kshs.3,590,700.97/= as set out in Paragraph 15 herein above.
 - d. Interest on (c) from the date of filing this suit.
 - e. Exemplary damages in the amount of Kshs. 11,000,000/=
 - f. Costs of this cause



- g. Any further relief that this Honourable Court may deem just.
(see pages 8-15 of the ROA dated the 14th of February 2025)
10. The Appellant also filed her verifying affidavit, list of witnesses, witness statements and list of documents all dated the 24th of July 2024 (pages 17-73 of ROA).
 11. The claim was opposed by the Respondent who entered appearance vide a memorandum of appearance dated 31st July 2024, which was not filed in court (page 78 of ROA). They also filed a response to memorandum of claim dated the 18th of September 2024 (pages 114-119 of ROA), list of witnesses, witness statement of Ruth Wambui, and list of documents (pages 120-129 of ROA).
 12. The Claimant/Appellant, on 12th October 2024 when the matter came up for pre-trial conference, applied for all the documents filed by the Respondent's advocates to be expunged from the court record, on the premise that the said advocates were not properly on record and were in contravention of Rule 13 (1) of the *Employment and Labour Relations Court (Procedure) Rules* (page 325 of ROA). The court directed the parties to file submissions towards the application, and the parties complied.
 13. vide its Ruling delivered on the 30th of January 2025, the Trial Magistrate Court declined to expunge the Respondent's documents from the court record, and instead deemed them as duly filed with the leave of the court. (Ruling at pages 317-320 of ROA).

Determination

14. The appeal was canvassed by way of written submissions. Both parties complied.
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. In her submissions dated the 5th of March 2025, the Appellant submitted on the grounds of appeal generally.



18. The Respondent identified the following issues for determination in their submissions dated the 7th of April 2025:
- i. Whether the learned Magistrate erred in law and in fact in exercising discretionary powers to allow the respondent's pleadings (be) filed out of time – grounds of appeal number, 2,3 and 4.
 - ii. Whether the learned Magistrate erred in law and in fact in finding that there was no prejudice occasioned on the appellant- ground of appeal number 1.
 - iii. Whether the learned Magistrate erred in law and in fact by failing follow and consider established binding precedent – grounds of appeal numbers 5,6 and 7.
19. The court finds that the issue for determination in the appeal is whether the appeal was merited.
20. The genesis of the appeal was the ruling of the trial court dated 30th January 2025 under which the Learned Magistrate rejected the invitation by the claimant/ appellant to expunge pleadings filed by the respondent. On the 2nd October 2024 when the advocates for the parties appeared before the trial court, Omulama Advocate for the claimant asked the court to expunge the documents filed by the respondent from the record. The court directed the parties to file written submissions on the issue. The court delivered the impugned ruling dated 30th January 2025.
21. The germane of the grievance by the appellant was that the response pleadings were filed in breach of Rule 13 of the 2016 *Employment and Labour Relations Court (Procedure) Rules* applicable then. The rule stated as follows:-

“ 13.

- (1) If a party served with a statement of claim intends to respond, the party shall, within twenty one days from the date of service, enter appearance and file and serve a response to the suit.”

22. The claimant submitted before the trial court that he was served with a memorandum of appearance which he stated was not filed. He asked the documents be expunged from record (page 325 of ROA). The respondent stated that it was a mistake that the documents had not been filed and that they had been mapped on the CTS and proceeded to file the memorandum of appearance. That it was the claimant who despite the service of appearance, served its client saying they were not on record.
23. The trial court believed the respondent's version of story that they had made a genuine mistake in lodging the appearance and failing to recheck whether the filing was successful. The trial court took notice of the fact that the system had technical hitches sometimes.
24. The respondent stated that on being notified of the issue they filed their documents one month and few days later which they submit was not inordinate time.
25. The court will only interfere with discretion of another court of satisfied of conditions set out in *Mbogo v Shah (supra)*. The court finds that the issue before it is purely a procedural technicality. The claimant was served with the said memorandum of appearance dated 31st July 2024 on the same date of 31st July 2024. The defence was then filed outside the 21 days contrary to rule 13 (2016). The trial court was guided by decision of the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electrical and Boundaries Commission & others* (2013) eKLR held as below:-

“Deviation from and lapses in form and procedure, which do not go to the jurisdiction of the court, or the root of the dispute or which do not at all occasion prejudice or



miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending parties, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances, the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injunctive by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed in the altar of strict adherence to the provisions of procedural law which at times create hardships and unfairness”

The court then held:-

“From a foregoing, I exercise my discretion and order that the pleadings and all other documents filed herein be deemed as duly filed with the leave of the court. The Claimant will not be prejudiced in any way by the failure to seek leave to file them out of time. The Claimant will have leave to file a Reply to the Respondent’s Response to the Claim and file any further or other documents as she wishes.”

26. The appellant submits that the trial court was bias in giving benefit of doubt to the respondent on the system hitches. That the documents ought to be expunged as held in *Salat* case for lack of application for extension of time. Section 20 of the [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.”

Article 159 (2)(d) of the [Constitution](#) states:-

“(d) justice shall be administered without undue regard to procedural technicalities; ..”

The appellant has not told the court the prejudice she suffered on the rejection of her application to expunge the documents and for the matter to proceed on formal proof. The trial court granted the claimant leave to file reply to the response. It is trite that the court should strive to keep a party on the seat of justice and promote the right to be heard by affording chance to a party to be heard.

27. I have perused the authorities relied on by the appellant and none held that a matter should proceed to formal proof while the defence is on record. Indeed, it would have been injustice for the trial court to have expunged the defence documents and proceeded on formal proof taking into account the provisions of section 20 of [Employment and Labour Relations Court Act](#) and Article 159(2)(d) of the [Constitution](#).
28. The court finds that the decision of the trial court was consistent with the provisions of Article 159 (2) (d) of the [Constitution](#) and section 20 of the [Employment and Labour Relations Court Act](#). That it is draconian to strike out the defence and deny the respondent opportunity to be heard when they arrived in court before the matter was set down for hearing . Since the appellant has not stated what prejudice she suffered as a result of the ruling allowing the matter to proceed on merit by admitting the defence filed out of time and allowing her to file reply I find no merit in the appeal. In so holding I am guided by decision of the court of appeal in [Trust Bank Limited v Amalo Company Limited](#) [2002] KECA 253 (KLR) which was a matter in which the learned judge had before him the appellant's documents upon which his whole case was based, on the date he had set down the matter for hearing; save for the



mere irregularity that the same had not been served on the respondent in time. The court allowing the appeal observed as follows:-

“The principle which guides the court in the administration of justice when adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by Georges, CJ. (Tanzania) in the case of *Essanji and Another v Solanki* [1968] EA at page 224.

The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of his right.”

That accords with the policy of the law as can be gleaned from Order 9(1) of the *Civil Procedure Rules* whereby a litigant has the right to appear, file its defence and be heard before any interlocutory or final judgment is entered in default against him regardless of any time limit. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.

The learned Judge was faulted by counsel for not considering and following what this Court said recently in the case of *Central Bank of Kenya v Uhuru Highway Development Ltd. and others* CA 75 of 1998, whereby Bosire, JA had the following to say on this same issue:-

“I am therefore, unable to subscribe to the view expressed by Mr. Rebello that documents filed out of time in response to an application are necessarily invalid and should not be looked at. To my mind a court is obliged to consider them unless for a reason other than mere lateness, it considers it undesirable to do so. Besides, the learned judge in the court below fell into error when he said that a failure to file grounds of opposition automatically entitles the applicant to orders ex-parte”.

This is our view in this matter. The appellant had the right to be heard on the documents he had put before the court and were on record. It cannot be said that he did not offer an explanation for the delay in serving the documents to the opposite party. Even if the application had to proceed ex-parte, the learned judge was still under a duty to consider the application on its merit, based on the usual principles governing the granting of injunctions. We are satisfied that the learned judge was in error in the manner he proceeded in the matter and thereby exercised his discretion unjudiciously.

29. In the upshot, I find that the trial court exercised its discretion judiciously and in sync with constitutional principles of judicial authority under Article 159(2)(d) that-‘ (d) justice shall be administered without undue regard to procedural technicalities; ‘ I do not find any basis to interfere with the decision of the trial court (*Mbogo v Shab*)
30. The appeal is dismissed. To temper justice with mercy I make no order as to costs. The matter to proceed on merit before the trial court.
31. The file is marked as closed.
32. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18TH DAY OF JULY 2025.

**J.W. KELI,
JUDGE.**



In The Presence Of:
Court Assistant: Otieno
Appellant – Omulama
Respondent: Ogera

