



**Mewa Hospital v Khator (Appeal E090 of 2023)  
[2024] KEELRC 396 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 396 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E090 OF 2023  
M MBARŪ, J  
FEBRUARY 15, 2024**

**BETWEEN**

**MEWA HOSPITAL ..... APPELLANT**

**AND**

**ASMAR KHATOR ..... RESPONDENT**

*(An appeal from the ruling of Hon. Chief Magistrate J. B. Kalo in  
Mombasa CMELRC No. E093 of 2022 delivered on 10 August 2023)*

**JUDGMENT**

1. The appeal herein arises from the ruling delivered on 10 August 2023 in Mombasa CMELRC No. E09 of 2022 whereby the learned magistrate Hon. J.B. Kalo dismissed the appellant’s application dated 5 May 2023 seeking to set aside the judgment of the court delivered on 6 April 2023 and to be granted unconditional leave to defend the suit. The grounds of appeal are that the court erred in failing to consider that the appellant had filed a draft Memorandum of Response that had triable issues and also failed to appreciate that there was no proper service of summons to enter appearance. There was no proof of service upon the principal officers of the appellant.
2. Other grounds of the appeal are that the leaned magistrate erred in failing to exercise his discretion in favour of the appellant as the respondent and particularly in failing to consider what was raised in the draft Memorandum of Response. the appellant court has remedied the claimant by way of throw away costs so as to allow the fresh hearing of the matter on merit.
3. The dismissal of the application dated 5 May 2023 led to the appellant being condemned unheard and the appeal should be allowed and the ruling of the trial court set aside and the appellant allowed to re-open the trial court matter for hearing on the merits.



4. On 7 December 2023, both parties attended court and agreed to address the appeal by way of written submissions. Timelines to file and serve written submissions were allocated. The appellant did not comply.
5. The matter came up for mention on 24 January 2024 and the appellant remained absent. The respondent filed written submissions on 2 February 2024.
6. The respondent submitted that he filed his claim on 8 March 2022 and served summon on 10 March 2022. On 29 March 2022 the appellant entered appearance but failed to file any response. On 21<sup>st</sup> October 2022 he served a hearing notice for 29 November 2022 but there was no attendance and his case was heard in the absence of the respondent. Judgment was scheduled for 6 April 2023.
7. Dissatisfied with the judgment of the trial court, on 5 May 2023, the appellant filed application seeking to set aside the judgment on the grounds that there was no proper service. In his ruling, the learned magistrate dismissed the application for lack of merits.
8. The respondent submitted that Order 5 of the Civil Procedure Rules requires that a party who is served with summons to enter appearance and to file a response thereof which the appellant failed to do and cannot turn back and assert that justice was not met. Application seeking to set aside the judgment of the trial court had no merit and was dismissed for good cause.
9. The respondent submitted that the learned magistrate well applied his discretion in determining application dated 5 May 2023 as held in *Mbogo & another v Shah* [1968] EA; *Francis Wambugu v Babu Owino & others*, SC Petition No. 15 of 2018. The learned magistrate applied his mind to the facts and the law and arrived at a cogent decision which should be confirmed and the appeal dismissed with costs.
10. As noted above, the appellant did not file any written submissions and on the appointed date did not attend court.
11. The mandate of the court on a first appeal is addressed in various authorities. In the case of *Igiro v Republic* (Criminal Appeal 41 of 2022) [2023] KECA 926 (KLR), the court held that;
 

... there is a duty imposed on the first appellate court of re-evaluating and re-analysing the evidence placed before the trial court and arrive at its decision cautious of the fact that it was not the trial court and therefore, unlike the trial court had no benefit of seeing the witness testify hence incapacitated in terms of gauging the demeanour of the witnesses and allowance must be given for this.
12. And in the case of *Livestock Research Organization v Okoko & another* (Civil Appeal 36 A of 2021) [2022] KEHC 3302 (KLR), the court held that;
 

This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. This is the principle espoused in section 78 of the Civil Procedure Act.
13. In other words, this 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 allowances in this respect. Also, take into account the trial court had a chance to ask questions directly to the witnesses.
14. Further, this court, as a specialised court given mandate under Article 162(2)(a) of the Constitution, 2010 is regulated under a different set of rules of procedures, the Employment and Labour Relations Court (Procedure) Rules, 2016 (*the Rules*). Under the Rules, the court on its own motion, upon application by the parties or as may be deemed necessary to meet the ends of justice is allowed to



proceed and determine a matter based on the filed pleadings and records. The rationale is that, a claimant is allowed to file its Memorandum of Claim pursuant to Rule 4 by attaching all evidence and a respondent is allowed to file a response and attach all evidence in accordance with Rule 13 thereof. Hence under Rule 21, the court is allowed to make a determination based on the filed records.

15. The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.
16. In this case, the trial court allowed parties to attend and be heard in their evidence. The appellant was served with summons and only entered appearance. No response was filed. A Hearing Notice was served upon the appellant through its advocate but there was no attendance. The respondent was heard on his case and a determination arrived at. The appellant in filing application dated 5 May 2023 was seeking to invoke the discretionary powers of the trial court. Such discretion cannot be faulted unless the appellant is able to demonstrate that the learned magistrate applied his discretion outside the known norms and principles.
17. Without any written submissions herein to address the appeal, the court is denied crucial material as to why the appellant is seeking to fault the trial court. The Memorandum of Appeal on its own cannot be sufficient or good cause to justify the setting aside of the ruling and judgment of the trial court. Discretionary power is to be exercised in a manner that is not capricious or whimsical, and that judicial officers to whom this power is donated should exercise the same judicially as held in the case of *Stanley Kang'ethe Kinyanjui v Toney Ketter & 2 others* Civil Application No. Nai 31 of 2012. An appellant must hence demonstrate that the learned magistrate in arriving at his decision, there was no foundation of reasons given. To this end, the appellant had failed to address the same.
18. This is aptly captured by the court in *Rosco Kibara Mangaara v Deputy County Commissioner Tharaka South Sub county & 3 others; Paul Kirimi Kiria* (Interested Party) [2021] eKLR that;

Discretion is a science, not to act arbitrarily according to men's will and private affection: so the discretion which is exercised here, is to be governed by rules of law and equity, which are to oppose, but each, in its turn, to be subservient to the other. This discretion, in some cases follows the law implicitly, in others it allays the rigor of it, but in no case does it contradict or overturn the grounds or principles thereof, as has been sometimes ignorantly imputed to this court. ...

19. In his ruling delivered on 10 August 2023, the learned magistrate outlined in details the procedures gone into with dates and the non-attendance by the appellant. The affidavits were analysed and case law applied with a detailed analysis thereof. In dismissing the subject application seeking to set aside the judgment delivered on 6 April 2023, there were sound grounds and justified reasons. The findings by the trial court cannot be faulted.
20. Through application dated 13 September 2023, the appellant filed an application seeking stay of execution orders against the judgment in Mombasa CMELRC No. E093 of 2022 pending the hearing of the appeal. The appeal related to the judgment of the trial court delivered on 6 April 2023 upon which the appellant filed application dated 5 May 2023 seeking the court to set aside the *ex parte* judgment and to allow the appellant to defend the claim.
21. The application dated 13 September 2023 was supported by the affidavit of Mohamed Hassan Mohamed and who gave the background of the appeal and the need for stay of execution. Part of the reasons given were that following the appeal dated 5 May 2023, a ruling was delivered on 10 August 2023 and the trial court dismissed the same. Hence the appeal herein.



22. This court considered the application dated 13 September 2023 and in a ruling delivered on 31 October 2023 allowed stay of execution in Mombasa CMEELRC No. E093 of 2022 to allow the court to hear the appeal on the merits.
23. The instant application is seeking to challenge the ruling of 10 August 2023. The appeal against the subject ruling is hereby found without
24. merit and hence the judgment in Mombasa CM ELRC No. E093 of 2022 is hereby confirmed.
25. Accordingly, the appeal herein is found without merit and is dismissed with costs. The appellant shall also bear costs of the lower court proceedings.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024.**

**M. MBARŪ**

**JUDGE**

