



**Cherotich v Mogogosiek Tea Factory (Appeal E003 of 2021)
[2024] KEELRC 635 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 635 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
APPEAL E003 OF 2021
DN NDERITU, J
MARCH 20, 2024**

BETWEEN

HELLEN CHEROTICH APPELLANT

AND

MOGOGOSIEK TEA FACTORY RESPONDENT

JUDGMENT

I. Introduction

1. The Appellant herein was the claimant in the lower court in Kericho CMCC (ELRC) No. 15 of 2020, filed through P. Sang & Co. Advocates, wherein she prayed for the following –
 - a. An award of Kshs.1,068,310/=
 - b. General damages for violation of the claimant’s constitutional rights
 - c. Interest at court rates
 - d. Certificate of Service.
 - e. In the alternative to prayers (a-d) Reinstatement to her former Job at the Respondent’s Company on permanent and pensionable status.
 - f. Cost of this suit.
2. The respondent defended the cause in the lower court and on 8th June, 2021, counsel for both parties recorded the following consent – “By consent the cause be determined by way of written submissions. The documents by the parties be relied on herein. The parties do file submissions within 14 days.”
3. In a ruling delivered on 15th October, 2021 the learned trial magistrate struck out the claim on the basis that no evidence had been adduced by the claimant in support of the claim.



4. The appellant was dissatisfied with the said ruling and has filed this appeal in the hope of overturning the same based on the following grounds as contained in a memorandum of appeal dated 25th October, 2021 –
 1. That the learned trial magistrate erred in law and in fact in disregarding the appellant’s evidence and evidence on record thus arriving at a wrong judgment.
 2. That the learned trial magistrate erred in law and in fact by disregarding the fact that the parties entered a consent to have the claim determined by way of written submissions.
 3. That the learned magistrate erred in law and in fact in failing to consider the submissions of the appellant’s counsel together with the case law in support.
 4. That the learned trial magistrate erred in law and in fact in basing the ruling on faulty appreciation of the law.
 5. That the learned trial magistrate erred in law and in fact in dismissing the claim yet no sufficient evidence was fronted by the respondent.
 6. That the learned trial magistrate erred in law and in fact and misdirected himself in failing to make a finding against the respondent.
 7. That the learned trial magistrate erred by failing to appreciate that the claimant had proved his case on a balance of probabilities which was uncontroverted ty the respondent.
 8. That the decision of the learned trial magistrate as a whole as contained in the ruling dated 15th October, 2021 is legally untenable, against the weight of evidence and ought to be set aside.
5. The appeal is opposed by the respondent.
6. When the appeal came up in court for directions on 6th February, 2023 it was, by consent, directed that the appeal be canvassed by way of written submissions. Counsel for the appellant, Mr. Mugumya, filed his submissions on 6th February, 2023 while counsel for the respondent filed on 20th April, 2023.

II. Submissions by Counsel

7. On the one hand, after laying the background of the appeal, counsel for the appellant condensed the grounds of appeal into four issues for determination by this court – Whether there was a consent order to dispose the matter by way of written submissions; Whether the trial magistrate erred in law and fact in failing to consider the consent entered into by parties to have the matter disposed of by way of written submissions and for failing to consider the submissions; Whether the trial learned magistrate erred in law and fact in dismissing the claim yet sufficient evidence was fronted by the respondent; and, Who should bear the costs of the appeal.
8. On the first issue it is submitted that the parties, through their respective counsel, entered the consent as reproduced in the introduction part of this judgment and that indeed the said consent was adopted by the learned trial magistrate as an order of the court. It is submitted that neither party is contesting that fact.
9. On the second issue it is submitted that the learned trial magistrate erred in effect holding that the consent was not binding and that the evidence by the claimant in form of witness statement and the documentary exhibits had not been properly presented and adduced before the court. It is submitted that the consent was neither set aside nor amended and as such it is binding.



10. It is submitted that the ruling by the trial court violated the appellant's right to fair hearing under Article 50(1) of the *Constitution*. It is further submitted that disposal of a cause by way of written submissions is provided for under Rule 25(2) of the *Employment and Labour Relations Court (Procedure) Rules* – 2016.
11. In support of the argument that a court can dispose a cause by way of written submissions counsel has cited *Kenya Power & Lighting Company Limited v Kenya Electrical Traders & Allied Workers Union* (2017) eKLR and *Dominic Ndegwa Kiere v Mercy Muthoni Ndung'u & Another* (2016) eKLR.
12. Further, it is submitted that the impugned ruling was draconian and in effect denied the appellant the constitutional and statutory right to be heard. It is submitted that the consent entered by counsel for both parties is binding unless set aside by consent or on the same legal basis as a contract.
13. On the third issue it is submitted that trial court failed to consider the evidence availed by the appellant on merit and as such dismissed the claim without giving her a hearing.
14. On the fourth issue the appellant prays for costs of the appeal against the respondent who is opposed to the appeal.
15. On the other hand, counsel for the respondent, after laying the background to the appeal, submits that no evidence was presented before the trial court by the appellant and as such the trial court was right in striking out the claim for lack of supporting evidence.
16. It is submitted that the consent as recorded did not incorporate admission of the documents as evidence other than that the cause was to be disposed of by way of written submissions. Counsel has cited *Robert Ngande Kathathi v Francis Kivuva Kitonde* (2020) eKLR to drive home that unless and until documents are produced and admitted in evidence they remain mere papers in the court file.
17. It is submitted that the statement by the claimant was not adopted as evidence and the documents did not become evidence by the mere fact of their filing. It is submitted that the respondent did not consent to production and admission of the same in evidence and the same carried no evidential value. Counsel has cited *Kenneth Nyaga Mwige V Austin Kiguta & 2 Others* (2015) eKLR in support of the foregoing.
18. It is submitted that the submissions filed by counsel for both parties did not occupy or take the place of evidence. Counsel has cited *Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & Another* (2014) eKLR in firming up the above proposition.
19. It is submitted that the appellant opted for a short-cut or summary trial that landed her in a ditch for which neither the trial court nor the respondent should be blamed. It is urged that the appeal be dismissed with costs.

III. Issues for Determination

20. This court has carefully gone through the entire record of appeal and more particularly the memorandum of appeal, the impugned ruling of the lower trial court, and the proceedings in the trial court, and the respective written submissions by counsel for both parties. In my understanding of all the foregoing, the appellant is complaining that the learned trial magistrate failed, refused, and or neglected to abide by a duly adopted consent and as such arrived at the wrong conclusion in the matter. The issue therefore is not whether a valid consent was entered and adopted by the court but what the said consent entailed and whether the court in its ruling of 15th October, 2021 properly took into consideration the contents of the said consent, and whether, therefore, the trial court arrived at the right or wrong decision.



21. Therefore, the issues that commend themselves to this court for determination are –
- a. What were the terms of the impugned consent between the parties as adopted by the court?
 - b. Did the court negate the terms of the said consent in its ruling of 15th October, 2021?
 - c. Did the court arrive at the wrong decision in the said ruling?
 - d. What are the appropriate orders for this court to make?
 - e. Costs.
22. There is no contention that a mutual consent was recorded by counsel for both parties on 8th June, 2021, in the following terms –
- 8/6/21
- Before Hon. S. M. Mokuua – CM
- Court Assistant – Elvis
- Mr. Nyadimo for Mr. Mugumya
- Ms. Ngetich for Respondent
- Miss Ngetich – We are yet to comply. I therefore pray for another date.
- Later
- Mr. Mugumya for claimant
- Ms. Ngetich for M.s Ngetich
- Sheila for Respondent
- By consent
- The cause herein be determined by way of written submissions. The documents by the parties be relied on herein. The parties do file submissions within 14 days.
- Ms. Ngetich – We will file our witness statements herein before the end of today.
- Ms. Ngetich – I confirm the terms of the consent.
- Court – The consent above is adopted as an order of the court. The parties are allowed 14 days to file submissions. Mention on 29/6/21.
- Signed
- S.M. MOKUA, CM
- 8/6/2021
23. The above terms of the consent are in my view clear and unambiguous. What the parties intended to have, and the court agreed and adopted the said consent, is for the court to rely on the documents and statements placed on record, consider and evaluate them, and determine the cause based on the same. The court readily and without hesitation adopted the said consent and thereafter written submissions were filed before the court retired to write a judgment.
24. In a strange turn of events, and this is the gist of the appeal, the learned trial magistrate delivered a ruling on 15th October, 2021, whereby the cause was struck out on the following basis –



4. The parties allegedly recorded and filed their statements, which form the basis of the respective cases. I note that the said statements were not introduced by the respective witnesses and thereafter adopted as evidence.
 5. Following the foregoing, the submissions herein cannot be deemed to be evidence. Ordinarily, cases are premised on the evidence adduced by the parties. In the claim herein, there is a serious omission on the part of the parties. I am guided by Article 10 of the Constitution of Kenya, 2010 which envisages on how the courts should interpret the Law. Without proper basis being in place, justice may not be served.
 6. Further, what the parties disregarded is not a technicality which can be wished away. Accordingly, I strike out the claim herein with no order as to costs.
25. It is that ruling, striking out the cause, that is now challenged in this appeal.

IV. Determination

26. The fact of the matter, as is deciphered from the consent as reproduced above, is that the parties through their respective duly instructed counsel consented to have the court determine the cause based on the materials placed before the court. Those materials included the pleadings, witness statements, and documents. And the court readily accepted and adopted that consent. It is amazing that the same trial magistrate who accepted the said consent turned around in the ruling to state that the said materials had not been properly presented to the court.
27. In my understanding and this is the law, the trial court in allowing and adopting the said consent was operating under the provisions of Order 11 of the Civil Procedure Rules.
28. In the impugned ruling the trial magistrate did not cite any law, other than the general mention of Article 10 of the Constitution, or any authorities that may have rendered the said consent illegal or unlawful. In any event, as a court of justice, if the learned trial magistrate had formed the opinion that the recorded consent was unlawful and or not helpful in arriving at a just and fair conclusion of the cause, he ought to have summoned the parties through their counsel to accordingly set aside the consent or amend the same accordingly.
29. Sections 1A, 1B, and 3A of the Civil Procedure Act and Articles 2(1), 50(1), 159, & 259(1) of the Constitution call upon courts of law to do justice to all and sundry that come before them. It is also the duty of a court of law to guide and lead parties and even counsel towards a fair and just resolution of a cause. Striking out a cause or a pleading is a most draconian approach and may only be applied in causes wherein a litigant has abused and violated the law rendering the cause irredeemable. The course of justice and the jurisprudence in Kenya has moved beyond mere technicalities to substance and fairness.
30. A consent was lawfully and properly entered by counsel on behalf of the parties. The said consent has neither been set aside nor challenged. If the learned trial court really desired to do justice and be fair to the litigants, it ought to have summoned them and informed them that the consent as adopted did not aid the course of justice. By doing so, the parties through their respective counsel could have had the opportunity to either amend or withdraw or set aside the said consent.
31. In view of all the above, it is in my considered view that the learned trial magistrate misdirected himself, disregarded the primary duty of a court of law to do justice and be fair, and as such arrived at the wrong conclusion in the impugned ruling. Obviously, the parties, and more so the appellant, did not get justice and fairness in the court.



32. Effectively, therefore, the appellant was not heard on merits contrary to the constitutional and statutory dictates that litigants shall be accorded a fair and just hearing as per the provisions cited above. It is therefore demanded of this court to intervene and order that a proper trial be conducted before another judicial officer other than Hon. S. M. Mokuia (CM).
33. While it is true that submissions are not evidence, it is unambiguous and evident that the intention of the consent, for all intents and purposes, was to have the cause determined on the basis of all the materials placed before the court as stated in an earlier part of this judgment.
34. The foregoing paragraphs answer to the four issues stated above for determination by this court.

V. Costs

35. The appeal is hereby upheld for the foregoing reasons. However, it is not for the failure or fault on the part of either party that this appeal had to be filed. As stated above, the trial court misdirected itself and arrived at the wrong decision and orders in the impugned ruling. However, since respondent opposed the appeal, the appellant shall get half costs of this appeal against the respondent. The costs may be agreed or taxed in the usual manner.

VI. Orders

36. The court issues orders that –
 - a. The ruling of the lower trial court dated 15th October, 2021 be and is hereby set aside.
 - b. The cause, being Kericho CMCC (ELRC) No. 15 of 2020, shall proceed for hearing and disposal before another judicial officer, other than S. M. Mokuia (CM).
 - c. The appellant is granted half costs of this appeal to be agreed upon or taxed in the usual manner.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 20TH DAY OF MARCH, 2024.

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DAVID NDERITU

JUDGE

