



**Apex Steel Limited v Onyango (Appeal 56 of 2018)
[2024] KEELRC 629 (KLR) (14 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 629 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 56 OF 2018
NJ ABUODHA, J
MARCH 14, 2024**

BETWEEN

APEX STEEL LIMITED APPELLANT

AND

DAVID OPONDO ONYANGO RESPONDENT

JUDGMENT

1. This appeal arises from the Ruling of the lower court Hon. I Orege (Mr) Senior Resident Magistrate delivered on 19th October, 2018. This ruling is found at page 93 of the record of appeal.
2. Even though the appellant has framed seven grounds of appeal, this appeal raises the single issue of whether the trial court erred in striking out and expunging from the record a further affidavit filed by the appellant sworn by one Samuel R. Mlemwa on 15th October, 2018.
3. It was common ground that the affidavit was struck out on grounds that the same was filed without leave of court. The appellant however alleges that he orally sought and obtained leave on 19th October, 2018. The respondent's advocate on the other hand denied any such leave was sought and obtained and that the further affidavit was sneaked in with the submissions by the appellant.
4. The proceedings concerning the application dated 19th October, 2018 are found at page 92 to 94 of the record of appeal. On 14th October, 2018, the court seized of the application allowed Mr. Makori for the defendant/applicant seven days to file submissions. The court granted the same and ordered the matter to be mentioned on 19th October, 2018 extending the interim orders.
5. On 19th October, 2018 when the matter came up as directed by the court, Mrs. Kariuki informed the court that she had filed submissions and further sought that an affidavit filed by the appellant be expunged from record for offending Order 57 of *Civil Procedure Rules* in that the advocate never sought leave. The court ordered the matter for mention on 23rd October, 2018 at the same time expunged the affidavit expunged by the defendant from record.



6. There is nothing on record to show any leave was first sought and obtained by the defendant before filing the affidavit. It is therefore incorrect for the appellant to allege such leave was sought and obtained.
7. The appellant in his submissions in support of the appeal has invoked the provisions of Article 159 of the Constitution to urge that justice should be administered without due regard to procedural technicalities and further that procedural infraction which causes no injurious prejudice to a person should not have an invalidating effect. This is a thinly veiled admission that the appellant never sought and obtained leave of the trial court prior to filing the further affidavit.
8. Setting aside orders, procedural orders and other directions are discretionary and a party seeking them must approach the court with clean hands. The appellant has failed this test.
9. The appeal is therefore found frivolous, unmerited and is hereby dismissed with costs.
10. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY MARCH, 2024

DELIVERED VIRTUALLY THIS 14TH DAY OF MARCH, 2024

Abuodha Jorum Nelson

Judge

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