



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Ntinyari & 17 others v Odwyer & 2 others (Employment and Labour Relations Cause E004 of 2023) [2024] KEELRC 545 (KLR) (8 March 2024) (Judgment)**

Neutral citation: [2024] KEELRC 545 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU**

**EMPLOYMENT AND LABOUR RELATIONS CAUSE E004 OF 2023**

**ON MAKAU, J**

**MARCH 8, 2024**

**BETWEEN**

**JACKLINE NTINYARI & 17 OTHERS ..... APPELLANT**

**AND**

**NICHOLAS ODWYER ..... 1<sup>ST</sup> RESPONDENT**

**WESTBULD GENERAL CONTRACTORS LTD ..... 2<sup>ND</sup> RESPONDENT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The Appellants sued the Respondents before the Chief Magistrate's Court Meru, claiming that they were employed by the Respondents from 2015 to 2018 during the construction of Kyeni-Kathenjeru-Karurumo Road and Chuka-Kaanwa-Kareri Road. They claimed that the Respondents failed to pay their salaries according to the Collective Bargaining Agreement (CBA) and prayed for salary arrears amounting to Kshs. 9,398,054.00. They further prayed for: a declaration that they were still employees of the Respondents; declaration that the Respondents had breached their employment rights; an order that the Respondents do pay the claimants gross salaries in lieu of notice; 2 months' compensation for unfair termination without notice; severance pay of 17 days for every year served; and costs of the suit.
2. The respondents denied liability to pay the dues sought by the claimants and prayed for the suit to be dismissed with costs. After hearing both sides, the trial court (Hon. Nyambu CM) rendered judgement on 20<sup>th</sup> December 2022 declaring that the Appellants' employment with the Respondents had ended; and that the Respondents had breached the Appellants' employment right as envisaged under the law. She then ordered the respondents to pay the claimants sixteen (16) months unpaid salary and computed the award for each claimant.
3. After the judgment, the appellants noted clerical errors on the judgment and filed a Notice of Motion dated 20<sup>th</sup> January 2023 seeking for review of the judgment to correct the name of the 1<sup>st</sup> claimant



and also the decretal sum awarded to the 1<sup>st</sup>, 2<sup>nd</sup> 12<sup>th</sup>, and the 15<sup>th</sup> claimants. After considering the application, the trial reviewed her judgment vide a ruling delivered on 10<sup>th</sup> March 2023 whereby she rectified the name of the 1<sup>st</sup> Claimant but held that there were no errors in amounts awarded since they were based on the figures quoted in the claimants' submissions.

4. The appellants were dissatisfied with the said ruling lodged this appeal raising the following grounds: -
  - a. That the Honourable Court erred in fact and law in accessing the money payable to the Claimant.
  - b. That the Honourable Court erred in fact and law by not allowing the Advocate's typing error to the documents of the Claimant.
  - c. That the Honourable Court erred in fact and law by failing to consider the Appellants' documentary documents on the part of monies payable to the Claimants in total.
5. The Appeal was canvassed by way of written submissions by the appellants and the 2<sup>nd</sup> respondent. The rest of the respondents never participated in the appeal.

### **Appellants' Submissions**

6. The Appellants submitted that they were not opposed to the Court's decision of 20<sup>th</sup> December 2022 save for the arithmetical errors therein. It was submitted that the error emanated from the Appellants' submissions dated 13<sup>th</sup> July 2022, wherein the 1<sup>st</sup> Appellant's salary was computed for 8 months instead of 16 months. It was submitted that the Court interchanged the amounts payable to the 12<sup>th</sup> and 15<sup>th</sup> Appellants while the 2<sup>nd</sup> Appellant's award was erroneously calculated based on a monthly salary of Kshs. 36,943.20 instead of 30,186.00.
7. Finally, it was submitted that based on the said errors, the amount awarded was Kshs. 7,741,334.72 instead of the correct amount of Kshs. 10,022,277.20. Therefore, the Appellants urged the Court to find that there were arithmetical errors in the lower court's judgment and allow the appeal with no order as to costs. It was observed that the rectification will not in prejudice the Respondents in any way.

### **2<sup>nd</sup> Respondent's Submissions**

8. The 2<sup>nd</sup> Respondent framed the following issues for determination:
  - a. Whether the instant appeal is an abuse of the Honourable Court's process?
  - b. Whether the Honourable Magistrate erred in law and fact in accessing the money payable to the Appellants?
  - c. Whether the Honourable Magistrate erred in law and fact by not allowing the Advocate's typing errors to the documents of the claimant?
  - d. Whether the learned Magistrate erred in fact and law in failing to consider the Appellants documentary evidence on the part of the money payable to the Appellants in total?
9. As regards abuse of court process, the 2<sup>nd</sup> respondent submitted that the trial court has already pronounced itself on the issue the alleged errors and as such under Order 45 Rule 1 (b) of the *Civil Procedure Rules* and section 80 of the *Civil Procedure Act* the appeal is an abuse of court process. It was further submitted that the Appeal is just a mask of the Appellants' intention to have a fresh review of the judgement.



10. It was submitted that the trial Court declined to review the awards in the judgment because the figures were provided by the Appellants in their pleadings and written submissions. It was further argued that the figures in the Application were totally different from those in the pleadings. To buttress its case, the 2<sup>nd</sup> Respondent relied on the cases of *Stephen Somek Takwenyi & Another v David Mbutia Githare & 2 Others* Nairobi (Milimani) HCCC No. 363 of 2009 and *HA v LB* [2022] eKLR.
11. With respect to the issue on assessment of amount payable, the 2<sup>nd</sup> Respondent reiterated the principle that parties are by their pleadings as was brought out in the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR. Reliance was further placed on the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR which cited with acceptance the Supreme Court of Nigeria Case of *Adetoun Oladeji (NIG) Ltd v Nigeria Breweries PLC S.C. 91/2002* where it was held that:

“...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”
12. It was argued that pleadings are the documents that authoritatively advise the Court in making its judgement and as such this Court was directed to the Statement of Claim appearing in pages 186-188 of the Record of Appeal.
13. It was further argued that the law under Order 45 1(b) of the *CPR* and Section 80 of the *CPA* allows review only: on discovery of new and important evidence that wasn't within the knowledge of the applicant at time of determination; on account of mistake or error apparent to face of the record; and for any other sufficient reason where the application was made without undue delay. Reliance was placed on the case of *Republic v Principal Secretary, Ministry of Internal Security & another Ex-Parte Schon Noorani & another* [2020] eKLR wherein the Court relied on the case of *National Bank of Kenya Ltd v Ndungu Njau*, [1996] KLR 469 (CAK) at Page 381.
14. In drawing a distinction on whether the error was by the Court or the Appellants, the 2<sup>nd</sup> Respondent defined an error on face of the record to mean an error or omission that is self-evident and does not require an elaborate argument or calling of any additional evidence to be established. It relied on the cases of *Nyamongo & Nyamongo Advocates v Kogo*, [2001] 1 EA 173, where the Court rendered itself on the issue on error on the face of the record.
15. In that regard, it was submitted that the calculation using 8 months instead of 16 was not an error on the face of the record as the Court relied on the figures in the pleadings. the figures were not error made by the court. It was argued that for the figure to be changed to 16 months there would be need for additional evidence to prove the duration of service of the 1<sup>st</sup> Appellant.
16. As regards the error by the trial court allowing the errors by counsel, the 2<sup>nd</sup> Respondent appreciated the principle that a mistake of counsel should not be visited upon innocent litigants. However, it submitted that the same was not automatic as an advocate's duty is not only to his client but also to the Court and opposing party. In support of its submission, it relied on the case of *Charles Omwata Omwoyo v African Highlands & Produce Co Ltd* [2002] eKLR and the case of *Tana and Athi Rivers Development Authority v Jeremiah Kimigbo Mwakio & 3 others* [2015] eKLR where the Courts emphasized on the need for advocates to shoulder the legal consequence of their negligence.



17. It was argued that the Appellants ought to have amended their pleadings to ensure that the erroneous figures were corrected. In support of the argument it relied on the case of *Savings and Loans Limited v Susan Wanjiru Muritu* Nairobi (Milimani) HCCS No. 397 of 2002.
18. It was argued that Order 8 of the [CPR](#) allows for amendment of pleadings and the Appellants had enough time to so do before judgement. It was contended that although the advocates had conduct of the matter, the Appellants were the witnesses and ought to have picked up the errors and sought amendment. As such it was argued that the Appellants were estopped from acting surprised at how the Court reached its judgement. It was submitted that the Appeal was an afterthought and with intention of reviewing the judgement which would disenfranchise the Respondent. This court was therefore urged to find that the Appeal is an abuse of court process and dismiss it with costs.

### Issues for Determination and Analysis

19. This being a first appeal, I am empowered to re-evaluate the evidence on record and proceed to make its own independent conclusions on the case before it. I gather support from the case of *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2EA 212, where the Court of Appeal stated as follows:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”
20. In the instant appeal, I have perused and considered the evidence contained in the record of Appeal and also the submissions by the Appellant. The issues falling for determination are:
  - a. Whether the impugned ruling is appealable.
  - b. Whether the impugned ruling should stand.

### Whether the Impugned Ruling is Appealable

21. The 2<sup>nd</sup> Respondent’s argument is that the issues raised in the grounds of appeal had already been dealt with by the trial court and put to rest. It is further argued that the Appeal is an abuse of court process since it is just another application for review of the same judgment disguised as an appeal. The Appellants on the other hand clearly indicated that they were not appealing against the judgement but the ruling of the Court of 10<sup>th</sup> March 2023.
22. The [Civil Procedure Rules](#) under Order 43 provide for orders from which appeals lie as of right. Rule 1 provides that:
  - “ 1.
    - (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—
      - i. Order 1 (parties to suit);
      - ii. ...
      - (x) Order 45, rule 3 (application for review);...



23. In view of the foregoing provision, I am satisfied that the appeal herein is properly before the court and not an abuse of the court process as alleged. Order 43 Rule 1 (x) gives a right of appeal to any party dissatisfied with an order for review under order 45 of the Civil Procedure Rules. Therefore, I proceed to hold that the impugned ruling is appealable as of right.

### **Whether the Impugned Ruling Should Stand**

24. The Appellants' contention is that there are errors apparent on the face of the record that the Court ought to have corrected but failed to do. The Court in its ruling of 10<sup>th</sup> March 2023 made under section 99 held as follows:

“The amounts payable to each of the Claimants remain the same. The calculations that the court used were those on the Claimants' submissions. The total amount of unpaid salaries in the Claim is stated in paragraph 32. It is different from what counsel is claiming today. In the supporting affidavit the deponent alluded to errors on the part of the court, however as regards to the calculations the error is on the part of the claimants, if at all there are any errors.”

25. With due respect, the trial court ought to have noted that the application for review was intended to correct an error in her judgment which amounted to an error on the face of the record. The judgment was clear that each claimant was awarded 16 months gross salary based on their respective salaries. However, when the trial court computed the awards, she erroneously used 8 months with respect to the 1<sup>st</sup> appellant as a result of which she was awarded half of her rightful dues. As regards the 2<sup>nd</sup> appellant, the court awarded a higher sum being Kshs. 591,091.20 instead of Kshs.482,976 just as the 15<sup>th</sup> claimant who was awarded Kshs.777,248 instead of Kshs.482,976. Finally, the 15<sup>th</sup> appellant was awarded a lesser amount being Kshs. 482,976 instead of Kshs. 777,248.
26. The above facts are quite clear, and I believe that a court of law directing itself properly on them ought to have corrected the error without pointing the blame on the advocate's negligence. Article 159 (2) of the Constitution, obliges the courts to do substantive justice as opposed to procedural technicalities. Correcting the error on the judgment, would ensure that no claimant got more or less than what is due to them. It is the duty of the court to evaluate the evidence to see whether the claims pleaded are proved to the required standard. A court of law is never bound by anything presented before by the parties including the submissions by counsel. It was therefore erroneous for the trial court to say that she awarded what was stated in the written submissions as opposed to pleadings and/or evidence.
27. Accordingly, it is apparent that, in declining to review its decision on the erroneous awards, the Court did not exercise its discretion properly and as a result she made the 1<sup>st</sup>, 2<sup>nd</sup>, 12, and 15 appellants retain erroneous awards. The court considered irrelevant factors, namely written submissions, and/or failed to consider relevant factors, namely the pleadings and the evidence.
28. It is trite law that submissions do not form part of pleadings and evidence before court but are merely the parties' way of directing the Court to the strong points of their cases with a view of swaying the Court to decide in their favour. In the case of Ngang'a & another v Owiti & another [2008] 1KLR (EP) 749, the Court held as follows:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallise the substance of the case, the evidence and the



law relating to that case. It is, as it were, a way by which the Court's focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable."

29. Having found that the trial court erred in failing to review its judgment to correct obvious error on the amounts awarded to 1<sup>st</sup>, 2<sup>nd</sup>, 12 and 15<sup>th</sup> appellant, I must hold that the impugned ruling cannot be allowed to stand. I say so because it is unjust to both sides because it amounts to denying some of the appellants their rightful employment benefits while ordering the employer to other appellants more than they deserve.

### **Conclusion**

30. For the reasons highlighted above, the Appeal is successful. Consequently, I hereby set aside the ruling of the trial court delivered on 10<sup>th</sup> March 2023 and substitute with order allowing the appellants' Notice of Motion dated 20<sup>th</sup> January 2023 in the following terms: -
- a. The error in the lower court judgment regarding the award damages payable to the 1<sup>st</sup>, 2<sup>nd</sup>, 12<sup>th</sup> and 15<sup>th</sup> appellants is corrected, thus:
    - i. Jackline Ntinyari Kshs. 36,943 x 16 months = Kshs. 591,088.00
    - ii. Judy Wanja Mukuru Kshs. 30,186 x 16 months = Kshs. 482,976.00
    - iii. Esther Mwakina Kshs. 30,186 x 16 months = Kshs. 482,976.00
    - v. Mary Kavata Mwangangi Kshs 48,578 x 16 months = Kshs. 777,248.00
  - b. The rest of the judgment remains unchanged save for the correction on the 1<sup>st</sup> appellant's name done by the trial court in the impugned ruling.
  - c. The appellant never sought costs of the appeal and the application for review. Consequently, I direct each party to bear own costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 8TH DAY OF MARCH, 2024.**

**ONESMUS N MAKAU**

**JUDGE**

**Order**

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**ONESMUS N MAKAU**

**JUDGE**

