



**Frodak Kenya Limited v Makunda (Appeal E005 of 2023)
[2024] KEELRC 1689 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1689 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
APPEAL E005 OF 2023**

**JW KELI, J
JUNE 27, 2024**

**ON THE NOTICE OF MOTION APPLICATION DATED
26TH APRIL 2024 BY THE APPELLANT/APPLICANT**

BETWEEN

FRODAK KENYA LIMITED APPLICANT

AND

PHILIP LUMANYASI MAKUNDA RESPONDENT

RULING

1. The ruling is on application by way of a Notice of Motion application by the Appellant/Applicant (herein “Applicant”) dated 26th April 2024 brought under the provisions of Order 12 Rule 7 of the Civil Procedure Rules, 2010, Sections 3(1), 16 & 17 of the Employment and Labour Relations Court Act, Rule 8(4), Rule 33 & Rule 34 of the Employment and Labour Relations Court(Procedure)Rules and Articles 159(2)(d) & 164(3) of the Constitution of Kenya 2010, seeking for the following orders:-
 - a. Spent.
 - b. Spent
 - c. This Honourable Court be pleased to set aside the order issued on 16th April 2024 striking out the Appellant’s Appeal hereof and reinstate the same for hearing.
 - d. Upon reinstatement, leave be granted to the Appellant/Applicant to file a supplementary record of Appeal containing the certified copies of typed proceedings and judgement.
 - e. Cost of and incidental to this application abide the result of the appeal.
2. The Notice of Motion was premised on the grounds on the face of the application and the grounds in the supporting affidavit of Fredrick Otieno Onyango sworn on 26th April 2024 as follows: -



- i. The appellant filed an appeal ELRCA No. E005 of 2023, seeking to set aside the judgement delivered by Hon. Reuben Sang (SPM) on 13th June 2023 in Butali MCELRC Case No. 2 of 2018.
 - ii. Through the judgment of this court delivered on 16th April 2024, the court struck out the Appellant's appeal on grounds of incompetency, as the Record of Appeal did not contain the Certified copies of typed proceedings, judgment (F.O.O-1), and decree.
 - iii. That the appeal proceeded first before the Deputy Registrar on 29th August 2023, when the Appellant sought leave to file a supplementary record of the appeal of the typed proceedings, judgment, and Decree.
 - iv. That they tried in futility to obtain the certified copies of the typed proceedings, judgment, and Decree from both the Butali Civil Registry and the ELRC at Kakamega, where they were informed of the unavailability of the trial court file.
 - v. That when the matter was mentioned on 22nd January 2024 before the judge, they failed to note the incompleteness of the record of appeal and thus failed to request leave to trace the lower court record and to file a supplementary record of appeal consisting of the typed and certified proceedings, Judgment and Decree.
 - vi. That neither the court nor the respondent noted the incompleteness of the record and sought for the same to be rectified, which led to their appeal to be fixed for judgment with an incomplete record.
 - vii. That having perused the Appeal file, the original trial court record together with certified copies of proceedings and documents that were missing in the Record of Appeal were forwarded to the Deputy Registrar on 17th November 2023(F.0.0-2).
 - viii. That the said documents which are to be introduced in the supplementary Record of Appeal having been already availed to the court through the original trial court record, no prejudice will be suffered by the Respondent if the appeal is reinstated and leave to file such supplementary Record of Appeal is granted to the Applicant and the appeal heard and determined on its merits.
 - ix. That they are aware rules of procedure are not cosmetic but must be obeyed and aver that the mistake of their counsel should not be visited upon innocent clients.
 - x. That the court has unfettered discretion to grant the appropriate remedy for curing the mistake of failing to file a certified copy of proceedings and judgment as per Rules 8,33, and 34 of the *Employment and Labour Relations Court (Procedure) Rules*.
 - xi. That with the judgment having been delivered on 16th April 2024, the stay of execution granted to the Appellant has lapsed, and as such the Applicant is open to attempts of execution from the Respondent despite having a merited appeal.
 - xii. That the present application has been brought without delay and it is in the interest of justice that a stay of execution of the judgment and decree of the lower court be granted pending hearing and determination of the application.
3. The Application was opposed by the Respondent through the Grounds of opposition dated 3rd May 2024 stating that: -



- i. The court is *functus officio* in its matter and the appeal is *resjudicata* as against the same parties and the only recourse to the Applicant is an appeal.
- ii. That the appeal cannot be reinstated after a final judgment was rendered.
- iii. That the application is not urgent, it is an afterthought, misadvised, bad in law, baseless, frivolous, scandalous, vexatious, and the Applicant is not entitled to the reliefs sought.
- iv. That the application is a disguise of an appeal and the same was brought late.
- v. That the Applicant failed and neglected to include a complete judgment and decree to its pleadings which is a fatal omission and not an excusable error or mistake, and the Applicant had sufficient time to comply with rules for the preparation of the record of appeal.
- vi. That the Applicant proceeded to write submissions all along aware that their record was incomplete, and the said application will result in great prejudice and injustice to the Respondent, and the same ought to be dismissed with costs.
- vii. That the application is fatally defective and incurable by amendment having been brought under the wrong provisions of the law.
- viii. That the Applicant has not met the threshold for grant of stay orders sought.

Written Submissions

4. The Court directed that the application be canvassed by way of written submissions. The parties complied. The Applicant's written submissions dated 6th May 2024 were filed by Okong'o Wandago & Company Advocates on 24th May 2024. The Respondent's written submissions filed by the Mukabane & Kagunza & Advocates LLP were dated 30th May 2024.

Determination

Issues for determination.

5. The Applicant did not identify any issues for determination but submitted globally on the discretionary power of the Court to set aside its decision striking out the appeal and grant the Applicant leave to file a supplementary Record of Appeal out of time.
6. The Respondent addressed one issue in his written submissions, whether the instant application is merited.
7. The court having perused the pleadings by the parties and their submissions was of the considered opinion that the issues placed before the court by the parties for determination of the application are: -
 - a. Whether the application offends the doctrine of *resjudicata*
 - b. If (a) in the negative, whether the Applicant was entitled to reliefs sought

a). Whether the application offends the doctrine of resjudicata

8. On the 16th of April 2024 this Court struck out the appeal between the parties holding as follows: -

“Applying the foregoing jurisprudence of the superior court and Order 42 Rule (13)(4) of the [Civil Procedure Rules](#), the record of appeal filed on 8th August 2023 is held as incompetent



for failure to include the copy of the certified judgment and Decree relied on and is struck out with costs."

9. The Applicant while admitting to the non-compliance in filing the record of appeal brought the instant application to reinstate the appeal and seeking for leave to comply. The application was grounded on Article 159(2)(d) of the *Constitution* and the *Court procedural rules*. The Applicant stated they had applied for the proceedings, judgment, and decree and still desired to pursue the appeal. The Applicant stated they were exposed to execution.
10. The Respondent in opposition to the application, submits that the court is *functus officio* after the appeal was struck out and the appeal is *resjudicata* as against the same parties.
11. The Respondent further submitted that the Applicant had sufficient time to comply with Order 42 Rule 13(4) of the *Civil Procedure Rules*. That the matter was mentioned several times before the Deputy Registrar and the Court for compliance and the Applicant never complied. That the extension of time being an equitable remedy the Applicant did not deserve the extension for being indolent.
12. The Applicant in submissions relied on the decision of Court of Appeal on incompleteness of the record in *Intercountries Importers and Exporters v Teleposta Pension Scheme Registered Trustees & 5 others* (2021) eKLR which relied on several decisions to hold it was not in the interest of justice to strike out the record of appeal for incompleteness as follows:-

"On whether an appeal before the Court which is deemed incompetent faces automatic striking out, the Court in *Deepak Chamanlal Kamani & Another v. Kenya Anti-Corruption Commission and 3 Others*, Civil Appeal (Application) No. 152 of 2009 (unreported) faced with a similar dilemma as to whether or not to strike out an appeal on account of incompleteness of the record for failure to include a primary document, while salvaging the appeal expressed itself as follows:-

"We think that in the circumstances of this appeal, striking it out would not facilitate the just, expeditious, proportionate and affordable resolution of the appeal. There is an alternative available and while we refuse to strike out the appeal as requested in the motion, we order, under rule 89(3) of the Court's rules, the 1st respondent to file and serve upon the applicants a supplementary record of appeal containing the notes of the two Judges left out in the record of appeal."

Also, in the case of *Peter Obwogo O & 2 others v HO Suing as Next Friend of PO (Minor) & Another* [2017] eKLR, Eldoret Civil Appeal (Application) No. 8 of 2017 the Court held;

"Whereas the rules for procedure are handmaidens of justice and play an important role in the administration of justice, they should not, in appropriate cases, impede the administration of substantial justice. Article 159(2) (d) of the *Constitution of Kenya* 2010, now requires that:

"justice shall be administered without undue regard to procedural technicalities." The Court has a discretion under Rule 84 to strike out a notice of appeal or appeal where an essential step has not been taken in the proceeding or has not been taken within a prescribed time. However, the discretion should be exercised judicially having regard to all the circumstances of the case. The omission to include a certified decree can be cured by the filing of a supplementary record



which act will not occasion any undue prejudice to the respondents. Any prejudice likely to be suffered can be compensated by an award of costs.” (Emphasis ours). Each case will therefore be considered within its own peculiar circumstances.

21. The above notwithstanding, this Court has time and again reiterated that Article 159(2)(d) of the Constitution and Sections 3A and 3B of the Appellate Jurisdiction Act are not a panacea to cure all manner of breach or violation of statutory rules that have been enacted to ensure predictability and good order in moving the Court for orders. Addressing this issue, this Court in *Patricia Cherotich Sawe v IEBC & 4 Others* [2015] eKLR stated that Article 159(2) (d) of the Constitution is not a panacea for all procedural shortfalls as not all procedural deficiencies can be remedied by it.
 - 29 In our view, striking out this appeal on grounds that the record of appeal as filed is incomplete, while the reason for the incompleteness is the unavailability of the records will not serve the ends of justice. Accordingly, we dismiss this application and order that the applicant has 45 days within which to file and serve a supplementary record of appeal to bring on board any relevant documents it may have in its possession omitted from the record which may assist in the just and fair disposal of this appeal. If no supplementary record is filed and served as ordered, the appeal to proceed for hearing with the record as filed."
13. The Respondent relied on the decision of the Supreme Court in Kenya Revenue Authority & 2 others v Mount Kenya Bottlers & 4 others (2022) eKLR where the Court found that the application did not meet threshold for extension of time to file an appeal. The Court found the circumstances of the application in the decision by the Supreme Court were substantially different from the instant case. For example, unlike the Applicant before the Supreme Court, the Applicant herein has sought to set aside the judgment.
 14. The doctrine of *res judicata* in Kenyan law is anchored on section 7 of the Civil Procedure Act to wit: -
 - “7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”(emphasis given)

The Record of Appeal was struck out for incompleteness. The Court holds the subject of the appeal is undecided on a merit basis hence not resjudicata.

b). Whether the Applicant was entitled to reliefs sought

15. Relying on the Court of Appeal decision in Intercounties Importers and Exporters v Teleposta Pension Scheme Registered Trustees & 5 others (2021) eKLR (*supra*) and the cited decisions therein the Court holds it was in the interest of justice to exercise its discretion in favour of allowing the prayer of setting



aside its decision of 16th April 2024 and to reinstate the appeal dated 3rd July 2023 and at same time grant leave to the Applicant to file supplementary record of certified proceedings, judgment and decree of the lower court subject to throw away costs to the Respondent.

16. Consequently, the application is allowed as follows: -
 - a. The Judgment dated 16th April 2024 is set aside and the appeal reinstated for hearing.
 - b. The Applicant is granted leave to file supplementary record of certified copies of proceedings, judgment and decree of the lower court within 30 days.
 - c. The Applicant to pay the Respondent Kshs. 30,000 as throw-away costs in the appeal to address any prejudice it may have suffered consequently within 30 days of this ruling.
17. Mention on 29th July 2024 to confirm compliance and to issue a fresh judgment date.
18. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27TH DAY OF JUNE 2024.

J.W. KELI,

JUDGE

In the presence of: -

Court Assistant: Macheso

Appellant /Applicant: - Twena

Respondent: Kagunza

