



**Wanyonyi & 48 others v Frodak Services (Frodak Kenya Limited)  
(Employment and Labour Relations Appeal E007 & 28 of 2023  
(Consolidated)) [2024] KEELRC 1390 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1390 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS  
APPEAL E007 & 28 OF 2023 (CONSOLIDATED)**

**JW KELI, J**

**JUNE 13, 2024**

**BETWEEN**

**NYONGESA WANYONYI & 48 OTHERS ..... APPELLANT**

**AND**

**FRODAK SERVICES (FRODAK KENYA LIMITED) ..... RESPONDENT**

*(An Appeal from the Ruling and Order of Honourable R. S. Kipngeno  
delivered on 5/9/2023 in Butali ELR Suit No. 4 of 2023 between Nyongesa  
Joseph Wanyonyi & 48 others vs Frodak services Limited & Butali Sugar Mills)*

**JUDGMENT**

1. The Appellants being dissatisfied with the ruling of the Honourable R. S. Kipngeno delivered on 5/9/2023 in Butali MCELRC Nos. 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 31, 32, 37, 39, 40, 41, 43, 50, 53, 54, 56, 57, 58, 59, 68, 73, 75, 78, 92, 94, 95, 96, 97, 98, 99, 100 & 102 of 2023, & MCELRC 1, 3, 5, 6, 26, 27, 28, 33, 34, 35, 36, 42, 44, 45, 46, 47, 51, 55, 60, 61, 62, 63, 67, 71, 91, 93, & 101 of 2023 filed the Memorandum of Appeal dated 18<sup>th</sup> September 2023 and Record of Appeal dated 17<sup>th</sup> January 2024 and received in Court on the 9<sup>th</sup> February 2024 in Kakamega ELRC Appeal No. E007 OF 2023; the Amended Memorandum of Appeal dated 18<sup>th</sup> September 2023 and the record of Appeal dated 5<sup>th</sup> February 2024 and received on 9<sup>th</sup> February 2024 in Kakamega ELRC Appeal No. E007 of 2023, seeking the following orders respectively:-

**Appeal E007/2023**

- a. This Honourable court be pleased to set aside the ruling delivered on the 5/9/2023 and all consequential order thereto



- b. That Butali MCELRC 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 31, 32, 37, 39, 40, 41, 43, 50, 53, 54, 56, 57, 58, 59, 68, 73, 75, 78, 92, 94, 95, 96, 97, 98, 99, 100 & 102 of 2023 be set down for hearing and determination.

In the alternative

- c. The respondent do pay costs of this appeal.
- d. Such further relief as may appear just to the Honourable court.

Appeal No. 28/2023

- e. This Honourable court be pleased to set aside the ruling delivered on the 5/9/2023 and all consequential order thereto
- f. That Butali MCELRC 1, 3, 5, 6, 26, 27, 28, 33, 34, 35, 36, 42, 44, 45, 46, 47, 51, 55, 60, 61, 62, 63, 67, 71, 91, 93, & 101 of 2023 be set down for hearing and determination.

In the alternative

- g. The respondent do pay costs of this appeal.
- h. Such further relief as may appear just to the Honourable court.

2. The Appeals were both premised on the same grounds, save where stated otherwise as follows: - -

- i. The learned magistrate erred in law and fact by holding that suit was time-barred against the 1<sup>st</sup> respondent when the cause of action arose on or about May 2017 and whereby the suit was filed on the 18<sup>th</sup> February 2020 which was well within time.
- ii. The learned magistrate erred in law and in fact by issuing conclusive orders that the strike was unprotected and proceeded to dismiss the same whereas this matter had not been heard and determined.
- iii. The learned Magistrate erred in law and in fact in making a finding in favour of the 1<sup>st</sup> Respondent who had not raised a preliminary objection in this matter.
- iv. The learned magistrate erred in law and in fact in making a finding and dismissing Butali MCELRC 41/2020 Jacob W. Warunga versus Butali Sugar Mills whereby no preliminary objection was raised in the same further that the matter does not involve the 1<sup>st</sup> Respondent neither does it involve the same cause of action filed herein. – (Appeal No. E007 of 2023)
- v. That the Learned Magistrate erred in law and in fact in making a finding in favour of the 1<sup>st</sup> Respondent who had not raised a Preliminary Objection in this matter- (Appeal 28/2023).
- vi. The learned magistrate erred in law and in fact in making its decision based on an amended statement of claim dated 4/10/2023 whereby there is no such amended statement of claim on record.

3. On 22<sup>nd</sup> April 2024, the 2<sup>nd</sup> Respondent made an application to be struck off the Record of Appeal, and the Court allowed the application and struck off the 2<sup>nd</sup> Respondent from the Appeal. The Court further consolidated Appeal No. 28 of 2023 to Appeal No. E007 of 2023 and issued an Order that the judgment in this appeal to apply in Appeal No. 28 of 2023.

4. The Appeal was canvassed by way of written submissions. The Appellants' written submissions drawn by V & A Shibanda & Company Advocates were dated 4<sup>th</sup> April 2024 and received in court on 12<sup>th</sup> April



2024. The 1<sup>st</sup> Respondent's written submissions drawn by Okong'o Wandago & Company Advocates were dated 8<sup>th</sup> April 2024 and received in court on 15<sup>th</sup> April 2024.

### **Background to the appeal**

5. The lead suit Butali Cause No. 4 of 2023 between Nyongesa Joseph Wanyonyi versus Frodak Kenya Limited was dated 4<sup>th</sup> December 2019 and filed on 18<sup>th</sup> February 2020 against the 1<sup>st</sup> Respondent for unfair termination. Vide the Statement of Claim dated 4<sup>th</sup> December 2019 and filed on 18<sup>th</sup> February 2020, the Appellant/Claimant sought the following reliefs: -
  - a. One month's salary in lieu of notice
  - b. Prorate leave
  - c. Underpayment of wages
  - d. Public holidays
  - e. Overtime for extra hours worked
  - f. Rest days
  - g. 12 months compensation salary
  - h. Costs of this suit
  - i. Certificate of service
  - j. House allowance (pages 3-5 of the record is the Appellant's claim).
6. The Statement of Claim was accompanied by an unsworn Verifying affidavit and accompanied by Joseph Wanyonyi's Witness statement dated 4<sup>th</sup> December 2019, the list of documents of even date, and the bundle documents (Pages 6 to 15).
7. The 1<sup>st</sup> Respondent on 22<sup>nd</sup> June 2020 filed response to claim dated 12<sup>th</sup> March 2020(pg. 16-18 of the Record).
8. The Appellant on 13<sup>th</sup> September 2021 filed an amended statement of claim amended on 14<sup>th</sup> April 2021 which was also supported by a verifying affidavit sworn on 14<sup>th</sup> April 2021, accompanied by an amended witness statement of the Appellant of 14<sup>th</sup> April 2021, a list of documents, and the bundle of document (pg.19- 27).
9. The On 16<sup>th</sup> November 2021, the 1<sup>st</sup> Respondent filed an amended response to the claim amended on 18<sup>th</sup> October 2021 which was accompanied by the 1<sup>st</sup> Respondent's list of documents of even date, and a list of witnesses of an even date (Pg-30- 36).
10. The 2<sup>nd</sup> Respondent entered an appearance on 25<sup>th</sup> May 2022(pg. 28) and filed a reply to the statement of claim on 15<sup>th</sup> June 2022 which was dated 2<sup>nd</sup> June 2022, accompanied by a list of documents of an even date, a list of witnesses of an even date, the witness statement of Esther Boribori dated 2<sup>nd</sup> June 2022; and a bundle of documents (Pg. 37-64).
11. On 7<sup>th</sup> July 2022, the 2<sup>nd</sup> Respondent filed a Notice of Preliminary Objection dated 17<sup>th</sup> June 2022 relating to Butali MCELRC Nos. 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 31, 32, 37, 39, 40, 41, 43, 50, 53, 54, 56, 57, 58, 59, 68, 73, 75, 78, 92, 94, 95, 96, 97, 98, 99, 100 & 102 of 2023 as consolidated with MCELRC 1, 3, 5, 6, 26, 27, 28, 33, 34, 35, 36, 42, 44, 45,



46, 47, 51, 55, 60, 61, 62, 63, 67, 71, 91, 93, & 101 of 2023 appealed in Kakamega ELRC Appeal No. 28 of 2023 on the common grounds that: -

- i. This suit offends the mandatory provisions of section 90 of the *Employment Act*, chapter 226, no. 11 of 2007 Laws of Kenya. The claimant alleges that his employment was terminated in 2017 and the present suit against the 2<sup>nd</sup> Respondent has been instituted five years after the alleged act.
- ii. The suit does not disclose a cause of action or dispute against the 2<sup>nd</sup> Respondent within the meaning of the *Employment Act* to be resolved by this court thus rendering it fatally and incurably defective.
- iii. This Court lacks territorial jurisdiction to determine this suit.
- iv. The suit against the 2<sup>nd</sup> Respondent is otherwise an abuse of the court process and ought to be struck out with costs to the 2 Respondent as an illegitimate use of the court process. (Pg.65-66).
- vii. The trial court on 14<sup>th</sup> July 2023 directed that the Preliminary objection be dispensed with vide written submissions with the same directions applying correspondingly to ELRC suit Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 31, 32, 37, 39, 40, 41, 43, 50, 53, 54, 56, 57, 58, 59, 68, 73, 75, 78, 92, 94, 95, 96, 97, 98, 99, 100 & 102 of 2023(pg. 67-68) (The Record of appeal had no proceedings with these directions which were available in the original lower court file).
- viii. The parties filed submissions in the lower Court, only the 2<sup>nd</sup> Respondent's submissions were placed in the Record of Appeal (Pg. 69-73).
- ix. The trial Court (Hon. R. S. Kipngeno, PM.) delivered its ruling on the 5<sup>th</sup> of September 2023 (pages 74-76) upholding the preliminary objection and dismissing the representative suit no. ELRC Suit No. 4 of 2023 and all the other suits namely: suits Nos. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 31, 32, 37, 39, 40, 41, 43, 50, 53, 54, 56, 57, 58, 59, 68, 73, 75, 78, 92, 94, 95, 96, 97, 98, 99, 100 & 102 of 2023 with costs.

## **Determination**

### **Issues for determination.**

12. The Appellants did not submit on specific issues and conceded that their appeal was only against the 1<sup>st</sup> Respondent and submitted that the trial court erred in finding that the suits were time-barred and further erred in delving into the merits of the suits having not heard the parties on merit.
13. The 1<sup>st</sup> Respondent submitted on the ground of appeal as follows: -
  - i. Grounds 1 and 3: that the learned magistrate erred in law and in fact by dismissing suit against the 1<sup>st</sup> Respondent on the basis of the 2<sup>nd</sup> Respondent's Preliminary objection.
  - ii. Ground 2: that the learned magistrate erred in law and in fact by issuing conclusive orders that the strike was unprotected before the matter had been heard and determined.
  - iii. Ground 4: that the learned magistrate erred in law and in fact in making a finding and dismissing Butali MCELRC 41 /2020; Jacob Warunga v Butali Sugar where no objection was raised in the same further that the matter did not involve the 1<sup>st</sup> Respondent neither did it involve the cause of action filed herein.



- iv. Ground 5. That the learned magistrate erred in law and in fact in making its decision based on an amended statement of claim dated 4/10/2-023 whereby there is no such amended statement of claim on record.
14. The Court sitting on appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1948) EA123.
15. The court guided by *Selle's* decision as above, finds the issues for determination in the appeal are as follows: -
- a. Whether the learned magistrate erred in law and in fact by dismissing the suit against the 1<sup>st</sup> Respondent based on the 2<sup>nd</sup> Respondent's Preliminary objection of a claim being time-barred.
  - b. Whether the learned magistrate erred in law and in fact by issuing conclusive orders that the strike was unprotected before the matter had been heard and determined.
  - c. Whether the learned magistrate erred in law and in fact in making a finding and dismissing *Butali MCELRC 41 /2020; Jacob Warunga v Butali Sugar* where no objection was raised in the same further that the matter did not involve the 1<sup>st</sup> Respondent neither did it involve the cause of action filed herein.
  - d. Whether the learned magistrate erred in law and in fact in making its decision based on an amended statement of claim dated 4/10/2023 whereby there is no such amended statement of claim on record.

**Whether the learned magistrate erred in law and in fact by dismissing the suit against the 1<sup>st</sup> Respondent based on the 2<sup>nd</sup> Respondent's Preliminary objection of a claim being time-barred.**

16. The Appellant submits that the cause of action arose in May 2017 and the suit was filed on 18<sup>th</sup> February 2020 hence not time barred. The court notes that there is no appeal against the decision of the trial court as concerns the 2<sup>nd</sup> Respondent. In paragraph 6 of the Ruling (75) the court upheld the Preliminary Objection as cause of action arose in 2017 and an amended suit was filed against the 2<sup>nd</sup> Respondent was filed on 18<sup>th</sup> February 2022.
17. I agreed with the 1<sup>st</sup> Respondent's submissions that the ruling only held the amended claim as against the 2<sup>nd</sup> Respondent to be statutory time barred and not claim against the 1<sup>st</sup> Respondent hence this ground of the appeal was misguided.
18. The court upholds the trial court holding on the amended claim against the 2<sup>nd</sup> Respondent being statutory time-barred.

**Whether the learned magistrate erred in law and in fact by issuing conclusive orders that the strike was unprotected before the matter had been heard and determined.**

19. The preliminary objection was by the 2<sup>nd</sup> Respondent. The court found that there was no issue in the preliminary objection of whether or not the strike was protected.
20. The 1<sup>st</sup> Respondent submitted that in its submission before the trial court under the preliminary objection, they brought to the attention of the trial court the existence of the judgment of Justice Abuodha in *Eldoret 38/2018 ELRC Peter Nyongesa Mulundu v Frodak Kenya Limited* where the



court held that the strike by the 1<sup>st</sup> Respondent's employees on the 2<sup>nd</sup> May 2017 was unprotected and unlawful and such all actions by the 1st Respondent culminating in termination of the various contracts of employment was unjustified in law. That jurisdiction reveres judicial hierarchy and in extension the principle of stare decisis which requires lower courts to follow superior courts decisions.

21. The Appellant submits that the trial court should have heard their suit first before deciding the same with finality on a preliminary objection.
22. The trial court in paragraph 7 applying the decision in Eldoret 38/2018 ELRC Peter Nyongesa Mulundu v Frodak Kenya Limited(supra) held that the claimant's case was on the same cause of action of the strike declared unprotected and stated that applying the principle of state decisis the issue in the suits had been settled by a superior court which bound the trial court. The learned magistrate then held that the case flowing from the unprotected strike amounted to an abuse of court process as held by Justice Abuodha and proceeded to dismiss the suit and ordered the decision to apply in several suits as stated on page 76 of the Record of Appeal.
23. On 7<sup>th</sup> July 2022, the 2<sup>nd</sup> Respondent filed a Notice of Preliminary Objection dated 17<sup>th</sup> June 2022 relating to Butali MCELRC Nos. 4, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 29, 31, 32, 37, 39, 40, 41, 43, 50, 53, 54, 56, 57, 58, 59, 68, 73, 75, 78, 92, 94, 95, 96, 97, 98, 99, 100 & 102 of 2023 & MCELRC 1, 3, 5, 6, 26, 27, 28, 33, 34, 35, 36, 42, 44, 45, 46, 47, 51, 55, 60, 61, 62, 63, 67, 71, 91, 93, & 101 of 2023 on the common grounds that: -
  - v. This suit offends the mandatory provisions of section 90 of the *Employment Act*, chapter 226, no. 11 of 2007 Laws of Kenya. The claimant alleges that his employment was terminated in 2017 and the present suit against the 2<sup>nd</sup> Respondent has been instituted five years after the alleged act.
  - vi. The suit does not disclose a cause of action or dispute against the 2<sup>nd</sup> Respondent within the meaning of the *Employment Act* to be resolved by this court thus rendering it fatally and incurably defective.
  - vii. This Court lacks territorial jurisdiction to determine this suit.
  - viii. The suit against the 2<sup>nd</sup> Respondent is otherwise an abuse of the court process and ought to be struck out with costs to the 2 Respondent as an illegitimate use of the court process. (Pg.65-66).
24. The ruling by the Learned Magistrate dated 5<sup>th</sup> September 2023 decided the issue of the unprotected strike which was not pleaded in the preliminary objection by the 2<sup>nd</sup> Respondent. The trial court had no basis to make such a finding as submissions are not pleadings as held by the Court of Appeal in Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others (2014) e KLR as follows: - "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ..... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. it is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves or at any rate one of them might well feel aggrieved; for a decision given on claim or defence- not made or raised by or against a party is equivalent to not hearing him at all and thus be denial of Justice....."



25. Consequently, the appeal is allowed against the finding by the Trial Court that the suit was an abuse of the court process and the dismissal of the suit as the decision was not based on the preliminary objection.

**Whether the learned magistrate erred in law and in fact in making a finding and dismissing Butali MCELRC 41 /2020; Jacob Warunga v Butali Sugar where no objection was raised in the same further that the matter did not involve the 1<sup>st</sup> Respondent neither did it involve the cause of action filed herein.**

26. The court finds that there was no mention of Butali MC ELRC 41 OF 2020 in the ruling (page 76)and hence that this ground of appeal was mistaken.

**Whether the learned magistrate erred in law and in fact in making its decision based on an amended statement of claim dated 4/10/2023 whereby there is no such amended statement of claim on record.**

27. On this issue, the court holds that the error on dates may have been a typing error taking into account the decision as reflected in paragraph 6 of the ruling. There was no dispute that there was an amended claim filed before the trial court introducing the 2<sup>nd</sup> Respondent. The issue was the claim was statutorily time-barred and the documents before the court demonstrated that. An error in dates could easily have been corrected by the court suo moto or by application for review if the Appellant was aggrieved. The court does not find it a weighty issue for determination on appeal.

### **Conclusion**

28. In the upshot, the Appeal is allowed on the ground that the trial court erred by dismissing the suit against the 1<sup>st</sup> Respondent based on the fact of the cause of action having been held as an unprotected strike by a superior court in another suit against the 1<sup>st</sup> Respondent when the issue was not pleaded by the 2<sup>nd</sup> Respondent in the preliminary objection, the subject of the ruling.

### **Disposition**

29. The appeal is allowed as against the 1<sup>st</sup> Respondent. The ruling of the Hon. R.S. Kipngeno dated 5<sup>th</sup> September 2023 in Butali ELRC Suit No. 4 of 2023 between Nyongesa Joseph Wanyonyi & 48 others vs Frodak services Limited & Butali Sugar Mills is set aside and substituted with Order that the Notice of Preliminary Objection by the 2<sup>nd</sup> Respondent dated 17<sup>th</sup> June 2022 is allowed and the amended statement of claim dated 14<sup>th</sup> April 2021 is dismissed as against the 2<sup>nd</sup> Respondent for being statutory time-barred according to section 90 of the *Employment Act*. The Order to apply Butali ELR Civil Suit Nos. 8,9,10,11,12,13,14,15,16,17,18,19,20,21,22,23,24,25,26,29,31,32,37,39,40,41,43,50,53,54,56,57,58,59,68,73,75,78,9 all of 2023.
30. This judgment is ordered to apply in the determination of ELRC Appeal NO. 28 of 2023 Alex Ajenga and 27 others v Frodak Services Limited and Anor.
31. The suits are remitted to the trial court for a determination on merit against the 1<sup>st</sup> Respondent.
32. Considering the appeal was partially successful I order each party to bear their costs in the appeals.
33. It is so Ordered.



**DATED, SIGNED, AND DELIVERED ON THE 13<sup>TH</sup> DAY OF JUNE 2024 IN OPEN COURT AT  
KAKAMEGA**

**J.W. KELI**

**JUDGE**

**In the presence of**

C/A Lucy Macheso

For Appellant: Shibanda

For 1<sup>st</sup> Respondent: Twena

