



Radar Security Limited v Obiele (Employment and Labour Relations Appeal E189 of 2022) [2024] KEELRC 2551 (KLR) (18 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2551 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E189 OF 2022**

**SC RUTTO, J
OCTOBER 18, 2024**

BETWEEN

RADAR SECURITY LIMITED APPELLANT

AND

KENNEDY KHATETE OBIELE RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrates Court sitting at Milimani Commercial Courts (Senior Resident Magistrates) Hon. S.N Muchungi (Mrs) delivered on 9th September 2022 in Employment MCELRC 130 of 2018)

JUDGMENT

1. The Respondent commenced a suit by way of a Statement of Claim at the Chief Magistrate's Court at Milimani being MCELRC No. 130 of 2018. Through the Statement of Claim, the Respondent averred that he was employed by the Respondent as a day /night security guard at a monthly salary of Kshs 507/= per day monthly. According to the Respondent, he was underpaid by Kshs 16/60 per day for 24 months. That from 1st May 2015 to 31st May 2016, he was underpaid for 13 months to the tune of Kshs 24,772.80.
2. The Respondent further averred that from 1st July 2016 to 31st December 2017, he was promoted as supervisor to be in charge of other security guards at a salary of Kshs 507/= per day. To this end, he contended that he was underpaid for six months to the tune of Kshs 70,992/=.
3. The Respondent further averred that the Appellant failed and refused to pay him for untaken weekly rest days, public holidays, annual leave and overtime worked. That further, when he resigned on 12th January 2017, he was not paid wages for 12 days worked.



4. Consequently, the Respondent sought against the Appellant the sum of Kshs 1,128,030.26 being underpaid salary, unpaid weekly resting days, unpaid public holidays, unpaid annual leave, unpaid overtime worked and unpaid salary for 12 days worked in January 2017.
5. The Appellant opposed the Statement of Claim by filing a Statement of Defence dated 28th February 2019. The Appellant averred that the Respondent signed a contract in which he agreed to be paid Kshs 12,246/= until review of his salary and that as of 31st May 2016, his salary had not been reviewed. Further, the Appellant denied the Respondent's claim of underpayment.
6. It was the Appellant's contention that the Respondent was paid all his dues as and when they fell due. According to the Appellant, the Claim for compensation had no basis in law. Consequently, the Appellant urged the trial Court to dismiss the Claim with costs.
7. Upon considering the totality of the evidence on record, the learned trial Magistrate delivered Judgment in favour of the Respondent upon finding that his evidence was not controverted as the Appellant had failed to call any witness. In the end, the trial Court awarded the Respondent the sum of Kshs 712,966.20 together with costs plus interest at court rates.
8. Being aggrieved by the Judgment of the trial Court, the Appellant lodged the instant Appeal in which it raises four grounds impugning the decision of the trial court.
9. Ideally, I would have enumerated the grounds upon which the Appeal is premised and proceeded to consider the Appeal on its merits taking into account the evidence on record and the written submissions by both parties.
10. Nonetheless, I find it imperative to consider at the outset, whether there is a competent Appeal before me and whether this court can invoke its appellate jurisdiction and proceed to determine the Appeal on its merits.
11. On this score, I will follow the finding of the Court (Ngaah J) in the case of Lawrence Nguthiru Riccardahw v George Ndirangu [2015] eKLR, that whenever the court is called upon to consider an appeal from a decision of the subordinate court, it only does so in exercise of its appellate jurisdiction and hence it cannot assume such jurisdiction and determine an appeal on its merits if such an appeal does not exist in the first place. In this regard, the learned Judge reckoned that as long as there is a lingering question of whether an appeal exists or not and thus whether the appellate jurisdiction of this court has been properly invoked, that question must be determined in limine.
12. In the instant case, I have gone through the Record of Appeal back to back and noted that the Appellant omitted to file the decree appealed from as it does not constitute part of the record herein. Further to that, it is apparent that the Appellant filed the Memorandum of Appeal herein outside the timelines stipulated under Section 79G of the *Civil Procedure Act*.
13. I entirely concur with the thinking of the Court in the case of Lawrence Nguthiru Riccardahw v George Ndirangu [supra] that a decree or order appealed from is a pertinent and an inextricable part of an appeal filed in the High Court against a decision from the subordinate court; without the decree or order appealed from there is, in effect, no appeal.
14. Indeed, Order 42 Rule 13(4) of the Rules is categorical that the Record of Appeal will not be complete without the decree or order appealed from. It is couched as follows: -

Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:



- a. the memorandum of appeal;
 - b. the pleadings;
 - c. the notes of the trial magistrate made at the hearing;
 - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:...
15. The import of the foregoing provision is that an order or decree appealed from constitutes part of the primary and mandatory documents that must be filed as part of the Record of Appeal.
16. Further and as stated herein, the Appellant did not file the Memorandum of Appeal within 30 days from the date of Judgment. This dealt another fatal blow to the Appeal. Section 79G of the [Civil Procedure Act](#) which is the operative part in this case provides as follows:
- Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
- Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.
17. In this case, the Appellant filed the Memorandum of Appeal on 2nd November 2022 whereas the impugned Judgment was delivered on 9th September 2022. By simple arithmetic, this was beyond the 30 days period stipulated under Section 79G of the [Civil Procedure Act](#).
18. When faced with a similar scenario in the case of Gregory Kiema Kyuma v Marietta Syokau Kiema [1988] eKLR, the Court of Appeal held as follows:
- “The upshot of this, was that the appellant did not file a memorandum of appeal from the order appealed from within thirty days and had no valid certificate of delay within the true contemplation of section 79G. So he cannot appeal as of right, not having complied with the strict requirement of section 79G. He could only set on foot a competent appeal by the grace of the Court if the Court in exercise of its discretion, under the provision granted him extension of time.”
19. It is worth pointing out that the Appellant did not file an Application to have the instant Appeal admitted out of time. This is quite baffling noting that Section 79G provides a window for extension of time to file the appeal if the decree or order appealed against could not, for one reason or another, be secured within the period which an appeal ought to be filed.
20. On this issue, I entirely agree with the position taken by the Court in the case of Gregory Kiema Kyuma v Marietta Syokau Kiema [supra], that the only permissible method by which the appeal could be prosecuted, was by extension of time allowed by the Court.



21. In the circumstances, I cannot help but find that the Appeal herein as filed, is fatally incompetent in that the Appellant failed to file the decree appealed against as part of the Record of Appeal and to top it off, filed the Memorandum of Appeal outside the 30 days stipulated under Section 79G of the Civil Procedure Act. As such, the Court has no jurisdiction to determine the Appeal on its merits.

22. Accordingly, the instant Appeal is hereby struck out with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF OCTOBER, 2024.

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STELLA RUTTO
JUDGE

In the presence of:

For the Appellant Mr. Wakasa Were instructed by Mr. Wachakana

For the Respondent Mr. Mwangi

Court Assistant Millicent Kibet

Order

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO
JUDGE

