



**Kiprono v Mogogosiek Tea Factory (Appeal E003 of 2022)
[2024] KEELRC 2857 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2857 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
APPEAL E003 OF 2022
DN NDERITU, J
NOVEMBER 7, 2024**

BETWEEN

BETT GOEFFREY KIPRONO APPELLANT

AND

MOGOGOSIEK TEA FACTORY RESPONDENT

((Being an appeal from the RULING of the Chief Magistrate (Hon. Mr. S. M. Mokua) delivered on 15th June, 2020 in Kericho CMCC (ELRC) No. 22 of 2020))

JUDGMENT

I. Introduction

1. The Appellant herein was the claimant in the lower court in Kericho CMCC (ELRC) No. 22 of 2020, filed through P. Sang & Co. Advocates, wherein he prayed for the following –
 - a. An award of Kshs1,301,975.50
 - b. General damages for violation of the claimant’s constitutional rights
 - c. Interest at court rates.
 - d. Certificate of Service.
 - e. Reinstatement to his former job at respondent’s company
 - f. Cost of this suit.
2. The respondent defended the cause in the lower court and on 8th June, 2021, counsel for both parties recorded the following consent – “The matter herein be canvassed by way of written submissions. The



documents filed herein be admitted in evidence. The Respondent be allowed to file statements herein. The parties to file written submissions within 14 days from the date herein.”

3. In a ruling delivered on 16th December, 2021 the learned trial magistrate struck out the claim on the basis that no evidence had been adduced by the claimant in support of the claim.
4. The appellant was dissatisfied with the said ruling and has filed this appeal in the hope of overturning the same based on the following grounds as contained in a memorandum of appeal dated 27th June, 2022 –
 1. That the learned trial magistrate erred in law and in fact in failing to fully analyze and evaluate the evidence on record thus reaching the wrong decision.
 2. That the learned trial magistrate erred in law in failing to find that there was a serious error apparent on the face of the record which error goes to the substratum of the suit thus causing a miscarriage of justice.
 3. That the learned trial magistrate erred in law and in fact in failing to find that there was an error apparent on the face of the record as the parties had entered into a consent to have a claim determined by way of written submissions.
 4. That the learned magistrate erred in law and in fact in failing to consider the submissions of the appellant’s counsel together with the case law in support.
 5. That the learned magistrate erred in fact and in law in failing to appreciate that the application dated 19th January 2022 was unopposed by the respondent.
 6. That the learned trial magistrate erred in law and in fact in basing the ruling on faulty appreciation of the law.
 7. That the learned trial magistrate erred in law and in fact and misdirected himself in failing to make a finding in favor of the claimant/applicant.
 8. That the learned trial magistrate erred by failing to appreciate that the claimant had proved his case on a balance of probabilities which was uncontroverted by the respondent.
 9. That the decision of the leaned trial magistrate as a whole as contained in the ruling dated 15th June 2022 is legally untenable, against the weight of evidence and ought to be set aside.
5. The appellant is seeking the following orders – see
 - a. The ruling by Hon. E. K. Makori, Chief Magistrate, in Kericho Chief Magistrate’s Court ELRC cause No., 8 of 2020 dated 15th June 2021 be set aside and or reviewed accordingly as the honourable court may deem fit.
 - b. The costs of this appeal be provided for.
6. The respondent did not respond to the appeal and did not appear for hearing although properly served.
7. When the appeal came up in court for directions on 10th July, 2024 it was directed that the appeal be canvassed by way of written submissions. Counsel for the appellant, Mr. Mugumya, relied on his submissions already filed in February, 2023 while counsel for the respondent did not file any submissions.



II. Submissions by Counsel

8. After laying the background of the appeal, counsel for the appellant condensed the grounds of appeal into four issues for determination by this court – Whether there was a consent order to dispose the matter by way of written submissions; Whether the trial magistrate erred in law and fact in failing to consider the consent entered into by parties to have the matter disposed of by way of written submissions and for failing to consider the submissions; Whether the trial learned magistrate erred in law and fact in dismissing the claim yet no sufficient evidence was fronted by the respondent; and, Who should bear the costs of the appeal?
9. On the first issue it is submitted that the parties, through their respective counsel, entered the consent as reproduced in the introductory part of this judgment and that indeed the said consent was adopted by the learned trial magistrate as an order of the court. It is submitted that neither party is contesting that fact.
10. On the second issue it is submitted that the learned trial magistrate erred in fact by holding that the consent was not binding and that the evidence by the claimant in form of witness statement and the documentary exhibits had not been properly presented and adduced before the court. It is submitted that the consent was neither set aside nor amended and as such it is binding.
11. It is submitted that the ruling by the trial court violated the appellant’s right to fair hearing under Article 50(1) of *the Constitution*. It is further submitted that disposal of a cause by way of written submissions is provided for under Rule 25(2) of the Employment and Labour Relations Court (Procedure) Rules – 2016.
12. In support of the argument that a court can dispose a cause by way of written submissions counsel has cited Kenya Power & Lighting Company Limited V Kenya Electrical Traders & Allied Workers Union (2017) eKLR and Dominic Ndegwa Kiere V Mercy Muthoni Ndung’u & Another (2016) eKLR.
13. Further, it is submitted that the impugned ruling was draconian and in effect denied the appellant the constitutional and statutory right to be heard. It is submitted that the consent entered by counsel for both parties is binding unless set aside by consent or on the same legal basis as a contract.
14. On the third issue it is submitted that trial court failed to consider the evidence availed by the appellant on merit and as such dismissed the claim without giving him a hearing.
15. On the fourth issue the appellant prays for costs of the appeal against the respondent who is opposed to the appeal.
16. There were no submissions on record from the respondent’s counsel.

III. Issues for Determination

17. This court has carefully gone through the entire record of appeal and more particularly the memorandum of appeal, the impugned ruling of the lower trial court, and the proceedings in the trial court, and the respective written submissions by counsel for the appellant. In my understanding of all the foregoing, the appellant is complaining that the learned trial magistrate failed, refused, and or neglected to abide by a duly adopted consent and as such arrived at the wrong conclusion in the matter. The issue, therefore, is not whether a valid consent was entered and adopted by the court but what the said consent entailed and whether the court in its ruling of 15th October, 2021 properly took into consideration the contents of the said consent, and whether, therefore, the trial court arrived at the right or wrong decision.



18. Therefore, the issues that commend themselves to this court for determination are –
- a. What were the terms of the impugned consent between the parties as adopted by the court?
 - b. Did the court negate the terms of the said consent in its ruling of 15th October, 2021?
 - c. Did the court arrive at the wrong decision in the said ruling?
 - d. What are the appropriate orders for this court to make?
 - e. Costs.
19. There is no contention that a mutual consent was recorded by counsel for both parties on 8th June, 2021, in the following terms –
- 8/6/21
- Before Hon. S. K. Ngetich – DR
- Court Assistant – Elvis
- Ms. Ngetich for Ms. S. Ngetich for respondent
- Mr. Mugumya for claimant
- Mr. Mugumya – By consent the matter herein be canvassed by way of written submissions. The documents filed herein be admitted in evidence. The respondent be allowed to file statement herein. The parties to file written submissions within 14 days from the date herein.
- Mention on 29/06/21.
- Ms. Ngetich – I confirm the above.
- Court -The consent be adopted as an order of the court. Mention 29/6/21
- SIGNED
- S.K. NGETICH, DR
- 8/6/2021
20. The above terms of the consent are in my view clear and unambiguous. What the parties intended to have, and the court agreed and adopted the said consent, is for the court to rely on the documents and statements placed on record, consider and evaluate them, and determine the cause based on the same. The court readily and without hesitation adopted the said consent and thereafter written submissions were filed before the court retired to write a judgment.
21. In a strange turn of events, and this is the gist of the appeal, the learned trial magistrate delivered a ruling on 16th December, 2021, whereby the cause was struck out on the following basis –
4. The parties allegedly recorded and filed their statements, which formed the basis of the respective cases. I note that the said statements were not introduced by the respective witnesses and thereafter adopted as evidence.
 5. Following the foregoing, the submissions herein cannot be deemed to be evidence. Ordinarily, cases are premised on the evidence adduced by the parties. In the claim herein, there is a serious omission on the part of the parties. I am guided by Article 10 of *the Constitution* of Kenya, 2010 which envisages on how the courts should interpret the Law. Without proper basis being in place, justice may not be served.



6. Further, what the parties disregarded is not a technicality which can be wished away. Accordingly, I strike out the claim herein with no order as to costs.
22. It is that ruling, striking out the cause, that is now challenged in this appeal.

IV. Determination

23. The fact of the matter, as can be deciphered from the consent as reproduced above, is that the parties through their respective duly instructed counsel consented to have the court determine the cause based on the materials placed before the court. Those materials included the pleadings, witness statements, and documents. And the court readily accepted and adopted that consent. It is amazing that the trial magistrate turned around in the ruling to state that the said materials had not been properly presented to the court.
24. In my understanding and this is the law, the trial court in allowing and adopting the said consent was operating under the provisions of Order 11 of the Civil Procedure Rules.
25. In the impugned ruling the trial magistrate did not cite any law, except for the general mention of Article 10 of *the Constitution*, or any authorities that may have rendered the said consent illegal or unlawful. In any event, as a court of justice, if the learned trial magistrate had formed the opinion that the recorded consent was unlawful and or not helpful in arriving at a just and fair conclusion of the cause, he ought to have summoned the parties through their counsel to accordingly set aside the consent or amend the same accordingly.
26. Sections 1A, 1B, and 3A of the *Civil Procedure Act* and Articles 2(1), 50(1), 159, & 259(1) of *the Constitution* call upon courts of law to do justice to all and sundry that come before them. It is also the duty of a court of law to guide and lead parties and even counsel towards a fair and just resolution of a cause. Striking out a cause or a pleading is a most draconian approach and may only be applied in causes wherein a litigant has abused and violated the law rendering the cause irredeemable. The course of justice and the jurisprudence in Kenya has moved beyond mere technicalities to substance and fairness.
27. A consent was lawfully and properly entered by counsel on behalf of the parties. The said consent has neither been set aside nor challenged. If the learned trial court really desired to do justice and be fair to the litigants, it ought to have summoned them and informed them that the consent as adopted did not aid the course of justice. By doing so, the parties through their respective counsel could have had the opportunity to either amend, withdraw, or set aside the said consent.
28. In view of all the above, it is in my considered view that the learned trial magistrate misdirected himself, disregarded the primary duty of a court of law to do justice and be fair, and as such arrived at the wrong conclusion in the impugned ruling. Obviously, the parties, and more so the appellant, did not get justice and fairness in the court.
29. Effectively, therefore, the appellant was not heard on merits contrary to the constitutional and statutory dictates that litigants shall be accorded a fair and just hearing as per the provisions cited above. It is therefore demanded of this court to intervene and order that a proper trial be conducted before another judicial officer other than Hon. S. M. Mokuu (CM).
30. While it is true that submissions are not evidence, it is unambiguous and evident that the intention of the consent, for all intents and purposes, was to have the cause determined on the basis of all the materials placed before the court as stated in an earlier part of this judgment.
31. The foregoing paragraphs answer to all the four issues stated above for determination by this court.



V. Costs

32. The appeal is hereby upheld for the foregoing reasons. However, it is not for the failure or fault on the part of either party that this appeal had to be filed. As stated above, the trial court misdirected itself and arrived at the wrong decision and orders in the impugned ruling.

VI. ORDERS

33. The court issues orders that –

- a. The ruling of the lower trial court (Hon. Mokuia) dated 16th December, 2021 be and is hereby set aside.
- b. The cause, being Kericho CMCC (ELRC) No. 22 of 2020, shall proceed for hearing and disposal before another judicial officer, other than S. M. Mokuia (CM).
- c. There is no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 7TH DAY OF NOVEMBER, 2024.

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DAVID NDERITU

JUDGE

