



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rotich v Mogogosiek Tea Factory (Appeal E004 of 2022)  
[2024] KEELRC 2867 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2867 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO  
APPEAL E004 OF 2022  
DN NDERITU, J  
NOVEMBER 7, 2024**

**BETWEEN**

**DAVID KIPLANGAT ROTICH ..... APPELLANT**

**AND**

**MOGOGOSIEK TEA FACTORY ..... RESPONDENT**

*((Being an appeal from the RULING of the Chief Magistrate (Hon. E. K. MAKORI)  
delivered on 15<sup>th</sup> June, 2022, in Kericho CMCC (ELRC) No. 8 of 2020))*

**JUDGMENT**

**I. Introduction**

1. The Appellant herein was the claimant in the lower court in Kericho CMCC (ELRC) No. 8 of 2020, filed through P. Sang & Co. Advocates, wherein he prayed for the following –
  - a. An award of Kshs1,306,610.9/=
  - b. General damages for violation of the claimant’s constitutional rights.
  - c. Interest at court rates.
  - d. Certificate of Service.
  - e. Reinstatement of his former job at the Respondent’s Company.
  - f. Cost of this suit.
2. The respondent defended the cause in the lower court.



3. In a ruling delivered on 16<sup>th</sup> 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 an amended memorandum of appeal dated 4<sup>th</sup> July, 2024 –
  1. That the learned trial magistrate erred in law and in fact in failing to fully analyze and evaluate appellant's the evidence on record thus reaching the wrong decision.
  2. That the learned trial magistrate erred in law and in fact by 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 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 the claim determined by way of written submissions.
  4. That the learned trial magistrate erred in fact and law in failing to consider the submissions of the Appellant's counsel together with the case law in support.
  5. That the learned trial magistrate erred in fact and in law in failing to appreciate that the application dated 19<sup>th</sup> January, 2022 was unopposed by the respondent.
  6. That the learned trial magistrate erred in law and in fact in basing the ruling faulty appreciation of the law.
  7. That the learned trial magistrate erred in law and fact and misdirected himself in failing to make a finding in favour 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 learned trial magistrate as a whole as contained in the ruling dated 15<sup>th</sup> June, 2021 is legally untenable, against the weight of evidence and ought to be set aside.
5. On 20<sup>th</sup> March, 2024 this court issued the following directions –

Directions

  1. When the court retreated to write a judgment in this appeal, I made the observations –
    - i. The memorandum of appeal dated 27<sup>th</sup> June, 2022 purports to challenge two rulings, one by Hon. E. K. Makori (CM) purportedly delivered on 15<sup>th</sup> June, 2022 and a second one by Hon. S. M. Mokua (CM) purportedly delivered on even date.
    - ii. The prayer in the memorandum of appeal is for settling aside of the ruling by HON. E. K. Makori (CM).
    - iii. The submissions by counsel for the appellant relate to the ruling by Hon. S. M. Mokua (C.M), while the submissions by counsel for the respondent are in regard to both the ruling by Hon. E. K. Makori (CM) and Hon. S. M. Mokua (CM).
  2. The foregoing mistakes and or anomalies are not attributable to the appellant but to his counsel.



3. While the court has the option of taking the draconian step of striking out the appeal for being incompetent, in the interest of justice and fairness the appellant is granted leave to amend the memorandum of appeal and file a supplementary record of appeal.
4. The court issues the following directions –
  - i. The appellant shall file and serve an amended memorandum of appeal and supplementary record of appeal within 30 days hereof.
  - ii. Mention on 11<sup>th</sup> June, 2024 for further orders and or directions.

Delivered Virtually, Dated, And Signed At Nakuru This 20<sup>th</sup> Day Of March 2024

David Nderitu

Judge

6. The above directions were given after the court noted that there was a serious mix-up as to which ruling was appealed whether that of Hon. Makori dated 15<sup>th</sup> June, 2022 or that of Hon. S. M. Mokuia dated 16<sup>th</sup> December, 2021. The court desisted from making the draconian step of striking out the appeal and advised in the above directions that a proper appeal be filed by way of the appellant amending the memorandum of appeal.
7. However, the appellant did not take the above directions seriously. From the record, the ruling by Hon. Makori read as follows –

Republic Of Kenya

In The Chief Magistrate’s Court At Kericho

Elrc No. 22 Of 2020 Bett Geoffrey Kiprono ..... Claimant

-versus-

Mogogosiek Tea Factory..... Respondent

RuliNG

1. The trial court – Mokuia CM on 16<sup>th</sup> Dec. 2021 via a ruling read by Ngetich PM struck out the claim herein on grounds that the parties consented to proceed on filled statements and failed to have the makers testify for the statements to have probative value.
2. This has been challenged as being draconian and depriving the parties a chance at the judgment seat.
3. Whether review can issue at this point is the question to ponder and if so under what terms.
4. Rules 25(2) and 27(1) of the Employment and Labour Relations Court (Procedures) Rules, 2016 allows parties to consent to adopt statements and file submissions without parties testifying orally his has been reiterated in various decisions of the ELCR decisions. This also sits well with Art. 159 of *the Constitution* which guarantees parties to be heard without undue regard to procedures. Active case management also proposes matters to be handled in an expeditious manner including adoption of statements.
5. In this matter it was the strong view of the magistrate that witnesses had to be called to adopt their statements. It’s the basis of this final ruling. He was aware of the consents by the parties



and considered the same in reaching his verdict. He could be wrong. That calls for an appeal not revision. If I revise him, I will be directly sitting as a superior court and I may also fall in error.

6. My view will then be that the current application is an appeal through the back door. An appeal be preferred. It will be the remedy and not review. The review application is denied with no order as to costs.
7. The orders herein bind ELRC No. 8 of 2020.

E. K. Makori

Chief Magistrate

15/6/2022

COURT: Ruling delivered virtually this 15<sup>th</sup> June 2020, by me E. K. Makori CM in the presence of M/s Njehu holding brief for Mugumya for the claimant, M/s Mitey/M/s Chausiku for the Respondent, Court Assistant, Langat present.

E. K. MAKORI

CHIEF MAGISTRATE

15/6/2022

8. What Hon. Makori advised the appellant to do, and rightly so, is to appeal the ruling of Hon. Mokuu, the trial magistrate, as Hon. Makori had no powers to sit on appeal on the ruling by his equal.
9. Surprisingly, and annoyingly so, the appellant in the header indicates that he is now appealing against the ruling by Hon. Makori which to me has nothing to be appealed. Infact, in the amended memorandum of appeal the appellant is seeking that –
  - a. The ruling by Hon. E. K. Makori, Chief Magistrate, in Kericho Chief Magistrate’s Court Elrc cause No. 8 of 2020 dated 15<sup>th</sup> June 2022 be set aside and or reviewed accordingly as the honourable court may deem fit.
  - b. The costs of this appeal be provided for.
10. The appeal is opposed by the respondent.
11. On 10<sup>th</sup> July 2024 the court directed that the appeal be canvassed by way of written submissions. Counsel for the appellant, Mr. Mugumya, informed the court that he wanted to rely on his submissions filed earlier on 6<sup>th</sup> February, 2023 and counsel for the respondent had filed submissions on 20<sup>th</sup> March, 2023.

## II. Submissions by counsel

12. On the one hand, 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 sufficient evidence was fronted by the respondent; and, Who should bear the costs of the appeal.
13. On the first issue it is submitted that the parties, through their respective counsel, entered the consent as reproduced in the introduction 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.
14. On the second issue it is submitted that the learned trial magistrate erred in effect 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.
  15. 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.
  16. 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.
  17. 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.
  18. 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 her a hearing.
  19. On the fourth issue the appellant prays for costs of the appeal against the respondent who is opposed to the appeal.
  20. On the other hand, counsel for the respondent, after laying the background to the appeal, submits that no evidence was presented before the trial court by the appellant and as such the trial court was right in striking out the claim for lack of supporting evidence.
  21. It is submitted that the consent as recorded did not incorporate admission of the documents as evidence other than that the cause was to be disposed of by way of written submissions.
  22. It is submitted that the statement by the claimant was not adopted as evidence and the documents did not become evidence by the mere fact of their filing. It is submitted that the respondent did not consent to production and admission of the same in evidence and the same carried no evidential value. It is submitted that the submissions filed by counsel for both parties did not occupy or take the place of evidence.
  23. It is submitted that the appellant opted for a short-cut or summary trial that landed her in a ditch for which neither the trial court nor the respondent should be blamed. It is urged that the appeal be dismissed with costs.

### **III. Issues for determination**

24. 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 both parties. 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 15<sup>th</sup> 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.

25. 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 15<sup>th</sup> 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.
24. I have gone through the typed proceedings in the lower trial court and the hand-written notes and I have not seen a consent that was recorded as alleged by both counsel. If there was such a consent it must have been done outside the record contained in the record of appeal and the court cannot speculate on the same. So, in answer to the first issue there is no consent on record.
25. The above finding and holding also answers to issues (b) and (c) above. On issue (c) the court holds that Hon. Makori arrived at the right decision in his ruling of 15<sup>th</sup> June, 2022 in that he could not sit on appeal against the order of Hon. Mokuu.
26. While the appeal is indicated to be against the ruling of 15<sup>th</sup> June 2022 by Hon. Makori, the submissions and the grounds in the amended memorandum of appeal points towards an appeal against the ruling of Hon. Mokuu delivered on 16<sup>th</sup> December, 2021. The submissions by counsel are in regard to the ruling by Hon. Mokuu yet the orders sought are against the ruling by Hon. Makori.
27. It is due to the foregoing confusion that the court gave the appellant a second chance by way of the directions issued on 20<sup>th</sup> March, 2024. However, the appellant did not heed to the directions leading to the absurdity cited above.
28. The court is at pains in trying to understand why the appellant and his counsel cannot follow those simple directions. Having squandered this second chance, the court has no alternative other than striking out the appeal which I hereby do for being incompetent.

#### **IV. Orders**

24. The appeal is hereby struck out for being incompetent with no orders as to costs.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024.**

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**DAVID NDERITU**

**JUDGE**

