



REPUBLIC OF KENYA



**Valmerdan Enterprise v Kiriago & another (Appeal E045 of 2024)
[2024] KEELRC 13481 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13481 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E045 OF 2024
M MBARŪ, J
DECEMBER 18, 2024**

BETWEEN

VALMERDAN ENTERPRISE APPELLANT

AND

HASSAN MARUBE KIRIAGO 1ST RESPONDENT

TOTAL ENERGIES 2ND RESPONDENT

*(Being an appeal from the judgment of DO Mbeja in Mombasa
CMELRC No.E521 of 2022 delivered on 16 November 2023)*

JUDGMENT

1. The appeal arises from the judgment delivered on 16 November 2023 in Mombasa CMELRC No.E521 of 2022. The appellant is seeking that the judgment be set aside and the case dismissed with costs. In the alternative, the appellant is seeking an order for the trial court to conduct a fresh trial de novo, with all parties allocated 14 days to file relevant documents before re-trial.
2. The appeal is on the following grounds;
 1. The learned magistrate erred in law and fact in entering judgment for the 1st respondent against the appellant without any justification.
 2. The learned magistrate erred in law and fact in failing to accord the appellant an opportunity to be heard despite the appellant's numerous efforts to have its case heard.
 3. The learned magistrate erred in law and fact in proceeding to render a determination on the main suit when three interlocutory applications were pending on the court's record.
 4. The learned magistrate erred in law by denying a party to a suit an opportunity to be heard, which went against the principles of natural justice and fair trial.



5. The learned magistrate erred in law by failing to consider the appellant's defence while rendering the judgment.
6. The learned magistrate erred in law and fact when it judged the 1st respondent without hearing the appellant's case.
3. The background of the appeal is a claim filed by the 1st respondent against the 2nd respondent and the appellant as the 1st and 2nd respondents, respectively. His case was that the 2nd respondent is a limited liability company, while the appellant is a young dealer appointed by the 2nd respondent to manage and supervise operations in one station known as Total Energies Jomo Kenyatta Avenue Branch in Mombasa.
4. The 1st respondent's case was that in August 2014, he was employed by the 2nd respondent but stopped paying his wages in May and June 2022, and on 28 June 2022, when he reported working, the appellant told him to go home, such resulted in the termination of his employment without good cause, and he claimed that his employment was terminated by the respondents and sought orders jointly for;
 1. Compensation Ksh.220,380;
 2. Notice pay ksh.18,365;
 3. Unpaid public holidays ksh.38,849;
 4. Salary arrears Ksh.36,730;
 5. Certificate of service;
 6. Costs of the suit.
5. On the record, the 2nd respondent did not enter appearance.
6. The appellant entered an appearance on 8 February 2023, and no response was filed.
7. The matter was placed for formal proof on 10 July 2023.
8. The appellant filed a response on 16 June 2023, but on the hearing date of 10 July 2023, this response was expunged. The matter proceeded undefended.
9. The learned magistrate delivered judgment on 16 November 2023 and held that the claim was not defended. The first respondent was entitled to claims as pleaded, and the respondents had failed to adduce any evidence to challenge the evidence present. The claim was allowed with costs.
10. The appellant submitted and argued that the trial court deprived them of a fair hearing, thereby violating their right to a fair trial, which is safeguarded under Article 25(c) of *the Constitution* and cannot be limited. The record indicates that the appellant was penalized due to their former advocate's lack of diligence, as the advocate failed to advance the appellant's case. The trial court should have shown leniency by allowing the newly appointed advocates to participate in the proceedings, especially given their repeated applications to do so. The appellant relied on the case of Civil Appeal 103 Of 1984 Mumias Sugar Company Limited v Augustine Kubende, where the Court of Appeal handling an ex-parte judgment held that;

... the Judge ought to have rightly exercised his discretion in setting aside the ex-parte Judgment. The effect of setting aside the judgment is to regularize the position so that the



applicant/defendant can file the defence. Appearance may be entered at any time before the entry of Judgment notwithstanding that the time limited in the summons has expired.

11. Further, the Kshs. 20,000 paid to the 1st respondent's Advocates can serve as throw-away costs so that the suit proceeds to a fresh trial on merits. In the case of Republic v Director of Public Prosecutions & 2 others; Evanson Murluki Kariuki (Interested Party); Ex parte James M. Kahumbura [2019] eKLR, the Court considered the right to a fair trial and held that;

Fundamentally, a fair and Impartial trial or investigation has a sacrosanct purpose. It has a demonstrable object that the accused should not be prejudiced. A fair trial or an Investigation is required to be conducted in such a manner which would totally ostracize injustice, prejudice, dishonesty and favouritism. And again decidedly, there has to be a fair investigation process and a fair trial and no miscarriage of justice and under no circumstances, prejudice should be caused to the accused.

12. In this matter, the appellant has shown that it actively sought to have its case heard, having filed three applications that remain unresolved by the trial court, despite being marked as urgent. The court should have granted the appellant an opportunity to be heard, especially considering its clear and consistent efforts to pursue the matter.

13. In *Murtaza Hassan & Another vs Ahmed Slad Kulmiye* [2020] eKLR the court set aside an ex-parte judgment on the principle that unless and until the court has provided a Judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power, where that has only been observed by a failure to follow any of the rules of procedure.

14. The Court in the above case also cited *Ridge v Baldinn* {1964} AC 40(1963) 2 ALL ER 66: in which it was held that;

The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a tribunal or subordinate court made in violations of the right to a fair hearing and due process.

15. In *Jeremiah Mghanga Msafari v Millicent Zighe Mwachala &3 others* [2021] eKLR, the court cited with approval the case of *Elton Homes vs Davis & others* (2019) eKLR in which the court observed that there is no greater prejudice in starting the case de novo than denying the appellant the right to be heard.

16. The respondent submitted that the appellant was obligated to provide a one-month notice before terminating his employment. He further argued that he should have been given a chance to defend himself against the allegations of desertion of duty on 28th June 2022, following a demand for payment of Kshs. 26,051.00, through a proper disciplinary hearing. In his letter dated 7th July 2022, the 1st respondent denied the allegations and claimed that the appellant violated Section 41 of the [Employment Act](#), which mandates notification and a fair hearing before termination on grounds of misconduct.

17. In the case of *Stella Auma Oduor v Solvit Security Solution* (2021) eKLR, the court held that the reasons for the Claimant's summary dismissal were given in the dismissal letter dated 30th August 2016 as "DESERTION" the allegation of desertion was not proved. The respondent has not proved that the reason for the dismissal was therefore unfair and I so declare.



18. Further, in the case of *National Bank of Kenya v Samuel Nguru Mutonya* (2019) eKLR, the Court held that;

To move and terminate without giving regard to Section 41 of the *Employment Act* and 43 provisions giving the Claimant a hearing in the presence of his representative the termination became procedurally unfair..... where an employer fails to abide with the Procedural requirements of section 41 of the *Employment Act*, even where payment in lieu of notice is made immediately, such does not cure the procedural unfairness fisted upon the Claimant. ...

19. The first respondent further argued that the appellant failed to provide reasons for considering his termination. As a result, the trial court deemed his dismissal unfair and unlawful.
20. The appellant was accorded an opportunity to be heard in the Trial Court but failed to so do and cannot purport to plead that its constitutional right has been infringed. The appellant filed its notice of appointment of advocates out of time by 90 days. Further, the appellant through the firm of Mogaka Omwenga & Mabeya Advocates was informed of the mentioned date to take directions on 18th April, 2023. On 18th April 2023, the appellant was informed of the hearing of the Claim that was scheduled for 10th July 2023.
21. On the issue of whether there were any proper applications before the trial Court at the time of pronouncing the Judgment, the 1st respondent submitted that there were none. The application dated 15th July 2023, was found not to be properly before the Court prompting the Trial Court to invoke order 9 of the *Civil Procedure Act* and ordering that Judgment in the said Claim be reserved for 9th November 2024 with the Court ordering that parties were at liberty to apply.
22. The Application dated 18th August 2023 was filed upon transfer of the learned Magistrate Trial Court and it would therefore be unfair to blame the said court for not handling an application that was not placed before it in the first place. The only jurisdiction that the Court had was to deliver a judgment in the said claim and placing the file before it if at all the same was to be done was just an exercise. In the case of *Omwoyo vs African Highlands & Produce Co LTD* (2002) eKLR cited in the case of *Julius Kogo (Suing as the Personal Representative of the Estate of Anthony K Lelei v Fundi K Biwott & another* [2020] eKLR the Court held that:

Time has come for legal practitioners to shoulder the consequences of their negligent act or omissions like other professionals do in their fields of endeavour. The Plaintiff should not be made to shoulder consequences of the negligence of the Defendants advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the Judgment.

23. In the application dated 31st October 2023, the Court found that the file was before Honourable Mbeja on 9th November 2023 for delivery of Judgment and that the application was not placed before the said judicial officer.
24. The appellant never complained or appealed the award of the Trial Court. In the case of *Ferdinand Ndungu Waititu Baba Yao v The Republic* the Supreme Court while citing the case of The first respondent further argued that the appellant failed to provide reasons for considering his termination. As a result, the honourable trial court deemed his dismissal unfair and unlawful and held that;

A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong



decision or unless it is manifest from the case as a whole that the judge was wrong in the exercise of his discretion and that as a result there has been misjustice.

Determination

25. This is a first appeal. The court must review, re-assess, analyze the record, and draw conclusions. However, consideration must be given that the trial court had to hear the witnesses.
26. The main issue in the appeal is that the trial court denied the appellant audience and the right to a hearing and proceeded to deliver judgment on 16 November 2023 without considering the pending applications seeking to be given a hearing.
27. As outlined above, the matter came up for hearing directions on 9 March 2023 for hearing directions. At this point, the 2nd respondent, Total Energies, had not filed an appearance.
28. The appellant appealed on 8 February 2023, but no response was received.
29. On 9 March 2023, only the 1st respondent, as the claimant, attended court and was allocated a hearing date of 10 July 2023.
30. In the interim, on 16 June 2023, the appellant, as the 2nd respondent, filed a response and denied being appointed as a young dealer by the 2nd respondent on 16 June 2021. The appellant engaged the 1st respondent as a customer attendant upon being appointed as a young dealer at a monthly wage of Ksh.22, 618. The 1st respondent admitted to incurring a cash sale shortage of Ksh.26, 051 and then deserted duty on 28 June 2022 after being directed to pay the loss. The appellant thus claimed notice pay of one month at ksh.22, 618 and that it is not liable to pay the claims made.
31. On the date set for the hearing, 16 July 2023, the first respondent attended, while the appellant and second respondent were noted as absent. The hearing closed, and directions were issued to file written submissions and mention on 7 August 2023.
32. On the material date, 7 August 2023, the appellant attended court, and advocates for the 1st respondent protested that the attending advocate had not been appointed and no change of Advocate notice had been served; hence, under Order 9, the attending advocate had no audience.
33. The appellant's advocate had filed a pending application dated 15 July 2023.
34. The trial court directed that;
 1. ...
 2. Judgment is reserved for 9 November 2023. Parties to at liberty to apply.
 3. The application dated 15 July 2023 by the appellant was seeking orders that;
 4. Pending the hearing of the application, the court will be pleased to grant leave to the firm of Khaminwa & Khaminwa Advocates to come on record for the Applicant/Respondent (Valmerdan Enterprises) in this matter.
 5. Pending the hearing of this application, the court be pleased to stay with directions and orders given in the main suit until this application is heard and determined.
 6. The court would be pleased to review and set aside any interlocutory judgments/orders in this suit and allow the applicant to file a response to the memorandum of claim before the deadline.



7. An order has been issued ordering the claimant to serve the applicant with the Memorandum of Claim and file a response within strict timelines for an expeditious hearing that will commence de novo.
34. The trial court addressed this application on 17 July 2023 and certified it urgent. In this instance, the appellant was granted leave to change advocates.
35. The court further directed that the application be served and an inter-parties hearing on 19 July 2023.
36. On the record, after 10 July 2023, when the matter proceeded for hearing and was reserved for written submissions on 7 August 2023, there is no record of how the trial court addressed the pending application on 19 July 2023.
37. The next record is 7 July 2023, when the appellant was denied an audience on the basis that they had not complied with Order 9, and hence, its record should be expunged.
38. There was an application dated 15 July 2023 certified urgent, but it was not addressed.
39. At the heart of this application are grounds that the appellant had not been served the summons and the pleadings to be able to attend in time and defend the claim against it.
40. It became imperative for the trial court to stop all else and address this application. Upon good invitation and before judgment was delivered on 16 November 2023, the appellant had taken interest and demonstrated their desire to defend the claim. The certification of the application as urgent and further allowing the appellant's advocate to come on record had not been set aside when they were denied audience on 7 August 2023.
41. This resulted in maladministration of justice.
42. Without the trial court taking into account the application dated 15 July 2023, the orders and direction on 17 July 2023 were empty, to proceed and decline to address the matter on the merits when both parties attended on 7 August 2023 was an error and resulted in denial of access to justice.
43. Parties shall revert to the application dated 15 July 2023. This application shall be heard on the merits before the trial court can issue further directions.
44. Accordingly, the judgment delivered on 16 November 2023 in Mombasa CMELRC 521 of 2022 is set aside entirely. Parties to revert to the application dated 15 July 2023 for a hearing on the merits. Costs to abide by the outcome of the claim.
45. Mention before the trial court for hearing directions on 14 January 2025.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

