



**Kibos Sugar & Allied Industries Ltd v Oguma (Appeal E16 of 2022)  
[2023] KEELRC 85 (KLR) (25 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 85 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E16 OF 2022  
S RADIDO, J  
JANUARY 25, 2023**

**BETWEEN**

**KIBOS SUGAR & ALLIED INDUSTRIES LTD ..... APPELLANT**

**AND**

**SULEIMAN ONG'AI OGUMA ..... RESPONDENT**

*(The Appellant herein (original Respondent) being aggrieved and dissatisfied with the entire/whole of the judgment, finding, decision and orders of the Learned Magistrate Hon Martha Agutu SRM delivered on 26th November 2019 in Kisumu CMCC ELRC Suit No. 3 of 2019, Suleiman Ong'ai Oguma v Kibos Sugar & Allied Industries Ltd hereby appeals to this Honourable Court on the grounds set out hereunder)*

**JUDGMENT**

1. Suleiman Ong'ai Oguma (the respondent) sued Kibos Sugar & Allied Industries Ltd (the appellant) before the Magistrates Court, alleging unfair termination of employment and breach of contract/statute.
2. In a judgment delivered on November 22, 2019, the Magistrates Court entered judgment for the respondent as prayed (the appellant allegedly did not appear or defend the Cause).
3. Aggrieved, the Appellant lodged a memorandum of appeal with this court on June 24, 2022, contending that:
  - (1) The learned trial court erred both in law and fact in failing to accord the Appellant a chance of being heard which is /was a breach of the Appellant's right to be heard as set out in article 50(1) of the Constitution and the rules of natural justice.
  - (2) The learned Magistrate erred both in law and fact by expunging the Appellant's documents that were filed in court, albeit out of time.



- (3) The learned trial Magistrate erred both in law and fact in restoring a judgment that had been entered in default of defence when there was a statement of defence on record, albeit filed out of time.
  - (4) The learned trial court erred in both law and fact in disregarding the provisions of article 159(1) of the Constitution by elevating procedural technicalities at the expense of substantive justice.
  - (5) The learned trial Court erred both in law and fact in elevating the rules of procedure which are subsidiary legislation, to the level of masters as against the substantive law in a statute.
  - (6) The learned trial court erred both in law and fact in failing to appreciate that the Respondent denied the claimant's claim, and hence there was need to hear both sides before proceeding to enter judgment based on an ex-parte hearing.
  - (7) The entire procedure adopted by the trial Court is/was flawed and in want of justification.
4. The record of appeal was filed on September 21, 2022, and the court gave directions on the hearing of the appeal on November 24, 2022.
  5. The appellant filed his submissions on December 14, 2022, and the respondent on January 12, 2023.
  6. The Court has considered the Record of Appeal and the submissions.

#### **Role of the Court on the first appeal**

7. The role of a first appellate court was discussed in Kamau v Mungai (2006) 1 KLR 150, where it was held that:
 

this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
8. This Court will abide by the interdict on its role as a first appellate Court.

#### **Right to a hearing**

9. The primary ground of challenge by the Appellant was that the trial Court failed to accord it an opportunity to be heard.
10. The Court has looked at the record. The Appellant included pleadings in Kisumu Chief Magistrates ELRC Cause No. 3 of 2018, Jack Odhiambo Okiro & Ors v Mildred Nafula Wangwe & Ar.
11. The Appellant also filed as part of the record, part of proceedings relating to taxation of costs.
12. The pleadings/proceedings were not relevant to the present Appeal.
13. The Appellant was served and acknowledged the Notice of Summons and Statement of Claim on July 12, 2019.
14. The Appellant then entered an appearance on July 24, 2019, and a Response was filed on August 6, 2019.
15. Under the prescribed rules, the Appellant should have filed a Response within 21 days. The Response ought to have been filed by August 2, 2019.



16. On August 3, 2019, the Respondent applied for interlocutory judgment and the trial Court endorsed the request on September 26, 2019.
17. The Cause was then taken through formal proof on the same day and judgment was delivered on November 22, 2019.
18. The record does not indicate whether the Respondent served a hearing notice upon the Appellant for the formal proof.
19. The Appellant filed its initial Response out of time. It never sought to regularise the Response before formal proof.
20. In the Court's view, in so far as the Appellant had entered appearance, it was entitled to be notified to attend the formal proof. But since its Response was not regularly on record, it could not lead evidence.
21. The trial Court, therefore fell into error of law by not ensuring the Appellant was aware of the formal proof.
22. However, on or around December 19, 2019, the Appellant applied to have the judgment set aside and, in a Ruling, delivered on July 16, 2020, the trial Court set aside the judgment and granted leave to the Appellant to defend.
23. The order was conditional on the Appellant paying the Respondent Kshs 10,000/- thrown away costs and the filing of a Response within 30 days.
24. When the Cause was placed before the trial Court on October 30, 2020 to confirm compliance, it turned out that the Appellant had not complied. The trial Court, therefore, vacated the orders of July 16, 2020.
25. The trial Court indulged the Appellant after the judgment and gave it conditions upon which leave to defend was granted.
26. The Appellant did not comply with those conditions.
27. The Appellant cannot now urge that it was denied the right to be heard or that the rules of natural justice were breached by the trial Court.

### **Procedural technicalities**

28. The Appellant filed a Response out of time. It never sought to have the Response placed on record before the formal proof.
29. However, when it applied to have the judgment set aside, the trial Court expressly directed it to file a Response within 30 days. The directive was not complied with.
30. Therefore, in this Court's view, the trial Court cannot be accused of having elevated the rules of procedures over the need to do substantive justice as envisaged by Articles 50 and 159(1) of the [Constitution](#).
31. The blame must be placed squarely at the foot of the advocates then on record for the Appellant.

### **Expunging of documents from the record**

32. The record does not indicate that the trial Court expunged from the record, any of the documents filed by the Appellant and which were formally on the record.



### **Breach of contract/statute/reliefs**

33. The trial Court granted the reliefs pleaded by the Respondent without more.
34. Since this Appeal is akin to a rehearing, the Court will re-evaluate the heads of reliefs allowed.

### **Pay in lieu of Notice**

35. The trial Court awarded pay in lieu of notice using the gross salary. As a practice and custom, salary in lieu of notice is computed using the basic salary.

### **Compensation for unfair termination**

36. The trial Court awarded maximum compensation but did not disclose which of the factors set out in section 49(4) of the *Employment Act, 2007*, it had considered. That was an error of both law and fact.

### **Overtime**

37. The Respondent did not lay an evidential foundation for the plea for unpaid rest days and public holidays and the trial Court did not explain the basis for the award.

### **House allowance**

38. The Respondent testified that he was on a daily rate of pay.
39. Under the Regulation of Wages Orders, daily rates of pay include house allowance and the trial Court did not factor this in allowing the claim for house allowance.
40. The trial Court fell into error.

### **Underpayments**

41. In claiming underpayments, the Respondent did not disclose the nature of his occupation or the tasks he was performing. This should have provided an evidential foundation to this head of the claim.

### **Leave**

42. The Respondent was awarded outstanding leave from 2014, while the Cause was filed in 2019. Section 28(4) of the *Employment Act, 2007* prescribes the number of leave days which can be carried forward.
43. The award by the trial Court did not consider the prescription.
44. The Appellant did not challenge the heads of reliefs granted by the trial Court. This Court says no more.

### **Conclusion and Orders**

45. From the above, the Court finds no merit in the Appeal, and it is dismissed with costs.

**Delivered virtually, dated, and signed in Kisumu on this 25<sup>th</sup> day of January 2023.**

**Radido Stephen, MCI Arb**

**Judge**

### **Appearances**

For Appellant Onsongo & Co. Advocates



For Respondent Kirwa & Co. Advocates

Court Assistant Chrispo Aura

