



Kyama v Muthaiga Golf Club (Employment and Labour Relations Appeal E037 of 2022) [2023] KEELRC 127 (KLR) (23 January 2023) (Ruling)

Neutral citation: [2023] KEELRC 127 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E037 OF 2022
AN MWAURE, J
JANUARY 23, 2023**

BETWEEN

JAMES KYAMA APPELLANT

AND

MUTHAIGA GOLF CLUB RESPONDENT

RULING

1. The respondent herein filed a preliminary objection dated August 3, 2022 and has the following prayers:
 1. That the application dated March 17, 2022 drawn by the appellant is addressed to the Court of Appeal thus making it fatally defective and void ab initio.
 2. That this honourable court is functus officio as judgment was delivered by the learned Judge Onesmus N. Makau on January 28, 2022 in ELRC 917 of 2016.
 3. That this honourable court has no jurisdiction to grant the orders sought by the appellant.
 4. That the application herein is in law, vexatious and an abuse of court process.
2. The genesis of all this emanates from an application by the appellant (claimant) dated March 17, 2020 seeking the following prayers:-
 1. That this application be certified urgent and service of the same be dispensed with in the first instance.
 2. That the time for filing of the notice of appeal in respect of the judgment made in the employment and labour relations court at Nairobi on January 28, 2022 in ELRC No 917 of 2016 be extended.



3. That the honorable court be pleased to define a time span within which to file the record of appeal
4. That the costs of this application be in the intended appeal.
3. The application is filed in the Employment and Labour Relations Court. It is however is filed pursuant to section 7 of the appellant judicature Act cap 9 laws of Kenya and Rule 4 and 5(2)(b) of the [Court of Appeal Rules](#). The case is headed Court of Appeal of Kenya ELRCA E037 of 2022.
4. The appellant in his submissions states that the issues raised in the preliminary objection are malicious and unwarranted. as for the issue raised on the jurisdiction applicant says the court has jurisdiction to hear the matter and that the parties should be given opportunity to argue their appeal.
5. Respondents in his submissions says the appellant's application is addressed to the Court of Appeal and yet moved this court to hear this application. They relied on the case of *Kenya Sugar Co Limited v Maitayo Ngoshe* (2021) eKLR the High Court struck out the appellant's civil appeal for being filed in the wrong court.
6. Their submissions are that the appellant's application should be struck out as it is defective, improper and an abuse of the court's process.
7. The respondent's submissions also are that the appellant moved the court vide the [Court of appeal rules](#) 2010, 4 and 5(2)(b) which he says is beyond the scope of this court.

Decision

8. The appellant indeed titled the suit as having been filed in the court of Appeal as per the notice of motion application dated March 17, 2022. The application is filed pursuant to [Court of Appeal Rules](#) 4 and 5.
9. It is obviously a defective application which is brought under Court of Appeal and yet is filed in the employment and labour relations court.
10. Under the circumstances the court is conflicted on the issue of the jurisdiction and in which court was the application meant to be prosecuted from. obviously this court has no jurisdiction to handle an appeal or a decision from the same court.
11. The appellant no doubt may have made an error which is human but then he should have rectified it instead of insisting he is in the right and it is obvious he is in the wrong court.
12. In the Court of Appeal Case No E046 of 2021 [Mukesh Kumar Kantilal Patel v Charles Lagat](#) was a stay of execution of the judgment of the Court of Appeal and decree of the same court and a certification of a matter of general public importance involved for purpose of an appeal to the Supreme Court from the said judgment and an application for extension of time to file an appeal to the Supreme Court from the said judgment.
13. The court held that where application for certification has been occasioned by a state of uncertainty in the law arising from contradicting precedents the Supreme Court may either resolve the uncertainty as it may determine or refer the matter to the Court of Appeal for its determination.
14. The case herein refers to an application between the Court of Appeal and the Supreme Court but the principle which the court is comparing is that an application filed in the wrong court cannot be held to be validly in that court even if the language used is a guise to justify such an application.



15. Considering the issue raised by the respondent in their submissions the court agrees that the application is filed in the wrong Court. That being the case and being cognizant that as held in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* 1989 "jurisdiction is everything and without it the court has no power to make one more step" the court agrees the suit is in the wrong court.
16. This is the position in this application and the law references being rule 4 and 5(2)(b) of *Court of Appeal Rules* do not apply to the Employment And Labour Relations Court. There are ELRC procedure rules that are provided for dealing with cases in the employment and labour relations court.
17. In view of the foregoing and considering this court is being asked to litigate on extension of time to appeal in a case that was decided in the same court, the court finds rightfully it has no jurisdiction to entertain the application. The application is dismissed with costs to the respondent.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 23RD DAY OF JANUARY 2023.

ANNA N. MWAURE

JUDGE

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 March 15, 2020 and subsequent directions of April 21, 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 has 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.

ANNA N. MWAURE

JUDGE

