



REPUBLIC OF KENYA



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**Kabathi t/a Kabathi & Co Adv v Muhoro & another (Appeal E006 & E007 of 2022
(Consolidated)) [2023] KEELRC 333 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELRC 333 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
APPEAL E006 & E007 OF 2022 (CONSOLIDATED)

ON MAKAU, J
FEBRUARY 9, 2023

BETWEEN

ANTHONY GATHITU KABATHI T/A KABATHI & CO ADV APPELLANT

AND

DIANAH NYAGUTHII MUHORO 1ST RESPONDENT

LEE NDEGWA MWANGI 2ND RESPONDENT

*(An Appeal from the Ruling of Honorable P N Maina, Chief Magistrate at Murang'a
Chief Magistrates Court ELRC Case No E003 of 2021 delivered on 26th May, 2022)*

JUDGMENT

1. The respondents are former employees of the appellant. They filed separate suits against the appellant seeking unpaid salaries and damages for constructive dismissal. Upon service of summons and statement of claim, the appellant entered appearance but failed to file defence to the claim. Instead he filed a notice of preliminary objection dated July 10, 2021 seeking for the suit to be dismissed with costs on ground that the summons to enter appearance served on him was irredeemably defective, for non-compliance with mandatory provision of the law.
2. The objection was considered by the trial court (Hon P N Maina CM) who dismissed it *vide* the ruling delivered on May 26, 2022. In doing so the trial court observed that the error in the summons to enter appearance was caused by the use of summons under *Civil Procedure Rules* in an employment matter where the time for entering appearance is 21. The court observed that the defect in the summons to enter appearance was not fatal to the suit and all what was required is for court to reissue fresh summons with the correct timelines. The court further observed that the appellant had already entered appearance and as such he stood to suffer no prejudice.



3. The appellant was grieved and brought this appeal urging the court to reverse ruling on the following grounds:
- 1) The learned Trial Magistrate erred in law and fact in dismissing the notice of preliminary objection dated July 10, 2021.
 - 2) The learned Trial Magistrate erred in law and fact, in relying on the Civil Procedure Rules instead of the Employment and Labour Relations Court (Procedure) Rules.
 - 3) The learned Trial Magistrate erred in law and fact in not striking out the summons to enter appearance and the claim in its entirety having found that the summons to enter appearance were defective.
 - 4) The learned Trial Magistrate erred in law and fact in failing to apply proper legal principles and law regarding issuance and service of summons in employment and labour relations matters.

Submissions

4. The appellant compressed the said grounds of appeal into the following three issues:-
- a) Whether the court can apply *Civil Procedure Rules* in ELRC matters, and if yes to what extent.
 - b) Whether the summons to enter appearance issued and served were defective and so, whether the defect can be cured.
 - c) Who should pay costs?
5. On the first issue, it was submitted for the appellant that Article 162(2) of the *Constitution* provides for establishment of the ELRC to hear and determine Employment and Labour Relations disputes while Section 9 of the *Magistrates Court Act* confers jurisdiction on the Magistrates to hear and determine claims related to Employment and Labour Relations subject to pecuniary jurisdiction under Section 7 of the Act. It was submitted that the Supreme Court has held, in *Republic v Karisa Chengo & 2 Others [2017] eKLR*, that the Specialist Courts of ELRC or ELC are not the High Court although they are equal in status.
6. It was further submitted that the ELRC in *Prisca Jepngetich v Generation Career Readiness Social Initiative Limited [2021] eKLR* held that parties must stop citing *Civil Procedure Rules* on all procedural matters before the ELRC except where permitted like for execution where Rule 32(2) of *ELRC(Procedure) Rule 2016*. In view of the foregoing observations, it was submitted that the ELRC procured are the only rules applicable to regulate ELRC matters before the Magistrates Courts and not the *Civil Procedure Rules* which only applies to the extent permitted by Rule 7 and 32 of the *ELRC Procedure Rules*. It was therefore urged that the trial court erred in law and fact by applying *Civil Procedure Rules* in dismissing the preliminary objection.
7. With regard to the second issue it was submitted that the summons to enter appearance was incurably defective. It was submitted that the suit being employment matter, the summons to have been issued is the one contemplated under Rule 11 of the *ELRC procedure Rules*. The said summons is set out in the first schedule to the Rules as Form 2 titled notice of summons. The time provided for entering appearance is 21 days not 15 days.



8. It was submitted that the mandatory provision of Rule 11 of the [ELRC Procedure Rules](#) was not complied with and as such the summons to enter appearance issued by the Chief Magistrate was fatally defective, null and void. The said defect in the appellant's view cannot be cured by Article 159 (2) (d) of the [Constitution](#) and rendered the claim defective and incompetent. For emphasis, reliance was placed on the case of [Willis Evans Otieno v Law Society of Kenya & 2 Others \(2011\)eKLR](#) where the court held that Article 159 (2) (d) of the [Constitution](#) is no a panacea for incompetent pleadings filed by an unqualified person. It was therefore urged that the trial court erred in law and fact in holding that the defect in the summons to enter appearance was a procedural one that can be cured by Article 159 (2) of the [Constitution](#).
9. Finally the appellant submitted that the appeal should be allowed because the defect in the summons to enter appearance cannot be cured as it goes to the substance of the case. It was further submitted that costs should then follow the events.
10. The respondents, on the other hand submitted on the following issues:-
 - a) Whether the trial court erred in law and fact in dismissing the preliminary objection.
 - b) Whether the appeal lacks merits and or is an abuse of court process.
 - c) Who should pay costs?
11. On the first issue it was submitted that the trial court, properly applied the legal principles in dismissing the objection. It was urged that the trial court was guided by the [ELRC Procedure Rules](#) and Article 159 (2) (b) and (d) of the [Constitution](#) in finding that the matter raised touched on procedural technicality which was not fatal to the suit. Reliance was placed on the case of [Nanjibhai Prabhudas & amp Co Ltd v Standard Bank Ltd \(1968\) EA \(K\) 670](#) where the Court of Appeal held that a defect in summons only constitutes an irregularity which is capable of being waived.
12. In view of the foregoing it was submitted for the respondent that the objection to the suit was therefore not a pure point of law as the discretion of the court was sought in determining whether or not to dismiss the entire suit. It was therefore submitted that the trial court was right in dismissing the objection to allow parties to canvas their substantive issues.
13. As regards the second issue, it was submitted that the appeal lacks merits and it is otherwise an abuse of the court process. It further submitted that the trial court in his ruling observed that the defect in the summons will be remedied by a reissuance of proper summons because the complaint was that they provided for entry of appearance within 15 days as opposed to 21 days. Besides the trial court notes that the appellant had already entered appearance and therefore he was not prejudiced by the short period given by the summons.
14. It was further submitted that the appeal was only means of delaying the respondents' suit and frustrate them after rendering them jobless with salary arrears of more than a year.
15. Finally it was submitted that the appeal lacks merits, is frivolous and vexatious and an abuse of the court process and therefore it should be dismissed with costs to the respondents.

Determination

16. Having considered the record of appeal and the rival submissions, it is clear that the appeal turns on the issue whether the summons to enter appearance served on the appellant in the primary suits were fatally defective. This being a first appeal, I am obliged to review the evidence and arrive my independent conclusion on the points of law raised.



Defective summons to enter appearance

17. The appellant's case is that he was served with defective summons to enter appearance. The summons required him to enter appearance within 15 days after service. He contends that the correct summons ought to give him 21 days to enter appearance and file defence. The summons ought to be title 'Notice for summons and in Form 2 of the first schedule to the [ELRC \(Procedure\) Rules 2016](#). He argues that the defect in the summons is a fatal defect which cannot be cured and it renders the suit incompetent ispo facto.
18. The respondents are in denial. They have maintained that the defect in the summons is a procedural one and can be cured by Article 159 (2) (d) of the [Constitution](#). Besides the appellant has suffered no prejudice since he entered appearance unconditionally and thereby waived his right to object to the defective service.
19. I have considered the submissions presented by both sides. The preliminary objection relates to service of summons in ELRC matters. The relevant provision is Rule 11(1) of the [ELRC \(Procedure\) Rules 2016](#) which provides that:-

“The court shall issue summons in Form 2 set out in the first schedule.”
20. Form 2 in the first schedule gives notice to a respondent that a statement of claim has been filed against him and that:

“Unless you file a Response within twenty one days from the date of this summons, the suit will be heard and determined in your absence.”
21. Two issue arise from the above and Rule 11 (1) aforesaid. First is that the notice of summons is not drawn by the claimant. Once a claimant files a statement of claim under Rule 5 of the [ELRC \(Procedure\) Rules 2016](#), the court is obliged to issue summons in Form 2 of the First Schedule. This is a different scenario from the [Civil Procedure Rules](#), where Order 5 Rule (5) provides:-

“Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.”
22. Secondly, the summons is separate from the claim and it is fundamentally a procedural matter under the rules of procedure. In the case of [Nanjibhai Prabhudas & amp Co Ltd v Standard Bank Ltd \[1968\] EA \(K\) 670](#) the Court of Appeal held that ;-

“Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity... The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature.”
23. I have already observed that the summons in issue in this appeal were drawn and issued by the court after the claimants filed their statements of claim. The error was therefore by the court not the claimants. I have further observed that the error committed was procedural in nature and therefore it did not render the suit incompetent in any way. Finally, the appellant was not prejudiced by the summons because he filed an unconditional appearance but later on filed the notice of preliminary objection.



24. The said change of heart by the applicant points to an afterthought. Accordingly, I am inclined to find that the objection involved a procedural technicality which could be cured under Article 159 (2) (d) of the Constitution by leave of the court extending the period within which the appellant can file his defence to the suit. It is not uncommon nowadays to see Respondents seeking extension of time to file defence for one reason or another.
25. In conclusion, I find that the appeal lacks merits and it must be dismissed with costs. The respondent is however at liberty to seek leave from the trial court to file response to the two claims within the period provided by Rule 13 of the ELRC (Procedure) Rule, 2016.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF FEBRUARY, 2023.

ONESMUS N MAKAU

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 April 15, 2020****, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

