Kicheche Camp Limited v Owidi (Appeal E15 of 2022)
[2023] KEELRC 342 (KLR) (9 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 342 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

APPEAL E15 OF 2022

HS WASILWA, J

FEBRUARY 9, 2023

BETWEEN

KICHECHE CAMP LIMITED ..... APPLICANT

AND

KENNEDY OWIDI ..... RESPONDENT

JUDGMENT

1. This appeal arose from the Ruling of the Chief Magistrates Court at Narok, Honourable G. N Wakahiu, in Nakok ELR case No. 3 of 2021 delivered on 26th October, 2021 on the Appellant's application dated 28th July, 2021. The grounds of the Appeal are as follows;-

    1. That the Learned Magistrate erred in law and in fact by sacrificing substantive justice at the altar of expediency when he found that the stay of the proceedings sought by the Appellant would serve the purpose of delaying the suit.

    2. That the Learned Magistrate erred in law and in fact in taking into account irrelevant and extraneous factors.

    3. That the Learned Magistrate erred in law by failing to recognize and appreciate that there is in place an Alternative Dispute Resolution mechanism as provided in the Colleclive Bargaining Agreement between the Kenya Association of House Keepers and Caterers (KAHC) and tne Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA).

    4. That the Learned Magistrate erred in law and in fact by failing to recognize and appreciate that the Respondent had failed fo exhaust the Alternative Dispute Rsesolution process.

    5. That the Learned Magistrate erred in law and in fact in ignoring and/or failing to acknowledge, appreciate and consider the Appellant's submissions.

6. That the Learned Magistrate erred in law by substantially and unreasonably relying on his own discretion to make his determination rather than relying on the law, and by so doing arrived at an erroneous determination contrary to the law.

7. That the Learned Magistrate misdirected himself on the law and the issues before the Court for determination and consequently made findings that were not in consonance with the case presented by the Appellant.

8. That the Learned Magistrate erred in dismissing the Notice of Motion dated 28th July 2021.

9. That in all the circumstances of the case, the Learned Magistrate failed to render justice to the Appellant.

10. Other grounds and reasons to be adduced at the hearing hereof.

2. The Appellant sought for the following Orders:-:

a. This Appeal be allowed.

b. The Ruling and Orders of the Honourable G.N. Wakahiu (C.M.) dated and delivered at Narok on 26th October 2021 in Narok CMELRC No. 3 of 2021-Kennedy Owidi v Kicheche Camp Limited be set aside.

c. The Appellant's Notice of Motion dated 28th July 2021 as filed in Narok CMELRC No, 3 of 2021 - *Kennedy Owildi v Kicheche Camp Limited* be allowed in its entirety.

d. That the costs of this Appeal and the Appellant's Notice of Motion dated 28th July 2021 as filed in Narok CMELRC No. 3 of 2021 - *Kennedy Owidi v Kicheche Camp Limited* be borne by the Respondent.

e. Such further or other reliefs as this Honouruble Court may deem just and fit fo grant in the circumstances of this Appeal.

3. The appeal is opposed by the Respondent based on the following grounds;

a. That the learned magistrate did not make any error in refusing to stay the proceedings of the lower Court in Narok as there was no basis for staying the proceeedings of the Court.

b. That the learned magistrate did not consider any irrelevant and extraneous factors in coming up with its ruling as alleged by the Appellant.

c. The learned magistrate did recognize the existance of the Collective Bargaining Agreement between the parties and also recognized the existence of (KUDHEIAH) and based its ruling in the said Collective Bargaining Agreement to the effect that it could not reconstruct the said agreement but had to rely on the same as it was.

d. That the learned magistrate in relying on KUDHEIAH collective Bargaining Agreement made a proper finding that there was no proper procedure provided for an individual employee to channel their grievances to KUDHEIAH.

Brief facts.

4. The Appellant / Respondent in the trial Court had filed an application dated 28th July, 2021, seeking *inter alia* for the proceedings to be stayed and the case be refered to the Secretary of the Joint Industrial Council in line with Clause 13(b) of the Collective Bargaining Agreement entered between

the Appellant and the Claimant's Union. The Respondent herein opposed that application on the basis that the application is based on section 15 of the *Employment and Labour Relations Court Act*, which is not couched in mandatory terms. Also that the said clause of the CBA is to address grievances of employees in active services not him because he had been terminated. Further that the section does not give procedure or form in which such grievances are to be raised and in any case that the section applies to employees within the coastal region as aptly captured in the CBA.

5. The Honourable G.N Wakahiu agreed with the Claimant/ Respondent herein on the fact clause 5(c) of appendix 5 CBA does not provide for mechanisms within which an individual employee can channel its grievances, moreover that the appeal to the Joint Industrial Council is contemplated for employees who work in the coastal region not all employees of the Respondent. The Honourable Magistrate then dismissed the application.

6. Its on that decision that the Appellant, filed this Appeal, which directions were taken for it to be disposed of by way of written submissions.

Appellant' Submissions .

7. The Appelant submitted from the onset that the issue in their application at the trial Court was for stay of proceedings to enable them have the matter heard by the Joint Industrial Council in line with clause 13 (c) of the CBA and not to Appeal the claim, therefore that the trial Court erred in relying on Order 42 for stay pending Appeal. Further that the application did not seek for the proceeding to be set aside as ruled by the trial Court, in effect, the trial Court took into consideration irrelevant issues in making his decision.

8. It was submitted that the reason why the Court dismissed the application was based on the fact that if the application for stay is allowed, the matter will be delayed. Which in the Appellant view, the trial Court misapplied his discretion. On that note, they relied on the case of *Alex Wainanina t/a John Commercila Agencis v Johnson Mwangi Wanjihia* [2015] eKLR where the Court held that;

> "... These are that such discretion should be exercised on sound reason rather than whim, caprice or sympathy and with the sole aim of fulfilling the primary concern of the Court, that is to do justice to the parties before it."

9. It was argued further that the decision by the Court to equate the referral of the matter to a forum agreed by the parties, as delay of the matter was made without proper explanation and application of the law.

10. The Appellant cited the holding of the case *Nanchang Foreign Engineering Company (K) Ltd v Easy Properties (K) Limited* [2014] eKLR where the Court held that;

> "Referral of a matter to arbitration or other alternative method of alternative dispute resolution is not intended to cause delays or deny a party who is rightly entitled to payment. Such a party ought not to await determination or resolution of the matter by an arbitral tribunal or a tribunal established with a view to reaching an amicable settlement just because there is a clause for referral of a dispute to such fora unless there is indeed a dispute. If there is no dispute which can be referred to such fora, the Court automatically assumes jurisdiction once a suit is filed in Court for its determination."

11. It was argued that the trial Court relied on the above cited case which was inapplicable in their case because the issue in dispute was unfair termination, which was up for determination. Further that they did not file any defence but raised the preliminary issue to enable the trial Court give direction before

subjeting themselves to the jurisdiction of the said Court. On that note, they argued that the min issue iddue in dispute was the one that is to be determined by the Joint industrial Council in accorabnce with the CBA.

12. It was submitted that the mechanism for dispute resolution provided under clause 12 and 13 of the CBA are elaborate , which the Respondent herein should have first explored before filing his case at the trial Court. It was submitted that the said alternative mechanisms should have been exploited first as aptly provided for under article 159 of the *Constitution*. In this they relied on the case of *Speaker of the National Assembly v Njenga Karume* [1992] KLR 21 and the case of *Kenya Chemical and Allied Workers Union v East African Portland Cement and Company Limited*[2013] eKLR where the Court held that;

> "Where parties have selected one of the dispute settlement mechanisms given by the Labour Relations Act and the Constitution, they ought to exhaust that mechanism, before deviating into other Alternative Dispute Resolution Mechanisms, or seeking the Adjudication of the Court. It is also important that the different ADR and Statutory mechanism are not confused. There would be no orderly dispute settlement, if parties were allowed to disregard valid agreements on the mode of dispute resolution between them."

13. The Appellant also relied on the case of *Kenya National Union of Teachers (KNUT) v Nnancy Njeri Macharia & Another* [2020] eKLR where the Court relied on the case of *R. v Independent Electoral and Boundaries Commission (I.E.B.C.) & Others Ex Parte The National Super Alliance (NASA) Kenya* which held:

> "What emerges from our jurisprudence in these cases are at least two principles: while, exceptions to the exhaustion requirement are not clearly delineated, Courts must undertake an extensive analysis of the facts, regulatory scheme involved, the nature of the interests involved – including level of public interest involved and the polycentricity of the issue (and hence the ability of a statutory forum to balance them) to determine whether an exception applies. As the Court of Appeal acknowledged in the Shikara Limited Case, the High Court may, in exceptional circumstances, find that exhaustion requirement would not serve the values enshrined in the Constitution or law and permit the suit to proceed before it. This exception to the exhaustion requirement is particularly likely where a party pleads issues that verge on Constitutional interpretation especially in virgin areas or where an important constitutional value is at stake."

14. In conclusion, the appellant submitted that the Respondent did not exhausrt all the alternative dispute resolution mechanisms before invoking jurisdiction of the Court , therefore the appeal is merit and urged the Court to allow it as prayed.

Respondent's Submissions.

15. The Respondent submitted on three issues; Whether the learned magistrate arrived at the correct finding to the effect that the collective bargaining agreement between the union of hotel keepers and caterer's association and the Kenya Union of Domestic hotels, educational institutions, hospitals and allied workers was not clear on the procedure for an individual employee to raise their grievances;Whether the Respondent failed to exhaust the alternative dispute resolution mechanism process before filing the suit in Narok and whether the learned magistrate erred in law in refusing to grant stay of proceedings in the Narok lower Court matter.

16. On the first issue it was submitted that Section 5(c) appendix B of the CBA between union of hotel keepers and caterer's association and the Kenya Union of Domestic hotels, educational institutions, hospitals and allied workers provides that ;

> " No matter affecting an individual employee (individual grievance) shall be discussed. Only matters affecting a number of employees (collective grievances) in the group as a whole shall be feature ... "

17. It was thus argued that the learned magistrate made a sound finding because the Respondent is an individual and therefore unable to air out his grievances. In any case that there is no procedure provided under the agremement in raising individual grievances. Additionaly, that the section relied on by the Appellant is only applicable to employees who are still working or are still under a contract of service as defined under section 12(b) on grievances and claims which are to be referred to the secretary of the joint industrial council. So that an employee who has ceased working for the Appellant was not entitled to address his grievances through the union as the union only dealt with people who are still under a contract of service.

18. On the second issue, it was submitted that the appeal herein is seeking to have the Appellant's application allowed, which in essesnce will revert the suit to the Joint industrial council, when the issue was already discussed and the Union gave direction and even aided the Respondent in the calculation of the his final dues and went ahead to order the Appellant to make payment. It was argued that it when the Appellant refused to pay the payments directed by the Council that the Respondent filed this Suit. Therefore that to allow this appeal and take back the matter to the council that already decisided on the issue would be a waste of time because the Council is functus officio. It was argued further that the Appellant has not challenged the contents of the replying affidavit that led to this Appeal , neither have they filed a response to claim, confirming that the facts therein remain uncontroverted. They relied on the case of *Ahmednasir Abdikadir & Co Advocates v National Bank Of Kenya Limited* [2006] eKLR where justice Fred A Ochieng stated

> " In that regard, I hold the view that if one party has made statements on matters of fact, and the other party did not respond thereto, there would be no basis for the said matters being termed as being contentious. I have always understood such statements to be deemed as uncontroverted. Therefore, to the extent that Mr. Ohaga's affidavit has not been answered by any replying affidavit, I find that the matters of fact stated therein remained unchallenged"

19. On the last issue, it was submitted that stay orders are discretionary powers. It was argued that the trial Court in its ruling dealt with this issue and came to the finding that staying the matter would only delay this matter further. In its reasoning, the trial Court appreciated the provisions of the constitution and the statute that advocates for alternative dispute resolution mechanism. The Court however noted that there was no clear avenue for the Respondent to move the Joint Council in airing out his grievances because the CBA was not clear over the issue. He added that the trial Court did not make any error in refusing to grant stay orders in the lower Court proceedings as there was no proper reason advanced by the Appellant herein for the said orders to be granted.

20. It was further submitted that the trial Court matter has a request of judgement, and therefore that the Appellant ought to first lift the said request vide an application before appealing to this Court.

21. I have examined the averments and submissions of the parties herein.

22. The main contention in this appeal is the failure by the trial magistrate to allow stay of proceedings sought by the appeallants vide their application dated 28/7/21.

23. A ruling on this application was made by the trial Court on 26/10/21. In the ruling the trial Court declined to stay proceedings in the matter as prayed on the grounds that stay of proceedings are discretionary under Order 42 of the CPR.

24. He also referred to Article 159 (2) (a) (b) (c) and (d) of the *constitution* which envisages that the Courts should foster and facilitate the overriding objective of the law to render justice to all parties in a just, expeditious, proportionate and affordable manner to all parties.

25. The learned magistrate also considered the fact that this matter was not subject to discussion as it related to an individual grievant.

26. I will relook again the CBA affecting the parties herein Clause 12 of the CBA (b) the parties herein states as follows;-

> " For the purposes of settling issues arising out of any breach of the Agreement real, alleged or of any other matter concerning employees in relation to the terms of their employment, the following procedures shall be used:-
>
> (a) Local grievances
>
> This shall mean any grievances arising from an alleged breach of the existing terms and conditions of service affecting any employee or group of employees or all employees of an individual member of the Association.
>
> i. Such grievances shall be in the first instance be raised by the employees or all employee/s concerned with his immediate supervisor or head of department.
>
> ii. Should the matter not be resolved then a report shall be made by the employee to the shop steward and Works Committee who shall refer the issue to the person appointed by management to deal with personnel matters.
>
> iii. When the issue is not resolved between the shop steward (work committee) and the appointed representative of management with mandate and authority to discuss the issue, then the dispute will be reported by the shop steward or in his absence a designated Works Committee member to the branch office of the Union whose officials may meet with management to try and resolve the dispute.
>
> iv. In the event that the issue is not resolved between management of the establishment concerned and the branch office of the Union, then the issue shall be referred to the Coast Disputes Committee where the establishment is situated within the Coast Province or if the establishment is outside the Coast Province, the dispute shall be referred to the joint industrial Council ..."

27. The clause herein refers to an "employee" and employer, the reference to which is the manner of resolving local grievances at the work place.

28. The employee must of necessity then be in active employment when these rules apply.

29. These clause does not in my view refer to an employee who has been terminated or dismissed.

30. These clause is in reference to an employee still in employment and the insistence by the appellant that the final magistrate was bound to stay the proceedings and refer them to Industrial council does not apply in this case where the Respondent Claimant had already been dismissed.

31. The appellant has submitted that at the time the grievance arose, the Claimant was still an employee of the Respondent/appellant and that he had not exhausted the laid down procedure in the CBA.

32. The cause of action may have occurred when the Claimant was an employee but at the time the claim was filed on 28/6/2021 at the lower Court the Claimant Respondent herein had been terminated vide a letter of 31/8/2020.

33. It is therefore my finding that the Claimant had no opportunity to have the grievance referred to ADR before his termination and it is therefore true that Hon. Trial magistrate guided his mind properly to these facts and declined to stay the proceedings and refer them to ADR.

34. The only situation where the trial Court may refer a matter to arbitration is based on Section 15 (4) of the *ELRC Act* 2007 which states as follows;

> " 15
>
> (4) If at any stage of the proceedings it becomes apparent that the dispute ought to have been referred for conciliation or mediation, the Court may stay the proceedings and refer the dispute for conciliation, mediation or arbitration."

35. This is also not couched in mandatory terms and the trial Court only has to exercise his or her discretion in deciding whether or not to refer the matter to ADR.

36. That being the case, I find that the trial Court exercised his discretion to decline to stay proceedings and in so doing his action cannot be faulted.

37. I therefore find that the appeal herein lacks merit and is therefore dismissed with costs.

38. I refer the claim back to be heard by the trial magistrate or any other magistrate as may be allocated by the Head of Station.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 9TH DAY OF FEBRUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ooro for Respondent – present

Wachira for the Appellant – present

Court Assistant - Fred