



REPUBLIC OF KENYA



KENYA LAW
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**Adpack Limited v Maguya (Appeal E023 of 2022)
[2023] KEELRC 591 (KLR) (9 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 591 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E023 OF 2022
K OCHARO, J
MARCH 9, 2023**

BETWEEN

ADPACK LIMITED APPELLANT

AND

SIMON MAGUYA RESPONDENT

JUDGMENT

[Before Hon. Justice Ocharo Kebira on 09/03/2023]

1. I have before me an appeal by Adpack Limited the defendant in the original action, from the Ruling of the Principal Magistrate Mavoko whereby the learned Magistrate dismissed the Appellant's application for allowing of Ms. Okemwa and Company Advocates to come on record for the Respondent therein; recalling of the Claimant for cross examination by the said Respondent; and directions on refiling of submissions and judgment date.
2. The application before the learned Magistrate was prompted by his having proceeded to hear the Respondent's [the Claimant in the original action] *ex parte* on being satisfied that the hearing date was known to the Appellant as service of court process regarding the hearing date had been duly effected, yet neither the defendant nor its witness had appeared at the trial.
3. Aggrieved by the Ruling in regard to the application hereinabove stated, the Appellant filed t This Appeal placing forth the following grounds:
 - i. That the learned trial Magistrate failed in law and fact to appreciate that the mistake of none attendance of the appellant at the hearing was attributed to its former advocates who despite receipt of the Hearing notice did not attend court or notify the appellant and therefore such mistake of the advocate should not have been visited on a totally innocent client.



- ii. The learned Magistrate failed in law and fact to appreciate that the appellant took reasonable steps to file the application and were also willing to pay any throw away fees as agreed by parties or directed by the court to atone the none attendance and hence no prejudice suffered by the Respondent or its Advocates.
 - iii. That the learned Magistrate failed in law and fact to appreciate that there was no iota evidence of obstruction of justice or delaying or any vitiating factor attributed personally to the Appellant who was in genuine pursuit of its justice, which was denied.
 - iv. That in the circumstances, denial of the prayers sort in the motion would lead to violation of the Appellant's rights to natural justice and a right to an open and public hearing enshrined in Article 50[1] & 25 [c].
 - v. The learned Magistrate ignored the Appellant's submissions and binding case law of the Court of Appeal in Patriotic Guards Ltd v James Kipchirir Sambu [2018]eKLR which was binding on the lower court.
4. Contemporaneous to assailing the learned trial Magistrate's ruling on the application, the Appellant herein has through the instant Appeal challenged the judgment, the product of the exparte proceedings, judgment that was delivered on the 17th February 2022, on the following grounds:
- i. The learned Magistrate erred in law in arbitrarily dismissing the above application dated 13th September 2021 and proceedings to render Judgment hence the Appellant's sacrosanct right to Natural Justice and Article 50 [1] & 25 [c] were contravened and therefore, null and void.
 - ii. That in the circumstances the Honourable Magistrate occasioned a miscarriage of justice and false enrichment against the weight of the evidence on record which the court closed its eyes.
 - iii. That the learned Magistrate proceeded to write a judgment well aware that the right of a party to be heard before adverse action of a decision which is arrived at in violation will be nullified, even if the same decision would have been reached had the party been heard, being a violation of natural justice.
5. The Appellant's twin attack therein above brought out has to fail. Fail upon reasons that this court shall bring out hereinafter shortly. The court notes the well-researched and detailed submissions by the parties, however for the same reason[s] as will appear hereinafter shortly, the court is not keen to place time on considering the same.
6. I have carefully considered the Ruling of the learned trial Magistrate, no doubt that the same was not on the merits of the application but on the procedural competence of the application. In his short ruling on the Appellant's application, he stated in part:

“..... I have perused the court record and noted that the firm of Eshiwani Ashubwe and Company Advocate is still on record for the Respondent. It is clear that the firm of Okemwa & Company Advocates to validly be on record, there must be on record an order discharging the firm of Eshiwani Ashubwe & Company Advocates from acting for the Respondent. Order 9 Rule 5 is elaborate on change of Advocate before conclusion of the matter and where no such change is effected by the parties, then the Advocate on record shall remain on record. Clearly the firm of Okemwa & Company Advocates can only be validly on record upon compliance with Order 9 Rule 5.

I consider that for the application herein to be granted, there must be a judgment on record for such leave of the court to be granted as per Order 9 Rule 9.



Having subjected the application to the relevant law, I am satisfied that the said application is totally defective and, on this basis, alone; the application dated 13th September 2021 is hereby dismissed with costs to the Claimant.

7. I get the learned Magistrate as saying that the Appellant's application before him was incompetently filed. Whether he was right or not on this finding, I restrain myself to comment. None of the grounds of appeal, set out in the memorandum of appeal filed herein, attacks this sole ground upon which the Honourable Magistrate dismissed the application. The appeal herein on the ruling is therefore misplaced. It should be dismissed.
8. The learned trial Magistrate found that the law firm of M/S Okemwa & Company Advocates was not on record for the Respondent [the Appellant in this Appeal]. The decision by the learned trial Magistrate has not been faulted, and successfully challenged in one of those legally recognized forums. As it stands, the decision maintained at the time the appeal was being filed and maintains to date. Consequently, this court concludes that the Appellant's appeal herein against the judgment was incompetently filed. It was filed by an Advocate not on record.
9. The submissions by the parties did not address the account on which the Appellant's application was dismissed by the learned trial Magistrate. I think as a result of the approach the Appellant gave its Appeal. They are not on whether or not the application before the first court was competently placed there for determination. It is for this reason, I hold that in the circumstances, the submissions are not helpful.
10. In the upshot, I find the Appeal herein lacking in merit and incompetently filed. It is hereby dismissed with costs.
11. Orders accordingly.

READ, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9TH DAY OF MARCH 2023.

OCHARO KEBIRA

JUDGE

Ms. Wairimu holding brief for Nyawade for the Respondent.

No appearance for the Appellant.

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 15th March 2020 and subsequent directions of 21st April 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 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.

A signed copy will be availed to each party upon payment of Court fees.

OCHARO KEBIRA

JUDGE

