



**Good Hope Sacco Limited v Kipteng (Employment and Labour Relations Appeal E013 of 2022) [2023] KEELRC 623 (KLR) (7 March 2023) (Ruling)**

Neutral citation: [2023] KEELRC 623 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E013 OF 2022**

**HS WASILWA, J**

**MARCH 7, 2023**

**BETWEEN**

**GOOD HOPE SACCO LIMITED ..... APPELLANT**

**AND**

**NAANYU ANGELINE KIPTENG ..... RESPONDENT**

**RULING**

1. Before me for determination is the Appellant/ Applicant's Notice of motion dated December 19, 2022 filed under certificate of urgency and brought pursuant to Article 159(2)(d) of the Constitution, Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Order 45 and Order 51 of the Civil Procedure Rules and all other enabling provisions of the law, seeking the following orders:-
  1. Spent.
  2. That this Honourable Court be pleased to vacate its judgement of December 8, 2022 dismissing the Appeal by the Appellant/ Applicant dated June 14, 2022.
  3. That this Honourable Court be pleased to review its judgement of December 8, 2022 dismissing the appeal by the Appellant dated June 14, 2022.
  4. That This Honourable Court be pleased to call for Kilgoris Senior Principal Magistrate Court's file case, Labour cause no 2 of 2019 into this Court.
  5. That the costs of this Application be in the cause.
2. The application is supported by the grounds on the face of the application and the affidavit sworn on December 19, 2022 by Issac Dopoi Kilesi, the Chairman of the board of the Applicant and based on the following grounds: -



- a. That the judgement in this matter was delivered by the Court on December 8, 2022, where the Court dismissed the appeal for lacking record of Appeal.
  - b. It is contended that the appeal was dismissed on technicality and the effect is that money which ought to be under protection of the depositors are likely to be applied in a manner conflicting with the interest of the Sacco members. Further that the dismissal of the appeal will result to the Appellant paying persons who have defrauded the Sacco.
  - c. The affiant stated that, the Appellant had applied to be supplied with typed proceedings of the trial Court in order to prepare the record of Appeal but they were not supplied with the same up to date.
  - d. That the difficult in getting the proceedings of the trial court was raised before this Court and a request was made by the applicant for this Court to call for the trial Court file which Court declined to call for the file.
  - e. He stated that the refusal by this Court to call for the trial court file created a good environment for the Respondent to defraud the Sacco.
  - f. The affiant beseeched this Court to set aside its judgement and call for the trial Court's file and consider the Appeal on merit.
  - g. In the supporting affidavit, the affiant stated that they had to move with speed and file an application to stop garnishee from entering an agreement to release Sacco funds to the Respondent. Also that in High Court Civil case number E002 of 2022 filed at Narok High Court, the Respondent and 33 other were surcharged for misappropriation of appellant's Sacco members' funds.
3. In opposing the application, the Respondents filed a replying affidavit deposed upon on the December 29, 2022 and a supplementary affidavit sworn on February 9, 2023. The affidavits are based on the following grounds;
- a. That the applicant learnt of the filling of this Application on December 23, 2022 when filling its Bill of costs. It was stated that directions of the Court were for the application to be served immediately but that the applicant took his sweet time and served her on December 28, 2022 with the Notice of Motion, Supporting Affidavit and Certificate of urgency leaving behind the chamber summons, indicating that the applicant had some hidden agenda.
  - b. That the supporting affidavit to the motion of December 19, 2022 did not annex the judgment in which the Applicant seeks to review making the application fatally defective.
  - c. Further that the dismissal of the Appeal was justified and there is no error on the face of the judgement to warrant the review orders sought. Also that the fact that the Appellant was not supplied with Proceedings is not new and important evidence to warrant the issuance of review orders.
  - d. That the deponent, Duncan Kiprono Advocate lacked capacity to swear the affidavit in support of the Chamber Summons as he is not authorized to swear affidavits on behalf of the the Applicant. Therefore, that the application is untenable, incompetent and incurably defective.
  - e. The affiant took issue with the letter dated August 23, 2021 addressed to the Executive Officer, Kilgoris Law Courts and stated that the said letter was not received by the Court and the



payment receipt accompanying it is dated August 11, 2021 days before the letter was written raising question on the genuineness of the letter.

- f. It is also stated that the applicant has not indicated any follow up measures it took in obtaining the said proceedings for the purposes of preparing the record of Appeal.
  - g. He stated that the applicant has a habit of filling multiple suits and applications in various courts both here, in Narok and Kilgoris and urged this Court to deter him from continuing with these application. He prayed for punitive damages of Kshs 1,000,000.
  - h. It is stated also that the applicant has not satisfied any of the condition under Order 45 Rule 1& 2 of the Civil Procedure Rules on review because no new evidence has been tabled before Court to warrant any move by the Court. Further that after delivery of its Judgement, this Court became functus officio and its jurisdiction is now limited.
  - i. The Affiant herein stated that the suit against her in Narok Court is independent and instituted through a plaint and cannot be referred to a counterclaim. In any case that the said suit is sub-judice to the suit in Kilgoris Senior Principal Magistrate Court.
  - j. The deponent prayed for the application to be dismissed with costs as it lacks merit.
  - k. In the supplementary affidavit, the affiant avers that the issues litigated herein were all raised in an earlier application, which ruling was delivered on the June 14, 2022 and judgement delivered on December 8, 2022, thus the application is res judicata and an abuse of Court process.
  - l. The affiant state further that the applicant is on a forum shopping because a similar application for review, which is similar in form and content, was filed before the trial Court concurrent with this application. Additionally, that the Applicant has filed an accumulative of 8 applications both in this Court, the trial Court and the Narok Court, which are aimed at crippling her financially and thus the affiant sought for prohibitory orders to be issued against the applicant.
  - m. The deponent also took issue with the deponent of the affidavit in support of the chamber Summons and the Notice of Motion and stated that neither of them had annexed any evidence showing that they are authorized to swear affidavits on behalf of the Applicant. On that note the deponents prayed for the affidavits to be struck out for want of authority and locus.
  - n. In conclusion, the affiant avers that if the court is inclined to allow the prayer then, it makes an orders for preservation of the entire decretal sum of Kshs 2, 116,627.49 at the Applicants Cooperative Bank Account Number xxxx, Narok Branch which currently hold a sum of more than Kshs 20 Million.
4. The application was disposed of by written submissions with the applicant filing on the February 10, 2023 and the Respondent on the February 13, 2023.

#### **Applicant submissions.**

5. The applicant submitted that this Appeal was dismissed because a record of Appeal. He argued that the applicant had requested for the typed proceedings from the trial Court but was not supplied with any prompting it to request this Court to call for the file, which Court declined. It was argued that dismissal of appeal for lacking record of appeal is a technicality and the dismissal has enables the Respondent to benefits from the actions of defrauding the Appellant and stealing the funds of the Sacco members. He argued further that the duty of the court is to do justice which duty cannot be fettered by procedural technicalities but by the overriding objectives provided for under Section 1A,



& 1B of the Civil Procedure Act as held in Wachira Karani V Bildad Wachira [2016] eKLR where the Court held that;-

' The fundamental duty of the court is to do justice between the parties. It is, in turn, fundamental to that duty that parties should each be allowed a proper opportunity to put their cases upon the merits of the matter. The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.'

6. It was submitted that the law dictates for the Court to find that the overriding objectives overshadow all technicalities, precedents, rules and actions which are in conflict with it as was held in Stephen Boro Gitiba V Family Finance Building Society and 3 others, Nairobi Court of Appeal case no 263 of 2009.

7. Emanating from the foregoing, the applicant submitted that the powers of a judge are immense in ensuring justice is delivered as was held in Patel V EA Cargo Handling Services Limited [1974] EA 75 where it was held that;

' The court has a very wide discretion and there are no limits and restrictions on the discretion of the judge except that if the judgment is set aside or varied it must be done on terms that are just. In Patel v EA Cargo Handling Services Ltd [1974] EA 75 at page 76, Sir William Duffus P held:

'The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules.'

8. To further emphasize on the need to overlook technicalities, the applicant cited the case of Philip Chemwolo & Another V Augustine Kubede [1986] KLR where the Court held that;

' Blunder will continue to be made from time to time and it does not follow that because a mistake has been made, that party should suffer the penalty of not having his case heard on merit.'

9. On whether this Court can call for the trial Court file, the applicant submitted that this Court has been clothed with Supervisory powers over the Subordinate Courts in Article 165(6) of the Constitution, to ensure fair administration of justice. He added that the claim emanated from actions of the Commissioner of Cooperative which was not sued or held liable for action of termination of the services of the Respondent, when the Commissioner of the Cooperative was the one that terminated the services of the Respondent herein.

10. In conclusion, the applicant submitted that the application was filed timeously, raising sufficient cause to warrant the review of the Judgement of the Court delivered in December 8, 2022. He prayed for the application to be allowed in the interest of substantive justice.

### **Respondent's Submissions.**

11. The Respondent on the other hand submitted from the onset that the applicant has not satisfied the conditions for review provided under Section 80 of the Civil Procedure Act as read with Order 45 Rule (1)&(2) of the Civil Procedure Rules, because it has not demonstrated that it has discovered new and important matter or evidence which with diligence had not discovered before, Shown any mistake or error is apparent on record or any other sufficient cause. It argued that without filing a record of Appeal, the hands of this Court are tied and could not rendered an appeal based on allegations which had not been substantiate as such the dismissal was rightfully done and regular in the circumstances.



12. The Respondent submitted that even if the contention by the Applicant was founded, then the proper forum to approach was the Court of Appeal and not this Court because the issue raised was failure by the trial Court to supply the appellant with record of Appeal and by this Court to call for the trial Court's File, which issues are outside the purview of Review and should be raised in an appellate Court because the issue for determination goes to the substantive decision made by this Court. Additionally, that if the court allows the application, it will be sitting on its own appeal contrary to the law.
13. It was also submitted that the allegations by the applicant that it sought for typed proceeding in a letter to the Executive office and exhibited receipt do not tally because the receipt was issued earlier before the alleged letter was issued raising question of the genuineness of the letter and the entire request.
14. The Respondent also took issue with the enabling provision of the law relied upon by the application in their application and stated that the applicant has failed to rely on the substantive law under section 80 of the Civil Procedure Act and Order 45 Rule 1&2 in its application making the application defective. Further that there was not decree and or judgement exhibit in the current application for the court to peruse through in making its decision, making the application defective and a candidate for dismissal. To support this argument, the Respondent relied on the case of Suleiman Murunga V Nilesta Holdings Limited & Another [2015] eKLR which cited the case of Julius Mukami Kanyoko & 2 others -vs- Samuel Mukua Kamere & Another (2014) eKLR where the Court while considering the application of Order 45 to an application for review while no formal order was annexed, rendered itself as follows:-

' The plain reading of the above provision (referring to order 45 Rule 1) is that an applicant for review ought to have annexed a formal extracted decree or Order in respect of which the review is sought. In essence judgment and/or ruling. Thus where an applicant fails to annex is sought to be reviewed such an application is defective. In the Defendant's present application the order that the Defendants sought to be reviewed was not annexed with the result that the Defendants application was fatally defective. I agree that a formal decree and/or order is a pre requisite before an applicant can bring himself/herself within the ambit of order 45 of the Civil Procedure Rules as relates to review of the decree and/or order'.

15. The Respondent also submitted that since the applicant had chosen to appeal the decision of the trial Court, they are barred from seeking for review of the same as stated under Section 90 of the Civil Procedure Act.
16. The Respondent also submitted that Isaac Dopoi Kilese and Dancun Kiprono are not officers of the Sacco, neither have they been given authority to sue on behalf of the Sacco, therefore they lack standing and locus to swear the affidavits on behalf of the Sacco. He stated in particular that the advocate who swore the affidavit does not have firsthand information on the facts of the case because he was merely holding brief for the advocate who was on record from the beginning of this matter as such does not have all the facts as required under Order 19 Rule 3 of the Civil Procedure Rules to be able to authoritatively swear an affidavit on facts. He added that advocates have been advised to refrain from swearing affidavits on behalf of clients on contested facts in the case of Simon Isaaac Ngugi V Oversees Courier Services(K) Limited [1998] eKLR.
17. He also argued that Rule 9 of the Advocates Practice Rules prohibits advocates from appearing as an advocate in a matter in which they may be required to give evidence. In this, they cited the case of Moiyo Matanya Ole Keiwua V Chief Justice of Kenya & others [2008] eKLR, where the Court stated that affidavits that are sworn by persons who are not parties to the proceedings before Court are incompetent and ought to be expunged from the record. On that note, the Respondent urged this



- Court to expunge both affidavits sworn by Dancun Kiprono Advocate and Isaac Dopoi Kilesi, for being incompetent.
18. The Respondent also submitted that a similar application was filed in Kilgori Principal Magistrate Court on December 20, 2022, which application is a mirror reflection of the currently application, as it seeks similar prayer of review, which is contrary to Section 1A, &1B of the *Civil Procedure Act*.
  19. On costs, the Respondent submitted that the costs of this applications should be borne by the Applicant.
  20. I have examined the averments and submissions of the parties herein.
  21. The applicant herein has sought review of this court's Judgment dated December 8, 2022 dismissing their case.
  22. The appellant applicant contends that the appeal was dismissed on a technicality in that there was no record of Appeal.
  23. They aver that they raised the issue of failing to get the proceedings of the trial court before this court but that this court failed to call for the file.
  24. The respondent on their part aver that there is no error on the record to warrant review.
  25. They also aver that the deponent Duncan lacked capacity to swear the affidavit in support of the Chamber Summons.
  26. They also aver that the letter dated August 23, 2021 addressed to the EO Kilgoris Law courts was not received by the court and payment receipt accompanying it is dated August 11, 2021 days before the letter was written.
  27. In determining this application, I rely on the ELRC Rules 2016 which at Rule 33 (1) state as follows;  
' 33(1).
    - (1) A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—
      - (a) If there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;
      - (b) On account of some mistake or error apparent on the face of the record;
      - (c) If the judgment or ruling requires clarification; or
      - (d) For any other sufficient reason'.
  28. Indeed the court has power to review its orders as provided above.
  29. The applicants seem to rely on Order 45 and 51 of the CPR as the reason for the review which is an error.
  30. That as it may be failure to produce a record of appeal would imply there was an error from the word go.



31. This however was never brought to the attention of this court either orally or in writing. When the court gave directions on the hearing of the Appeal, the applicants were present and never at any point did they indicate that the record was incomplete.
32. They were willing to proceed despite not presenting in court the evidence upon which they wanted the court to proceed on.
33. The appellants have also indicated that this court refused to call for the trial court file.
34. Indeed this was not submitted to the court and no request was made to have the trial court file submitted to court. The applicants failed themselves in this case.
35. No new evidence has been placed before this court even on communication before court and the applicants or even the record that was initially missing that would enable court consider the application based on evidence that was previously missing.
36. I find no reason as to why I should allow this application for review and I dismiss it accordingly with costs.

**RULING DELIVERED VIRTUALLY THIS 7<sup>TH</sup> DAY OF MARCH, 2023.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:-

Kiprono holding brief for Muigai for Applicant – present

Angeline (Respondent in person) - present

Court Assistant – Fred

