



REPUBLIC OF KENYA



Butali Sugar Mills Limited v Wemali & another (Employment and Labour Relations Appeal E017 of 2022) [2023] KEELRC 886 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 886 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E017 OF 2022**

**JW KELI, J
APRIL 14, 2023**

BETWEEN

BUTALI SUGAR MILLS LIMITED APPELLANT

AND

JOHN NYONGESA WEMALI 1ST RESPONDENT

FRODAK KENYA LIMITED 2ND RESPONDENT

JUDGMENT

1. The appellant aggrieved by the Ruling and order of Honourable Eric Malesi (PM) delivered on the August 16, 2022 in Kakamega CMELR NO. 25 of 2020 brought the instant Appeal vide Memorandum of Appeal dated September 1, 2022 and record of appeal received in court on the 17 November 2022 and supplementary record of appeal dated December 15, 2022 received in court on the November 16, 2022 seeking the following Orders:-
 - a. The appeal be allowed and the Ruling dated August 16, 2022 together with the consequent orders thereto be set aside.
 - b. Costs of the appeal be granted to the appellant
 - c. Any other relief that this Honourable court may deem fit to grant.
2. The Appeal was premised on the following grounds:-
 - i. The learned Trial Magistrate grossly misdirected himself in treating the written submissions on territorial jurisdiction before him and consequently coming to a wrong conclusion on the same.
 - ii. That the learned trial Magistrate erred in law in dismissing the appellant's Preliminary Objection thereby arrived at a decision unsustainable in law.



- iii. The Learned Trial Magistrate misdirected himself in ignoring the principles applicable and the relevant authorities cited in the written submissions presented and filed by the appellant in their entirety.
- iv. The learned trial Magistrate erred in law and fact by failing to consider the relevant provisions of the Magistrate Court Act 2015 and the Civil Procedure Act 2010 applicable in the determination of the Notice of preliminary objection raised by the appellant.
- v. The learned trial Magistrate failed to apply himself judicially and to adequately evaluate the appellant's submissions thereto and thereby arrived at a decision unsustainable in law.

Background to the appeal

3. The 1st respondent filed a suit Kakamega CMERC CASE NO. 25 OF 2020 against the 2nd respondent and the appellant dated December 6, 2019 and amended on the August 25, 2021 seeking judgment against the respondents for the following reliefs:
 - a. May salary for Kshs. 11926.40/-
 - b. One month salary in lieu of notice Kshs. 11926.40/-
 - c. Prorate leave Kshs. 50, 090.88/=
 - d. Underpayment of wages Kshs. 50, 481.60/=
 - e. Public holidays Kshs. 75, 431.40/=
 - f. Overtime for extra hours worked Kshs. 64, 800/=
 - g. Rest days Kshs. 114, 493.44/=
 - h. 12 months compensation salary Kshs. 143, 116.40/=
 - i. Cost of the suit
 - j. Certificate of service
 - k. House allowance Kshs. 128, 805.12/= . (page 5-9 of the record of appeal)
4. The appellant entered appearance and filed defence to the amended statement of claim (pages 15 to 23 of the record). While the suit was pending the Appellant filed notice of preliminary objection dated May 5, 2022 as follows:-
 - i. This Honourable court lacks territorial jurisdiction to hear and determine the suit.
5. The objection was based on the provisions of the law being section 12 of the Civil Procedure Act and further grounds to be adduced at the hearing.
6. The court gave directions for the judgment in this appeal to apply in Bungoma ELRCA nos. E15, E18, E202, E21 AND E22 of 2022 and for the appeal to be canvassed by way of written submissions. The appellant's written submissions drawn by Mbeka & Associates were dated December 8, 2022 and received in court on December 13, 2022. The 1st respondent's written submissions drawn by V.A. Shibanda & Company Advocates were dated January 18, 2023 and received in court on the January 19, 2023. The 2nd respondent's written submissions drawn by Okong'o Wandago & Company Advocates were dated January 26, 2023.



Determination

Issues for determination.

7. The Appellant in their written submissions identified the following issues for determination:-
 - a. Whether the trial court had jurisdiction to hear and determine the dispute
 - b. Whether the court can order transfer of a suit filed in court without jurisdiction to a court of competent jurisdiction.
 - c. Which party should bear the costs of the appeal.
8. The 2nd respondent supported the appeal
8. The 1st respondent response to the appeal was that the appeal had been overtaken by events the court having in its ruling dated December 2, 2022 In Bungoma High Court ELRC Misc. Application No. E009 /2022 Isaiah Chikamai v Froka Kneya & Butali Sugar Mills ordered the primary suit herein Kakamega MCELR No. 25 of 2020 be transferred to Butali law courts which is what the appellant is seeking in his appeal. That the ruling had not been appealed against.
10. The court adopts the issues as addressed by the parties for determination of the appeal being:-
 - a. Whether the appeal is overtaken by events
 - b. If not in (a) the court to determine:-
 - c. Whether the trial court had jurisdiction to hear and determine the dispute.
 - d. Whether the court can order transfer of a suit filed in court without jurisdiction to a court of competent jurisdiction.
 - e. Which party should bear the costs of the appeal
11. The principles which guide this court in an appeal from a trial by the magistrate court are now well settled. In *Selle and another v Associated Motor Boat Company Ltd & others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

Further in *David Kaburuka Gitau & another v Nancy Ann Wathithi Gatui & another* Nyeri HCCA No. 43 of 2013 the court opined:- ‘Is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.’”



a. Whether the appeal is overtaken by events

12. The 1st respondent, the claimant in the trial court submits that vide ruling dated December 2, 2022 this court in Bungoma High Court ELRC Misc. Application No. E009 of 2022 *Isaiah Chikamai v Frodak Kenya & Butali Sugar Mills* the court ordered the primary suit being Kakamega MCELRC No. 25 of 2020 be transferred to Butali Law Courts which is what the appellants are seeking in the appeal. That the instant appeal was filed on the September 2, 2022 and in the memorandum of appeal dated September 1, 2022 while the notice of motion application seeking transfer of the primary suit being Kakamega MCELRC No. 25 of 2020 was dated August 5, 2022 and filed in court on the August 16, 2022. That the appellant participated in the said application vide written submissions and was present in court when the ruling was delivered transferring the primary suit to Butali law courts. That the appellant had not appealed against the said ruling transferring the primary suit and had opted to file the instant appeal.

Appellants submissions

13. The appellant did not address the issue but proceeded to address the issue of whether the court can transfer a suit filed in a court without jurisdiction to a court of competent jurisdiction. The 2nd respondent did not also address the issue.

Decision

14. The 1st respondent in Bungoma High Court ELRC Misc. Application No. E009 of 2022 *Isaiah Chikamai v Frodak Kenya & Butali Sugar Mills* filed Notice of Motion dated 5th day of August, 2022 18(1) (b) and 3 A of the *Civil procedure Act* and Order L of the *Civil Procedure Rules* seeking the following orders:-

- a. That the Honourable court be pleased to order that Kakamega E&LRC Nos :-

5, 145, 56, 59, 27, 136, 468, 82, 96, 110, 77, 73, 50, 165, 121, 26, 137, 66, 69, 79, 74, 91, 117, 28, 141, 89, 162, 101, 154, 153, 111, 25, 163, 122, 84, 108, 126, 133, 75, 144, 21, 61, 143, 68, 159, 151, 87, 142, 72, 100, 98, 85, 92, 74, 7, 116, 102, 152, 118, 131, 125, 127, 64, 120, 135, 76, 139, 161, 130, 45, 71, 29, 2, 31, 124, 97, 123, 150, 9, 157, 47, 88, 160, 134, 147, 65, 94, 105, 70, 30, 106, 140, 103, 81, 99, 51, 49, 104, 158, 109, 93, 114, 115, 119, 155, 164, 57, 129, 83, 128, 132, 138, 80, 148, 86, 32 of 2020 be and is hereby transferred from Kakamega Chief Magistrates Court to Butali Law courts for purposes of hearing and determination.

- b. Costs of the Application be provided for.

15. The court directed the said application be canvassed by way of written submissions. The court vide ruling dated December 2, 2022 in Bungoma High Court ELRC Misc. Application No. E009 of 2022 *Isaiah Chikamai v Frodak Kenya & Butali Sugar Mills* ordered the primary suit being Kakamega MCELRC No. 25 of 2020 and other suits be transferred to Butali Law Court as follows:- ‘The court allows the application dated 5th August 2022 and hereby Orders that Kakamega E&LRC Nos-5, 145, 56, 59, 27, 136, 468, 82, 96, 110, 77, 73, 50, 165, 121, 26, 137, 66, 69, 79, 74, 91, 117, 28, 141, 89, 162, 101, 154, 153, 111, 25, 163, 122, 84, 108, 126, 133, 75, 144, 21, 61, 143, 68, 159, 151, 87, 142, 72, 100, 98, 85, 92, 74, 7, 116, 102, 152, 118, 131, 125, 127, 64, 120, 135, 76, 139, 161, 130, 45, 71, 29, 2, 31, 124, 97, 123, 150, 9, 157, 47, 88, 160, 134, 147, 65, 94, 105, 70, 30, 106, 140, 103, 81, 99, 51, 49, 104, 158, 109, 93, 114, 115, 119, 155, 164, 57, 129, 83, 128, 132, 138, 80, 148, 86, 32 of 2020 suits pending



before Kakamega Chief Magistrates Court be and are hereby withdrawn from that court and ordered for transfer to Butali Law Courts for disposal. Costs of the application to the Respondents.”

16. The court in the said application dealt with the powers of the court under section 18 of the [Civil Procedure Act](#) to transfer suits to wit:-

“The applicant has invoked the jurisdiction of the court to exercise its powers under section 18 of the [Civil Procedure Act](#). The said law reads: ‘18. Power of High Court to withdraw and transfer case instituted in subordinate court (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage— (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or (b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter— (i) try or dispose of the same; or (ii) transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same.’”

17. The court further held in its ruling of December 2, 2022 :- ‘The court finds that Under section 11 of the [Civil Procedure Act](#), a suit may be instituted at lowest grade subordinate court in the County to try the matter and may also be moved within the County.’”
18. The court finds and determines that it applied its mind on the issue of jurisdiction of the magistrate court in ordering transfer of the suits in its ruling of 2nd December 2022. The court then finds it would be resjudicata to render a decision on the same issue of the jurisdiction of the trial magistrate court having transferred the files to the court of the lowest grade competent to try it within the county of Kakamega as envisaged under section 11 of the [Civil Procedure Act](#) being Butali Law Courts.
19. The court finds that the appellant was aware of the said decision of the court and had the option to appeal against the said ruling if not satisfied. The court appreciates that the instant appeal filed after the application was pending before the court when the ruling dated December 2, 2022 was delivered. The court having found it already addressed its mind on the jurisdiction of the trial magistrate court and having found any other decision on same issue would be resjudicata agrees with the 2nd respondent that appeal is already overtaken by events. The court then finds no need to determine the other issues as it would be in violation of the principle of resjudicata.
20. The court in ruling dated December 2, 2022 in Bungoma High Court ELRC Misc. Application No. E009 of 2022 *Isaiah Chikamai v Frodak Kenya & Butali Sugar Mills* made the following order:- ‘The court allows the application dated August 5, 2022 and hereby Orders that Kakamega E&LRC Nos-5, 145, 56, 59, 27, 136, 468, 82, 96, 110, 77, 73, 50, 165, 121, 26, 137, 66, 69, 79, 74, 91, 117, 28, 141, 89, 162, 101, 154, 153, 111, 25, 163, 122, 84, 108, 126, 133, 75, 144, 21, 61, 143, 68, 159, 151, 87, 142, 72, 100, 98, 85, 92, 74, 7, 116, 102, 152, 118, 131, 125, 127, 64, 120, 135, 76, 139, 161, 130, 45, 71, 29, 2, 31, 124, 97, 123, 150, 9, 157, 47, 88, 160, 134, 147, 65, 94, 105, 70, 30, 106, 140, 103, 81, 99, 51, 49, 104, 158, 109, 93, 114, 115, 119, 155, 164, 57, 129, 83, 128, 132, 138, 80, 148, 86, 32 of 2020 suits pending before Kakamega Chief Magistrates Court be and are hereby withdrawn from that court and ordered for transfer to Butali Law Courts for disposal. Costs of the application to the Respondents.’”
21. In the instant appeal the primary suit challenged is Kakamega CMELRC NO. 25 OF 2020. The same was transferred under the said order of December 2, 2022. The court finds and determines the instant appeal is overtaken by events and dismisses the same with no order as to costs.
22. The court had ordered that this judgment to apply to appeals Nos. E15, E17, E18, E20 , E21 AND E22 and it is so ordered.



23. The court perused Bungoma ELRC Appeals Nos E016, E019, E023 AND E24 of 2022 and found that the appeals were from same ruling by HON. Eric Malesi of 16th August 2022 with respect to primary suits Kakamega CMERLC NOS 9 OF 2020, 45 OF 2020, 31 OF 2020 and E007 of 2020 which the court found were transferred under Bungoma High Court ELRC Misc. Application No. E009 of 2022 *Isaiah Chikamai v Frodak Kenya & Butali Sugar Mills*. Consequently the instant judgment applies to determine Bungoma ELRC Appeals NOS E016, E019, E023 AND E24 of 2022 which are dismissed on basis of the appeals having been overtaken by events with no order as to costs.

24. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 14TH APRIL 2023.

JEMIMAH KELI,

JUDGE

In the presence Of:-

Court Assistant : Lucy Macheso

For Appellant : Mbeka

2nd Respondent:- Wanyangu holding brief for Twena

1st Respondent : Shibanda

