



REPUBLIC OF KENYA



KENYA LAW
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**Longterm View Capital Limited v Ayuma (Appeal 5 of 2019)
[2023] KEELRC 1217 (KLR) (19 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1217 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 5 OF 2019
NJ ABUODHA, J
MAY 19, 2023**

BETWEEN

LONGTERM VIEW CAPITAL LIMITED APPELLANT

AND

EZRA OKIEGA AYUMA RESPONDENT

JUDGMENT

1. Through the memorandum of appeal dated March 1, 2019, the appellant appeals against the ruling of Honourable P. Muholi (SRM) given on February 1, 2018 in civil case No 7613 of 2015. The decision appealed against was the ruling on the application dated April 12, 2018 that sought stay of execution of the *ex parte* judgment dated August 23, 2017.
2. The appeal was based on the grounds that:
 - a. The honourable magistrate erred in fact and in law by entertaining the suit yet it lacked jurisdiction to hear and determine it;
 - b. The honourable magistrate erred in fact and in law in finding that the appellant did not file a draft defence yet there was already the issue of settlement and jurisdiction before it;
 - c. The honourable magistrate erred in fact and in law in delivering the impugned judgment and sanctioning execution of the decree yet it lacked jurisdiction over the subject matter;
 - d. The honourable magistrate erred in law and in fact in dismissing the appellant's application dated April 12, 2018;
 - e. The honourable magistrate erred in law in ignoring the fact that the suit was already compromised by the settlement agreement signed between the appellant and the respondent whereby the claimant was given Kshs 203,435/=;



- f. The honourable magistrate erred in fact and in law in holding that vacating the judgment made in default of appearance would prejudice the respondent yet it is the appellant who would actually be prejudiced;
 - g. The honourable magistrate erred in fact and in law in not considering the fact that the decision to dismiss the application to set aside the judgment had the effect of ordering the appellant to compensate the respondent twice;
 - h. The honourable magistrate erred in fact and in law in unjustly enriching the respondent who had been compensated in an out of court settlement;
 - i. The honourable magistrate erred in fact and in law in not addressing its mind to the supporting affidavit of Beautah Maroko sworn on April 12, 2018, further affidavit of Beautah Maroko as well as the affidavit of Elizabeth Gicheru both sworn on May 30, 2018;
 - j. The honourable magistrate erred in fact and in law in permitting an obvious abuse of court process by the conniving respondent;
 - k. The honourable magistrate erred in fact and in law in denying the appellant a right to fair hearing considering the surrounding circumstances;
 - l. The honourable magistrate erred in fact and in law ignoring the appellant's explanation for not entering appearance and filing a defence;
 - m. The honourable magistrate erred in fact and in law in finding that the appellant ought to have consoled the respondent with a throw away cost as they go through the trial;
 - n. The honourable magistrate erred in law in finding that the notice of motion lacked merit; and
 - o. In all the circumstances of the case, the honourable magistrate failed to do justice.
3. The appellant prays that this court do orders that:
- a. The appeal be and is hereby allowed.
 - b. The judgment issued on August 23, 2018 and the ruling of February 1, 2019 of the honourable magistrate in Civil Case No 7613 of 2015 be and is hereby set aside.
 - c. That this honourable court dismisses Civil Case No 7613 of 2015 on account of lack of jurisdiction by the Chief Magistrate Court.
 - d. That in the alternative to prayer (c) above, the court allows the notice of motion application dated April 12, 2018.
 - e. The appellant be awarded the costs of this appeal.
4. The appeal was disposed of through written submissions.
5. On the question of jurisdiction, the appellant submitted that this was both an employment and labour dispute since it arose from the terms of the employment contract between the parties herein. That however, being a work injury benefits claim, it ought to have been handled by the Director WIBA before an aggrieved party approached this honourable court. This is despite section 9(b) of the *Magistrates' Courts Act* 2015 donating powers to the Magistrates Courts to hear and determine labour claims subject to the set pecuniary jurisdiction.



6. The appellant relied on the decision of *Law Society of Kenya v Attorney General & another* [2019] eKLR in which the Supreme Court held that compensation for injuries suffered by an employee at work are assessed by the Director WIBA as provided for under the *Work Injury Benefits Act*, and not the courts. The court further held that the director is essentially performing a quasi-judicial function and that by dint of article 165(6) of the *Constitution*, his actions and decisions are still subject to the over-riding authority of the High Court.
7. It was the appellant's submission that it follows therefore that the trial court lacked jurisdiction to hear and determine the aforementioned civil case No. 7613 of 2015 as the same was a WIBA matter and only the Director WIBA had original jurisdiction to examine the injuries and assess compensation. That it therefore was not obligated to file a draft defence in the matter. That the magistrate acted contra-statute and ought to have downed its tools as per the celebrated case of the *Owners of the Motor Vessel Lilian 'S' v Caltex Kenya Limited* (1989) KLR 1, in which the Court of Appeal held that:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
8. Secondly, the appellant submitted that parties had reached a settlement in which the respondent received Kshs 203,435/- from the appellant as damages for the injuries suffered. That courts have severally held that settlement agreements in which an employee accepts payment are binding and such employee cannot institute proceedings over the same issues. It relied on the case of *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR in which the Court of Appeal held that signing a discharge voucher constitutes a complete contract and the employer is fully indemnified in such instance.
9. It further submitted that in the circumstances, awarding the respondent damages for which he had been compensated pursuant to the settlement agreement would amount to unjust enrichment as he shall have been paid twice for the same injury. The appellant asserts that settlement was reached and there was as such no need for compensation to be re-assessed.
10. On the other hand, the respondent submitted that it is settled law that cases and appeals are decided on pleadings. Since the appellant did not raise the issue of WIBA or jurisdiction of the trial court in its motion of April 17, 2018, the supporting and further affidavits or even in its submissions, the ruling could not have dwelt on jurisdiction. That raising such an issue for the first time on appeal is an afterthought and the trial court should not be faulted for entering default judgment.
11. It is the respondent's submission that in any event, the law applicable then was the decision of Ojwang J (as he then was) in *LSK v A.G* before it was overturned on appeal in *A.G v LSK* [2017] eKLR.
12. On the issue of the settlement agreement signed by parties, the respondent submits that the purported agreement would itself not be a triable defence in law since courts have held such to be illegal and unenforceable for being contrary to public policy (*Kimau v Kasese (No 2)* 1990 KLR 35). That the appellant did not offer any tangible evidence of payment and neither was the respondent's advocate on record involved. According to the respondent, the appellant does not deserve the court's discretion at all.
13. It was the respondent's submission that he has not been compensated since 2014 and that if this court acceded to the appeal, conditions be imposed that:
 - a. The trial court's award of damages be deposited in an interest joint account in 21 days.



- b. Costs of the motion and of the appeal be borne by the appellant.
- c. In default execution to issue.

Determination

14. The duty of a first appellate court was established in the Court of Appeal in *Selle v Associated Motor Boat Company Limited* [1968] EA 123 as follows:

“An appeal to this court from a trial by the High Court is by way of 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 it has clearly failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

14. In determining the appeal herein, this court shall similarly seek to reanalyse the evidence tendered before the trial court vis-à-vis the court’s conclusion and disposition. On the issue before this court, section 109 of the *Evidence Act* casts an evidential burden upon any party who alleges the existence of a fact. In the case of *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] eKLR, the Court of Appeal at Mombasa held that:

“Evidence that ‘he who asserts must prove’ (see *Jennifer Nyambura Kamau v Humphrey Mbaka Nandi Nyr* CA civil appeal No 342 of 2010 [2013] eKLR)”

14. Therefore, as to whether there exists a settlement agreement between parties herein, the appellant had the evidentiary burden to produce the same before the trial court. However, having failed to do so, it cannot plead that the learned magistrate erred when it in fact did not file a defence on merit let alone raise the issue before the magistrate.

14. To this extent the court finds and holds that the appeal is unmerited and is hereby dismissed with costs

14. It is so ordered

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF MAY 2023

Abuodha J. N.

Judge

