



Fiftythree Seafood Shop Ltd v Lawrence & another (Employment and Labour Relations Appeal E066 of 2023) [2023] KEELRC 2097 (KLR) (13 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 2097 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E066 OF 2023**

**K OCHARO, J
JUNE 13, 2023**

BETWEEN

FIFTYTHREE SEAFOOD SHOP LTD APPELLANT

AND

ALRED MAKONDO LAWRENCE 1ST RESPONDENT

FLORAH NYAMBURA CHEGE 2ND RESPONDENT

RULING

Introduction

1. Through a Notice of Motion Application dated May 15, 2023, the Appellant/Applicant seeks:
 - a. That the application be certified urgent and service thereof be dispensed with in the first instance.
 - b. That pending the hearing and determination of this application, inter partes, the Honourable Court be pleased to issue an order of stay of the proceedings, including delivery of judgment on June 16, 2023 in Milimani Chief Magistrate Cause No E2087 of 2021 – Alfred Lawrence Makondo v Fiftythree Seafood Shop Limited.
 - c. That pending the hearing and determination of this Application the Honourable Court be pleased to issue an order of stay of the proceedings including delivery of judgment on June 16, 2023 in Milimani Chief Magistrate Case No E2087 of 2021 – Alfred Lawrence Makondo v Fiftythree Seafood Shop Limited.
 - d. That pending the hearing and determination of the Appeal, the Honourable Court be pleased to issue an order of stay of the proceedings including delivery of judgment on June 16, 2023 in Milimani Chief Magistrates Case No E2087 of 2021 – Alfred Lawrence Makondo v Fiftythree Seafood Shop Limited.



- e. That the Court be pleased to set aside the ruling delivered on April 14, 2023 pending the Applicant's application dated October 26, 2022.
 - f. That costs of this application be provided for.
2. The Application is anchored on the grounds obtaining on the face of the application and in the supporting affidavit sworn by Eric Kivuva, Counsel for the Applicant.
 3. The application is opposed upon basis of the grounds obtaining on the replying affidavit sworn by Mercy Nyambane Counsel for the Respondent.

The Application

4. The Applicant states that on the April 14, 2023 the trial court dismissed its application dated October 26, 2022. The dismissal order is the subject matter of the appeal herein.
5. The Applicant further states that the appeal raises arguable points worthy of adjudication, and that it has high chances of success.
6. It is further contended that should the orders sought in the application be declined, the appeal shall be rendered nugatory. The applicant shall suffer substantial loss as it could have been denied a right to fair hearing.
7. The Applicant states further that the application herein has been lodged without undue delay. That the interest of justice and the right to fair hearing demand that the ruling be set aside to allow the applicant present its case before the trial court.

The Respondents' Response

8. The Respondents stated that through Milimani Chief Magistrates ELRC Cause No 2087 of 2021, they instituted a claim against the Applicant seeking against it, various reliefs. Upon being served with summons to enter appearance, the Applicant did file a memorandum of appearance and subsequently a statement of response to their statement of claim.
9. After the close of the pleadings the matter got slated for a pre-trial conference for the April 20, 2022. Despite service of court process upon counsel for the Applicant, counsel never appeared in court for the pretrial directions. Consequently, the trial court certified the matter ripe for hearing, in his absence. Subsequently, the matter was slated for hearing for the June 28, 2022.
10. The matter came up for hearing on the June 28, 2022, and the same was adjourned at the instance of the applicant's counsel, on the ground that Respondent's witness had been sick and therefore had not been able to execute a witness statement. It was given leave of 30 days to file and serve the witness statements and any other documents.
11. Subsequently the registry gave the matter hearing date for the October 26, 2022. On this date counsel for the Applicant again sought for an adjournment citing ground that the witness statement had not been filed as the applicant's witness had not signed it. The court declined to the adjourn the matter and directed that it proceeds for hearing.
12. Unbowed, the Applicant's counsel made a further application, urging the trial Court to proceed with Respondents' but at the close thereof allow the applicant to file the witness statement. The trial magistrate rejected the application. Consequently, the matter proceeded, counsel for the Respondent had an opportunity to cross-examine and indeed did cross examine the Respondents in detail.



13. The Respondents stated that at the close of their case the Applicant's Counsel re-applied for leave for the applicant to file the witness statement, an application which the trial magistrate declined on the grounds, first that the Respondents would be prejudiced and second, that the Court had already pronounced itself on the application.
14. It was further stated that the court directed the parties to file their written submissions and slated the matter for mention for the November 29, 2022 to check on compliance and for further directions.
15. Subsequently, the Applicant filed an application dated October 26, 2022 wherein he sought inter alia that the proceedings of October 26, 2022 and all consequential orders be set aside and it be allowed to file and serve the witness statement out of time.
16. The application was dismissed on the April 14, 2023 with costs on the grounds that the application was *res-judicata*; the applicant had been given numerous chances to be heard but failed to seize the opportunity; the applicant had participated in the hearing and extensively cross-examined the Respondents; and allowing the application could be prejudicial to them.
17. Consequent to the ruling, parties agreed to file closing submissions. The Respondents were granted fourteen (14) days to file their submissions whilst the Applicant was granted 21 days to.
18. The Respondent contended that the Applicant has deliberately concealed material facts from this court.
19. The circumstances of the matter are to the effect that the Applicant's appeal herein has no chance of success.

The Parties submissions

20. When this matter came up for hearing of the application on the May 17, 2023, their Counsel made oral submissions which largely reiterated the contents of the affidavits filed by their respective clients and which submissions I have carefully considered.

Analysis and determination

21. I have carefully considered the applicant's application, the grounds upon which it is anchored, the affidavit in support thereof, the Respondents' replying affidavits and the submissions by Counsel for the parties, a single issue commends itself for determination, thus, whether the applicant's application has merit.
22. For the reason as will shortly come out hereinafter, the applicant's application herein is one that lacks merit and fit dismissal.
23. In prayer 5 for the application, the applicant seeks:

“ that the court be pleased to set aside the ruling delivered on April 14, 2023, dismissing the applicant's application filed October 26, 2022.”

This court finds considerable difficulty in comprehending what informs this prayer and what jurisdiction it has, to, at this point of the proceedings, grant the same. If the court was to grant the order at this point, there won't be anything left on the applicant's appeal herein for determination.
24. With due respect, this application is one afflicted by poor draftsmanship. It is too general in content, and so sketchy for one to understand fully nature of the application that the applicant had before the



trial court, the ruling that emanated from the hearing of the application and the grounds that afforded its dismissal. With this deficiency, the court is only left to guess. Guessing which this court is reluctant to do.

25. The Court notes that according to the Respondent, one of the reasons why the trial magistrate rejected the application was that the application was res judicata as she had rendered herself twice on the orders that were being sought in the application, following oral applications that had been made earlier on by the Applicant. The applicant did not contest this fact and its counsel did not make any submissions, to discount the same. It is at this point that I should agree with the respondent that the applicant has not demonstrated that it has an arguable appeal as it asserts.
26. Considering that the doctrine of res judicata may come into play against the appeal herein, to allow the application herein shall amount to an abdication of duty by this Court to do justice.
27. By reason of the premises, I find the application lacking in merit. Consequently, it is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED THIS 13TH DAY OF JUNE 2023.

OCHARO KEBIRA

JUDGE

In Presence of:

Ms Yala.....for Applicant

Ms. Nyambane.....for Respondent

