



REPUBLIC OF KENYA



**KENYA LAW**  
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**Oduor & 101 others v Jackwins Company Ltd (Appeal E017 of 2022)  
[2023] KEELRC 1733 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1733 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E017 OF 2022  
CN BAARI, J  
JULY 13, 2023**

**BETWEEN**

**GEORGE ODUOR & 101 OTHERS ..... APPELLANT**

**AND**

**JACKWINS COMPANY LTD ..... RESPONDENT**

*(Being an appeal from the Judgment and Decree of Hon. Obina  
(PM) in CMELRC E0189 OF 2021 delivered on 21st June, 2022)*

**JUDGMENT**

1. This appeal arises from a Judgment rendered on 21<sup>st</sup> June, 2022, wherein, the Trial Court found that the Appellants had not proved their case on a balance of probability, and proceeded to dismiss the entire suit with no orders on costs.
2. The Appellants being aggrieved by the decision of the Trial Court, lodged this appeal on 29<sup>th</sup> June, 2022.
3. The appeal is premised on the grounds That:
  - i. The Honourable Principal Magistrate erred in law and fact by purporting to vacate, set aside and/or alter the Interlocutory Judgment entered on the 22<sup>nd</sup> February, 2022.
  - ii. The Honourable Principal Magistrate erred in law and fact by failing to assess Damages and Terminal Dues payable to the Claimants after Formal Proof Hearing on the 12<sup>th</sup> April, 2022.
  - iii. The Honourable Principal Magistrate erred in law and fact by finding that Kisumu Law Courts lacked the requisite Jurisdiction to hear and determine this case, contrary to Section 15 of the [Civil Procedures Act](#) (Chapter 21 of the Laws of Kenya).



- iv. The Honourable Principal Magistrate erred in law and fact by communicating via Mobile Telephone Text message on 11<sup>th</sup> May, 2022, from his telephone Number 071085XXXX to the Claimant's Advocates' Office Mobile No 079557XXXX and thereby faulting this claim on the basis of Territorial Jurisdiction.
- v. The Honourable Principal Magistrate erred in law and fact by failing to appreciate that this Honourable Court was functus officio with regard to liability as determined by Interlocutory Judgment entered on 22<sup>nd</sup> February, 2022.
- vi. The Honourable Principal Magistrate erred in law and fact by failing to consider the Claimant's written submissions and supplementary written submissions filed on the 21<sup>st</sup> April, 2022 and on 13<sup>th</sup> June, 2022, respectively.
- vii. The Honourable Principal Magistrate erred in law and fact by dismissing the claim for alleged lack of merit despite cogent evidence adduced by the Claimants.

### **The Appellants' Submissions**

4. The Appellants submit that upon entry of the Interlocutory Judgment on 22<sup>nd</sup> November, 2022, and in default of appearance or defence under Order 10 Rule 6 of the *Civil Procedure Rules*, the issue of liability was no longer in contest. They placed reliance in *Peter Njoroge Kamau v The Attorney General* (2017) eKLR to buttress this position.
5. The Appellants further submit that without participating in the Formal Proof, the Respondent spurned an opportunity to contest the validity of the Supporting documents and it was therefore baseless and spurious on the part of the Honourable Principal Magistrate to allege that: -

“..... I am not convinced that these documents originated from the Respondent. To the contrary I am convinced that these documents were prepared by the Claimant respectively; George Oduor, to support the Claimant's (*sic*) case. I say so because the titling and wordings in the said documents does not speak and/or indicate that documents authentically came from and/or are authored by a person working with the Respondent's (*sic*) documents.....”
6. It is submitted for the Appellants that the Respondent did not contest or controvert the Supporting documents, especially the Payrolls produced in evidence and marked as Exhibits 1 and 2.
7. The Appellants submit that it was incumbent upon the Respondent to issue them with Letters of Employment pursuant to Section 10(1) of the *Employment Act*, and that Section 10(7) of the Act, squarely places the burden of proof upon the employer to adduce the employment records of an employee in legal proceedings.
8. It is their submission that Trial Court did not declare further on the issue after expressing his misgivings regarding jurisdiction, and service in his Judgment and therefore misleading for it to allege that he raised the issue of jurisdiction during Formal Proof proceedings or at any other time when the matter was in court.
9. The Appellants submit that Judgment on liability was conclusively entered on 22<sup>nd</sup> February, 2022 upon entry of the Interlocutory Judgment and therefore, the court was functus officio regarding the issue of liability.
10. It is their final submission that relying upon the exhibits adduced during formal proof hearing, they merit Judgment as pleaded in their Statement of Claim and the authenticity of the exhibits produced.



11. The Appellant prays that their appeal is allowed.

### **Analysis and Determination**

12. I have considered the Appellant's Record of Appeal, and the submissions by the Appellant. The grounds of appeal are summarized, as follows: -

- i. Whether the Trial Court erred in law and fact by purporting to vacate, set aside and/or alter the Interlocutory Judgment entered on the 22<sup>nd</sup> February, 2022.
- ii. Whether the Trial Court erred in law and fact by failing to assess Damages and Terminal Dues payable to the Claimants after Formal Proof Hearing on the 12<sup>th</sup> April, 2022.
- iii. Whether the Trial Court erred in law and fact by finding that Kisumu Law Courts lacked the requisite Jurisdiction to hear and determine this case, contrary to Section 15 of the Civil Procedures Act (Chapter 21 of the Laws of Kenya).

13. The Court of Appeal guided on the handling of a first appeal in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR;

“This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned Trial Judge are to stand or not and give reasons either way”

14. The Appellants' assertion is that the Trial Court entered an interlocutory judgment and thus erred when it purported to vacate and/or set aside the judgment already entered.

15. Under Order 10 Rule 6 of the *Civil Procedure Rules*, an interlocutory judgment is only entered where the claim is for pecuniary damages only or for the detention of goods. The Appellants in their suit sought an award for salary arrears, damages for unfair termination service pay or terminal dues, which all require that they be specifically proved.

16. Order 10 Rule 4 (1) and (2) of the *Civil Procedure Rules, 2010*, states as follows:

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- (1) Where the plaintiff makes a liquidated demand only and the defendant fails to appear on or before the day fixed in the summons or all the defendants fail so to appear, the court shall, on request in Form No 13 of Appendix A, enter judgment against the defendant or defendants for any sum not exceeding the liquidated demand together with interest thereon from the filing of the suit, at such rate as the court thinks reasonable, to the date of the judgment, and costs.
- (2) Where the plaintiff makes a liquidated demand together with some other claim, and the defendant fails, or all the defendants fail, to appear as aforesaid, the Court shall, on request in Form No 13 of Appendix A, enter judgment for the liquidated demand and interest thereon as provided by sub-rule (1) but the award of costs shall await judgment upon such other claim.”



17. Further, The *Employment and Labour Relations Court (Procedure) Rules* do not provided for entry of an interlocutory judgment, for the simple reason that parties to an employment arrangement are bound by the terms of their contract, which terms must thus be proved.
18. This therefore goes to say that the suit herein was not one where an interlocutory judgment could be entered, for reason that the claim did not only carry a liquidated claim.
19. I thus find that the interlocutory judgment purportedly entered on 22<sup>nd</sup> February, 2022, was irregular and cannot form the basis for this appeal.
20. The next ground in this appeal is whether the Trial Court erred in failing to assess damages and Terminal Dues payable to the Claimants after Formal Proof Hearing on the 12<sup>th</sup> April, 2022.
21. The Trial Court's finding is that the documents produced in support of the Claimant's case did not originate from the Respondent, but were in the view of the trial court, drawn by the 1<sup>st</sup> Appellant, and thus the decision that the Appellants did not prove that they were employees of the Respondent or that they were unfairly terminated.
22. The Claimants on their part, contend that it was the Respondent's duty, as the employer, to provide them with employment contract or otherwise show that it was not their employer.
23. This court is alive to the fact that the suit herein, was undefended. All the Trial Court had were the documents/evidence tendered by the Appellants. The evidence was not in any way rebutted.
24. It is however not lost on this court that even were a suit is not defended the Claimants have an obligation to prove their claim on a balance of probability.
25. The Appellants' position is that they were employed to do bush clearing for purposes of construction of a road in the year 2020. Further, no evidence was led to show how long the Appellant's contracts (if any) were to run, or whether they were employed as casual labourers or otherwise considering the type of jobs they purported to do.
26. The documents produced in evidence and forming part of the record of appeal, do not satisfy this Court that the Appellants had valid contracts of service with the Respondent or that they are owed as a result of those contracts.
27. Consequently, I find that the Appellants, as correctly held by the Trial Court, have not proved their case on a balance of probability.
28. The appeal is dismissed in its entirety.
29. The Respondent did not defend the appeal, and hence I make no orders on costs.
30. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13<sup>TH</sup> DAY OF JULY, 2023.**

**C. N. BAARI**

**JUDGE**

Appearance:

Mr. Jaoko Present for the Appellants

N/A for the Respondent



MS. Christine Omolo - Court Assistant.

