



**Prime Steel Company Limited v Rop & another (Appeal E002 of 2021)
[2023] KEELRC 1675 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1675 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E002 OF 2021
CN BAARI, J
JULY 13, 2023**

BETWEEN

PRIME STEEL COMPANY LIMITED APPELLANT

AND

SIMON KIPKOECH ROP 1ST RESPONDENT

SOIN CONSULTANT FIRM 2ND RESPONDENT

JUDGMENT

(Being an Appeal from the Ruling of the Hon. Purity Kosgei, Resident Magistrate, Tamu in Tamu PMCC No 51 of 2017 delivered on December 17, 2020)

1. This appeal arises from a ruling delivered on December 17, 2020, pursuant to the Appellant's application dated October 19, 2020, seeking the review of the decree rendered in the matter on September 10, 2020.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on January 14, 2021.
3. The grounds of appeal are as follows:
 - i. The Learned Trial Magistrate grossly misdirected herself on the law and fact in dismissing the Appellant's application dated October 19, 2020, for review/setting aside the judgment, as lacking in merit.
 - ii. The Learned Trial Magistrate misdirected herself in law and facts by failing to take into consideration relevant matters and judicial guidelines in determining applications for review/setting aside judgments/order thereby erroneously dismissing the Appellant's application dated October 19, 2020.



- iii. The Learned Trial Magistrate erred in law and grossly misdirected herself on facts by failing to judiciously determine the matters canvassed by the Appellant in its application dated October 19, 2020, and the Appellant's written submissions dated November 18, 2020 thereby occasioning a miscarriage of justice.
 - iv. The Learned Trial Magistrate erred in law and grossly misdirected herself on facts by failing to appreciate or for otherwise ignoring the tenets and principles applicable in an application for review/setting aside judgments/orders which were concisely raised and addressed in the Appellant's Application dated October 19, 2020, and the Appellant's written submissions dated November 18, 2020.
 - v. The Learned Trial Magistrate erred in law and grossly misdirected herself on facts by taking into consideration factors that were irrelevant in arriving at the decision to dismiss the Appellant's application dated October 19, 2020, on the grounds of lacking merit.
4. Parties canvassed the appeal through written submissions, and submissions were filed for both parties.
 5. The Appellant prays that this Appeal be allowed with costs, and that the Ruling of the Learned Trial Magistrate dismissing the Appellant's application dated October 19, 2020, be set aside and substituted with an order allowing the application with costs.

The Appellant's Submissions

6. It is submitted for the Appellant that the trial court erred in failing to appreciate that the Court of Appeal in Nairobi Civil Appeal No 133 of 2011 (*Attorney General V Law Society Of Kenya & Another* [2017] eKLR) did not order that the matters commenced in courts before its Judgment shall be heard and finalized by the Magistrate Courts. It submits that the Court of Appeal instead, affirmed the constitutionality of Section 16 of *WIBA* which provision ousts the original jurisdiction of the courts to hear and determine matters relating to Work Injury.
7. It is the Appellant's further submission that only matters filed before the enactment of the *WIBA* were to be finalized under the forum they were commenced.
8. The Appellant submits that a suit or appeal filed before a court which has no jurisdiction, is incompetent and is not available for transfer to the court with jurisdiction. It is its further submission that the fate that such suit or appeal should suffer is that of being struck off.
9. It is the Appellant's submission that this matter was filed on 29/8/2017, when the *Work Injury Benefits Act* was already in force and at its Section 58(2), the *Act* requires that all cases filed prior to its coming into force on June 2, 2008, be deemed to have been filed under it, and that the resultant controversy was settled by the pronouncement of both the Court of Appeal and the Supreme Court.
10. The Appellant submitted that the Court of Appeal and the Supreme Court protected cases filed before the *WIBA* came into operation on account of the doctrine of legitimate expectation.
11. It is the Appellant's further submission that in view of the findings of the two superior Courts, the category of litigants who have legitimate expectation that their pending cases will be heard and determined by courts without following the procedure under *WIBA*, are those who filed their cases before the commencement of *WIBA* on June 2, 2008 through Gazette Notice No 60 of 2008.
12. The Appellant submits that courts are bound by the principle of precedence where lower courts are to follow the decisions of the higher courts in the hierarchy of courts and that the Trial Court did not obey this principle.



13. The Appellant urges this Court to uphold its submission by allowing the appeal, and setting aside the judgment delivered on September 10, 2020, and further award them the Cost of the appeal.

The Respondent's Submissions

14. The Respondent submits that from the Record of Appeal dated 29th February, 2023, the Order being appealed against has not been attached or included in the appeal.
15. It is their further submission that the Appellant has also failed to attach the Pleadings of their Application dated October 19, 2020, which is the subject of the Ruling and Order appealed against, hence rendering the said appeal fatally defective and incompetent and ought to be struck out. The Respondents sought to rely in Kakamega Election Petition Appeal No 3 of 2018 *Elvis Anyimbo Sichenga v ODM & Others* [2016] eKLR to buttress this position.
16. It is the Respondents' submission that Order 42, Rule 13(4) of the *Civil Procedure Rules, 2010* provides documents which the Court may dispense with, and that the provisions have made it mandatory that the Memorandum of Appeal, Pleadings and the Order being appealed against, cannot be omitted from the Record of Appeal.
17. It is their submission that any omission offends the provisions of Order 42, Rule 13(4)(f) of the *Civil Procedure Rules, 2010*, and renders the appeal incompetent and fatally defective.
18. It is the Respondents' submission that the Decree dated January 17, 2023, and the Judgment delivered on the September 10, 2020, attached to the Record of Appeal have not been appealed against. It is the Ruling and Order of Hon. Purity, RM, Tamu in Civil Suit No 51 of 2017 delivered on December 17, 2020, that has been appealed against.

DIVISION Analysis and Determination

19. I have considered the Appellant's Record of Appeal together with the submissions by both parties. The grounds of appeal are summarized into just one ground, which is whether the Trial Court misdirected herself on the law and fact in dismissing the Appellant's application dated October 19, 2020, for review/setting aside of the judgment, as lacking in merit.
20. In *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, the Court of Appeal held thus:

“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-analyze 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”
21. The Respondents submitted that the Appellant has not placed before this Court the order from which the appeal is proffered. Indeed, the record of appeal includes a judgment delivered on September 10, 2020, by Hon. P.K Rugut, and not a ruling of Hon. Purity of December 17, 2020, and which is the basis for the instant appeal.
22. The grounds of appeal placed before this Court, relate to an application for review dated October 19, 2020. Neither the application nor the ruling therein formed part of the record of appeal.
23. In the circumstances, I deem the appeal before this Court irredeemably defective on account of the omission of the orders/ruling appealed from for reason that the omission divests this Court of the jurisdiction to consider factual and/or legal controversies embodied in the the appeal.



24. In the case of *Lucas Otieno Masaye v Olewe Kidi* [2022] eKLR, also cited by the Respondent, the Court held thus:

“From the foregoing it is clear that an appeal can be rendered fatally defective in the absence of a decree. The Appellant herein has not attached the copy of the decree it follows therefore that his appeal is incompetent and should be and is hereby struck out with costs to the Respondent.”

25. The Court of Appeal in *Chege v Suleiman* [1988] eKLR, held: -

“But we concur positively in the submission of Mr Lakha that this is not a procedural but a jurisdictional point. Those holdings were founded on a proper interpretation of section 66 of the *Civil Procedure Act* which confers a right of appeal from the High Court to this Court from “decrees and orders of the High Court”. And those holdings were predicated on the fact that since the appeal could only lie against a decree or order, no competent appeal could be brought unless those decrees or orders were formally extracted as the basis of the appeal.”

26. I thus find and hold that failure to provide the Order appealed against, is a jurisdictional point, and which renders the appeal herein fatal and is for striking out.

27. The appeal is struck out with costs to the Respondents.

28. Judgment accordingly.

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

C. N. BAARI

JUDGE

Appearance:

N/A for Appellant

Ms. Oriche h/b for Ms. Migai for the Respondent

Ms. Christine Omolo - Court Assistant.

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