



**Bedrock Holdings Limited v Wangari (Employment and Labour Relations Appeal E003 of 2023) [2023] KEELRC 2293 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2293 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2023  
ON MAKAU, J  
SEPTEMBER 29, 2023**

**BETWEEN**

**BEDROCK HOLDINGS LIMITED ..... APPELLANT**

**AND**

**HELLEN WANJA WANGARI ..... RESPONDENT**

**JUDGMENT**

**Introduction**

1. The respondent sued the appellant in the Lower court alleging that her employment had been unfairly terminated and sought compensatory damages, terminal dues plus costs. After considering the evidence tendered, the court (Hon.K.M Njalale PM) rendered a Judgment on 12<sup>th</sup> January, 2022 dismissing the claim for unfair termination and awarding only the undisputed terminal benefits of Kshs.21,200/- made up of leave Kshs.20,000/- and uniform refund Kshs.1,200/-. The respondent was also awarded the prayer for a certificate of service.
2. The judgment was never challenged by appeal or review, but the respondent was issued with a decree and certificate of costs. The appellant was settled the decree but challenged the certificate of costs by a Notice of Motion dated 26<sup>th</sup> May 2022. After considering the application, Affidavits and submissions, the Lower court (Hon.E.Kanyiri PM) rendered a ruling on 22<sup>nd</sup> December 2022 in which she set aside the certificate of costs dated 18<sup>th</sup> February 2022. She also made an order granting the respondent costs of the suit and gave her the liberty to apply for the costs in compliance with order 21 of the [Civil Procedure Rules](#).
3. The appellant was dissatisfied with the ruling and brought this appeal seeking to dislodge the same on the following grounds:-
  - a. The learned Magistrate erred in granting an order of costs after delivery of judgment when the court was functus officio.



- b. The learned Magistrate erred in law in reviewing the court’s judgment when no party had applied for review.
- c. The learned Magistrate erred in law and in fact in awarding costs of the main suit to the Respondent when her claim for unlawful termination of employment by the Appellant was unsuccessful.

## The Appeal

4. The appellant submitted that the lower court erred in awarding costs in the impugned ruling when they were never awarded in the judgment. Further that, the court ignored the fact that it was already *functus officio* contrary to the laid down principle of law. Accordingly it argued that the court lacked jurisdiction to sit in an appeal of its own decision or to review that decision outside the limited avenues provided by the law.
5. For emphasis, reliance was placed on several precedents including the Court of Appeal decision in *Telkom Kenya Ltd v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited)* (2014) eKLR where the court held that court cannot amend its judgment and the only recourse is review of the judgment.
6. The appellant further submitted that no application was made for review of the judgment and as such by his ruling, the lower court exercised the power of review unlawfully. Further that, the facts of the case did not meet the requirements for review rectification of obvious errors in the decision, under rule 33 and 34 of the *ELRC Procedure Rules*, respectively. It was also submitted that the impugned ruling was untenable because it amounted to the magistrate sitting in appeal to reverse discretion of another magistrate.
7. Finally, the appellant submitted that the respondent was not entitled to costs because costs follow the events. In this case it was argued that the claimant’s case for unfair termination was dismissed and what was awarded was the undisputed claim. For emphasis reliance was placed on *David Kiptum Korir v Kenya Commercial Bank & another* (2021) eKLR where the phrase “costs follow the events” was discussed.
8. The respondent opposed the appeal. She submitted that the appeal was filed out of time contrary to rule 8(1) of the *ELRC Procedure Rules*. Consequently, she submitted that the Memorandum of Appeal dated 10<sup>th</sup> March, 2023 is a nullity and ought to be struck out for being filed after 30 days of the ruling.
9. She further submitted that the doctrine of *functus officio* has exceptions as set out under section 99 of the *Civil Procedure Act*. The exceptions include convection of clerical or arithmetical mistakes in judgment, decree or orders, or errors arising therein from any accidental slip or omission. The court has the power, at any time, to correct the said error of its own motion or on application by either party.
10. She submitted that the court was justified to award costs because the suit was not dismissed entirely. Therefore she contended that the court never re-opened the suit or review its case but only determined the issues as raised in the appellant’s application.
11. As regards ground number 2 of the appeal, the respondent acknowledged that the court was silent on the issue of costs in the judgment. She further acknowledged that she never applied for review, but she contended that the failure to award costs in the judgment was an omission which the trial court was empowered by section 99 of the *Civil Procedure Act* and rule 33 of *ELRC Procedure Rules* to correct on its own motion.



12. Besides, she submitted that she made an application and they were assessed. She, further contended that had the trial court intended to deny her costs, reasons for such denial would have been given. To emphasize the foregoing submissions, reliance was placed on the case of *Nation Media Group & another v Awale Transporters Ltd* (2022) eKLR where the court held that failure by the court to pronounce itself on who should pay costs was an inadvertent omission which could be rectified by the court on its own motion or through application for review.
13. In the end the respondent contended that the court had jurisdiction to grant costs under section 12 (4) of the *ELRC Act*. Consequently, she asked the court not disturb the award by the lower court and instead dismiss the appeal.

### **Analysis And Determination**

14. I agree with the respondent's submission that this being a first appeal, my mandate is to re-appraise the evidence and draw my own inferences of fact. Further, I should not interfere with the finding of the trial court unless it is based on no evidence or on a misapprehension of the evidence or where the trial court acted on wrong principles. In *Selle v Associated Motor Boat Co.* (1968) EA 123, the Court of Appeal held that;

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate 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, the 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.”

15. The dispute in the instant appeal is about an order by trial court awarding costs of the suit eleven (11) months after the judgment and without any application for review of the judgment. Consequently, the issues for determination arising from the grounds of the appeal and submissions by counsel are:-
  - a. Whether the appeal is time barred.
  - b. Whether in awarding the costs, the trial court violated the doctrine of *functus officio*.
  - c. Whether the appeal has merits and ought to be allowed.
  - d. Where costs of the appeal should be awarded.

### **Time Barred Appeal**

16. The respondent contends that the appeal was filed out of the statutory period of 30 days from the date of ruling. The respondent did not counter that argument. I have considered rule 8 of the *ELRC Procedure Rules* which provides that:-
  1. “Where any written law provides for an appeal to the court, the appellant shall file a Memorandum of appeal with the court within the time specified for that appeal under the written law.
  2. Where no period of appeal is specified in the written law under paragraph (1), an appeal shall be filed within thirty days from the date the decision was delivered.



3. A memorandum of appeal shall be in Form 1 set out in the first schedule with necessary modification.
4. A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence therein and copy of the judgment from the proceedings of the matter being appealed against provided that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file such copies as soon as possible and within a reasonable time.”
17. The above provision sets out mandatory time lines for filing appeal before this court. The time lines are, the time specified in a written law, or if none, within thirty (30) days from the date the impugned decision was delivered.
18. The provision to paragraph (4) then allows a party to file the memorandum of appeal without the typed proceedings and judgment, if the latter are not supplied by the court before the time for filing appeal expires. It follows that a party who filed an appeal out of time for the reason that typed proceedings had not been supplied by the lower court, stands on sinking sand.
19. Borrowing a leaf from the *Civil Procedure Act*, section 79 G provides that;-

“ Every appeal from a subordinate court to the High court shall be filed with a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
20. In this case the decision /orders appealed from were made on 22<sup>nd</sup> December 2022 and therefore the 30 days within which to file appeal lapsed on 22<sup>nd</sup> January 2023. Five days after the window for filing appeal closed, the appellant wrote to the court on 27<sup>th</sup> January, 2023 requesting for certified copies of typed proceedings and ruling in order to file an appeal.
21. The court took up to 1<sup>st</sup> March, 2023 to prepare the certified copies of the proceedings. The impugned ruling was typed before 22<sup>nd</sup> December 2022 when it was delivered. Having considered the totality of the material before the court, I find no sufficient cause demonstrated to justify the late filing of the appeal. As at the time of seeking the typed proceedings on 27<sup>th</sup> January 2023, the time for filing the appeal had already lapsed.
22. Whichever way one looks at the facts of the case, that is, whether through the lenses of rule 8 of the *ELRC Procedure Rules* or section 79 G of the *Civil Procedure Act*, the appeal herein having been filed on 23<sup>rd</sup> March 2023 is fatally incompetent for having been filed out of time. On the basis of the said incompetence, I eschew from going to the merits of the appeal, and hereby struck out the same with costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF SEPTEMBER, 2023.**

**ONESMUS N MAKAU**

**JUDGE**

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC



Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

Onesmus N Makau

Judge

