



Kenya Plantation and Agricultural Workers Union v Oyawa (Miscellaneous Application E023 of 2023) [2023] KEELRC 2536 (KLR) (19 October 2023) (Ruling)

Neutral citation: [2023] KEELRC 2536 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
MISCELLANEOUS APPLICATION E023 OF 2023**

**HS WASILWA, J
OCTOBER 19, 2023**

BETWEEN

**KENYA PLANTATION AND AGRICULTURAL WORKERS
UNION APPLICANT**

AND

GIDEON OYAWA RESPONDENT

RULING

1. This Ruling is in respect of the Applicant's Notice of motion dated 16th May, 2023 filed pursuant to Section 1A, 1B, 3, 3A, 18B & 63(e) of the *Civil Procedure Act* and Order 51 Rule 1 of the *Civil Procedure Rules*, seeking for the following Orders; -
 1. That the Honourable Court be pleased to set aside the Judgement dated 11th November, 2022 and the Ruling of the Application dated 23rd November, 2022 of ELRC Cause number 117 of 2018, pending the hearing and determination of the application inter partes.
 2. That the Honourable Court be pleased to order transfer of ELRC Cause No 117 of 2018 from the subordinate Court to the Employment and Labour Relations Court for hearing and determination.
 3. That the costs be borne by the Respondent.
2. The Application is supported by the grounds on the face of it and the supporting affidavit of Thomas Kipkemboi, the deputy secretary General of the applicant Union, sworn on 15th May, 2023.
3. The basis upon which the application is made is that the main suit, ELRC Cause no 117 of 2018 was filed by the Respondent herein on 8th November, 2018 against the applicant claiming to have been unfairly terminated.



4. That the Applicant, filed its defence on 14th December, 2018 with full knowledge that the case would be heard and determined in the Employment and Labour Relations Court because at the time the Chief Magistrates Courts did not have jurisdiction to hear employment matters.
5. It is stated that the Respondent worked in cahoots with his agents and illegally moved the Courts' file from this Court to the Chief Magistrates Courts without making any formal application raising the Court's suspicion on Court file movement.
6. It is averred that following the said move by the Respondent herein, the Applicant was unable to trace the file in the registry and thus could not participate in the hearing of the case. Furthermore, that he was not served with any mention or hearing notices through out the hearing of the case in the subordinate Court.
7. The applicant only became privy of the outcome of that matter when it was served with a letter dated 22nd November, 2022, seeking for payment of the decretal sum.
8. He states that upon perusal of the Court filed, he discovered that the matter had indeed proceeded in the Magistrates Court before, Hon Orenge who delivered his judgement for the Respondent against the Applicant on 11th November, 2022 for payment of decretal sum of Kshs 640,140.
9. Dissatisfied with how the matter was handled and the decision made by the trial Court, the Applicant herein filed a memorandum of Appeal. Subsequently they filed stay of execution application which was allowed on condition that the Applicant deposits the entire decretal sum in an interest earning account in joint names of parties advocates.
10. It based on these facts that the Applicant herein urged this Court to allow the application as prayed.
11. The Application is opposed by the Respondent who filed a replying affidavit deposed upon on the 3rd July, 2023. In his affidavit, the Respondent states that the application is incompetent, a non-starter and an abuse of Court process and should therefore be dismissed in limine with costs.
12. He stated that he filed the claim in the Chief Magistrates Court on 19th November, 2018 pursuant to direction given by the Former Chief Justice in Legal Notice number 6024 of 10th June, 2018, which granted jurisdiction to the magistrates of the rank of the Senior Resident Magistrate and above to handle employment matter. Therefore, that the Magistrates Court, had and still has jurisdiction to hear claims of all person whose salary is below Kshs 80, 000. He added that at the time of termination he was earning Kshs. 27,000 which is still within the said bracket.
13. He contends that the Applicant is forum shopping because, it filed a memorandum of Appeal serialized as ELRC Appeal No E027 of 2023 and sought stay of execution Orders which were granted in favour of the Applicant requiring them to deposit the decretal sum in an interest earning account, but that they have failed to comply with the Courts orders till date but still proceed to file the current application seeking to set aside the very orders they sought
14. The Respondent contends that the proceedings herein is a delay tactic aimed at delaying him enjoyment of the fruits of his judgement.
15. He maintained that the Applicant was served with all mention and hearing notices but they failed to attend Court to prosecute their defence therefore there was no injustice done and the judgement was regular.
16. Without prejudice, the Respondent stated that in the even that this Court allows the Application, then an order be directed against the Applicant to pay the entire decretal sum as ordered by the Court.



17. The Application herein was canvassed by written submissions with the Applicant filing on 10th July, 2023 and the Respondent on 27th July, 2023.

Applicant's Submissions.

18. The Applicant submitted on two issues; whether the claim was heard by a court of competent jurisdiction and whether the Respondent is entitled to the reliefs sought.
19. On competence of the Court, it was submitted that the Respondent was dodgy in his replying affidavit because he did not annexe a copy of the claim that showed it was indeed originally filed in the Magistrates Court and also that he did not exhibit any evidence of transfer of the suit to the magistrates' court or the mention and hearing notices allegedly served upon the Applicant. He added that he who alleges must prove as stipulated in section 107(2) of the *Evidence Act* and reiterated in the case of *KN v JMT* [2018] eKLR. Accordingly, that the Respondent has failed to prove his claim and therefore the application herein should succeed.
20. To further support their position, the Applicant relied on the case of *Selle v Associated Motor Boat Co.* [1968] EA 123 that 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 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, 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 demeanour of a witness is inconsistent with the evidence in the case generally.”

21. They also cited the case of *Coghlan v Cumberland* (1898) 1 Ch. 704, where the Court of Appeal of England held that;

“Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen.”

22. Similarly, that this court being superior than the trial Court has a duty to revisit the facts as presented in the trial Court, analyse the same and arrive at its own independent conclusion.
23. On the second issues, it was submitted that as per the Applicant's defence dated on 17th December, 2018, the Respondent was not entitled to the reliefs sought and the reliefs granted by the trial Court on 11th November, 2022 should be declared null and void for the reason that the trial court did not have



jurisdiction to hear and determine the claim at the time and for the fact that the Respondent herein had been paid all his terminal dues.

24. It was submitted further that the Respondent herein did not deserve the Orders granted because the claim was illegally transferred from this Court to the magistrates Court, causing the Applicant to lose track of the file, as a result the Respondent was granted ex parte orders.
25. Based on the foregoing, the Applicant urged this Court to allow its Application by setting aside the judgement of the trial court issued on 11th November, 2022 together with the subsequent ruling of the Application dated 23rd November, 2022 then transfer the court file from the magistrates' court to this Court for hearing and determination.

Respondent's Submissions.

26. The Respondent submitted from the onset that the enabling provisions relied upon by the Applicant does not give jurisdiction to this Court to set aside judgement and orders of the trial Court. It was argued that this Court can only handle trial Court matter on appeal which the Applicant has already exercise and filed Nakuru Appeal Number E027 of 2022; *Kenya Plantation Agricultural Workers Union v Gedion Oyawa*, which is pending determination.
27. It was argued that the issues raised in this Application are similar to those raised in Appeal E027 of 2022 and being that the Appeal was filed earlier, the same should be given priority and the current application dismissed with costs. In any event that the issues raised in this application are both sub-judice and res judicata in respect of the pending Appeal and ruling of the trial magistrate delivered in respect of the applicant's application of 23rd November, 2022 which had sought to set aside the Court Judgement. Thus, this Court should down its tools for want of jurisdiction.
28. The Respondent submitted that the Magistrates' Court, at the time of filling his claim on 19th November, 2018, was and is still the court of competent jurisdiction to hear and determine the employment matter because his salary at the time of dismissal was Kshs 27,000, which was below the Kshs 80,000 provided for in legal Notice number 6024 of 2018. Furthermore, that the Applicant herein had subjected itself to the jurisdiction of the Court by filling a defence and has never questioned the jurisdiction of the Court even in its subsequent application dated 23rd November, 2023, seeking stay of execution.
29. It was submitted that the Applicant filed this Application seeking for equitable orders when they have defied the orders granted by the Court on 23rd May, 2023, staying execution proceedings against judgement of the trial Court and directing them to deposit the decretal sum in a joint interest earning account, which they have not deposited to date.
30. In conclusion, the Respondent submitted that the application herein is aimed at defeating justice and the same should thus be dismissed with costs.
31. I have examined all the averments and submissions of the parties herein.
32. From the pleadings submitted before me the Respondent/claimant herein filed claim cause No 117 of 2018 before the ELRC court in Nakuru dated 8th November, 2018.
33. As per the averments of the applicant this matter was later heard and a judgment delivered on 11/11/22 in Chief Magistrate's ELRC No 117 of 2018.
34. It is not clear how this claim was transferred from the ELRC to the CM'S ELRC court and heard and determined.



35. I have had to look at the main file being ELRC cause No 117 of 2018 and note that this file was filed as ELRC 117 of 2018 in the Employment Court.
36. The applicant herein entered appearance to this claim on 18/12/2018. The respondent filed a reply to the response on 15/2/2019.
37. The communication on the file were directed to the DR ELRC Nakuru by the claimant.
38. On 12/3/2019, however this claim was fixed for mention before the Chief Magistrate's court and placed before Hon. B. Mararo PM in absence of the applicants.
39. The respondents were all along absent and the matter proceeded ex parte and a judgment was delivered on 11/11/22 in favour of the respondent by Orege PM.
40. From the proceedings, it is clear that this matter ELRC 117/2017 was a matter to be heard before the ELRC Nakuru but due to some miscarriage of justice the matter was heard erroneously before the Chief Magistrate's Court.
41. I therefore exercise my discretion and as prayed by the applicant, I set aside the judgment delivered on 11/11/22 and all subsequent orders and direct this file to be heard in the ELRC Nakuru on merit.
42. Costs in the cause.

RULING DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Awino for claimant – present

Nyabera for respondent – present

Court Assistant – Fred

