



Board of Management, Nyanchwa Preparatory School & another v Misiyani (Appeal E039 of 2023) [2023] KEELRC 3032 (KLR) (29 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 3032 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E039 OF 2023
S RADIDO, J
NOVEMBER 29, 2023**

BETWEEN

**BOARD OF MANAGEMENT, NYANCHWA PREPARATORY
SCHOOL 1ST APPELLANT**

**SEVENTH DAY ADVENTIST CHURCH (EA) LTD, SOUTH KENYA
CONFERENCE 2ND APPELLANT**

AND

ARTHUR OLUOCH MISIYANI RESPONDENT

(An appeal from the Ruling and Orders of Hon C.A. Ocharo (SPM) delivered on 14 March 2023 in the original Kisii Chief Magistrates' Employment and Labour Relations Cause No. 4 of 2020)

JUDGMENT

1. On 14 March 2023, the Honourable Senior Principal Magistrate declined an application for adjournment by the Board of Management, Nyanchwa Preparatory School and Seventh Day Adventist Church (EA) Ltd, South Kenya Conference (the Appellants) because they had been granted a last adjournment previously and they had not filed witness statements.
2. The Appellants then applied for leave to appeal against the decision but the application was also declined on 17 March 2023.
3. On 8 June 2023, this Court granted the Appellants leave to appeal and further directed them to deposit the decretal sum into Court
4. The Appellants then lodged an appeal with this Court on 24 July 2023, contending that:



- i. The learned trial Magistrate erred in law and in fact by heavily relying on the procedural technicalities (discouraged by article 159(2)(d) of our Constitution) to shut the Appellants evidence out and deny them their right to be heard.
 - ii. The learned trial Magistrate erred in law and in fact by exercising her discretionary powers in such a manner that denied justice to the Appellants as enshrined in article 159(a) of our Constitution.
 - iii. The learned trial Magistrate effectively denied the Appellants their constitutional right to be heard as enshrined in article 50(1) of our Constitution.
 - iv. The learned trial Magistrate erred in law and in fact by failing to consider fully and make a finding on the issue of mediation raised and this offends article 159(d) of our Constitution and section 59(B) of the Civil Procedure Act and order 46 rule 26 of the Civil Procedure Rules chapter 21.
 - v. The learned trial Magistrate took cognisance of the fact that the Appellants have been depositing the Respondent's arrears of salary into his bank account but failed to embrace the alternative form of dispute resolution mechanisms as enshrined in article 159(c) of our Constitution.
 - vi. The learned trial Magistrate erred in law and in fact by failing to take cognisance of trite law that procedure is only but the handmaiden of substance and ended up sacrificing justice at the altar of the procedure.
 - vii. In the circumstances, the learned trial Magistrate gravely caused miscarriage of justice by denying the Appellants a right to have the dispute that can be resolved by the application of law decided in a fair and public hearing before a court as enshrined in article 50(1) of our Constitution.
5. The Court gave directions on 9 October 2023 and the Appellants filed joint submissions on 19 October 2023, and the Respondent on 6 November 2023.
 6. The Court has considered the Record of Appeal and submissions.

Role of the Court on first appeal

7. 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 stated as follows regarding the duty of a first appellate Court:

This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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.

Violation of right to fair hearing

8. The Ruling giving rise to the instant Appeal stems from a refusal to grant an adjournment and not the merits of the Cause before the Senior Principal Magistrate.
9. The Cause before the Senior Principal Magistrate came up for hearing on 1 February 2022. The Respondent testified and closed his case. The Appellants then sought an adjournment and their case was rescheduled to 28 June 2022.



10. The Senior Principal Magistrate did not sit on that date and the hearing was set for 8 November 2022. The hearing did not take off because the Senior Principal Magistrate was involved in an election Petition and it was pushed to 14 March 2023.
11. On this later day, the Appellants sought another adjournment which was denied. The denial prompted the appeal.
12. Before this Court, the Appellants asserted that they were denied the right to a fair hearing contrary to the Constitutional imperative in article 50(1) of the *Constitution*.
13. The Appellants further faulted the Senior Principal Magistrate for failing to consider a request to refer the dispute to alternative dispute resolution.
14. The record shows that on 13 October 2020, the Appellants informed the Court that they had not complied with the requirements of pre-trial and sought one month to comply.
15. The Court granted the request and hearing was fixed for 16 February 2021.
16. On 16 February 2021, the parties informed the Court that they were negotiating and the Court allowed them more time.
17. The parties did not agree and hearing was set for 20 July 2021. The hearing did not take off.
18. When the Cause next came up for hearing on 1 February 2022, the parties entered a partial consent and the Respondent's evidence was taken on the unresolved part of the dispute.
19. At the close of the Respondent's case, the Appellants successfully secured an adjournment. They did not produce witnesses at the resumed hearings. The Court ultimately declined to allow a further adjournment on 14 March 2023.
20. The Appellants herein failed to file and serve witness statements when they filed their Responses to the Memorandum of Claim as required by the *Employment and Labour Relations Court (Procedure) Rules, 2016*.
21. By filing and serving the witness statements, the Appellants would have been signaling an intention to exercise their right to a fair hearing.
22. In the course of the proceedings before the Senior Principal Magistrate, the Appellants sought and obtained the indulgence of the Court to file and serve the witness statements.
23. The Court duly indulged the Appellants, but again they failed to file and serve the witness statements. The Court had granted them a last adjournment.
24. According to the Appellants, the failure to file and serve witness statements was a procedural technicality which should not have been determinative of the adjournment request in light of article 159(2)(d) of the *Constitution*.
25. The Appellants did not file witness statements as prescribed by the *Employment and Labour Relations Court (Procedure) Rules, 2016*. They failed take advantage of the indulgence granted by the Senior Principal Magistrate to file and serve witness statements.
26. The right to a fair hearing is not a free floating right to be invoked at whim.
27. The right to a fair hearing is meant to amongst others ensure equality of arms for all disputants hence procedural law has outlined various parameters within which the right should be evaluated.



28. Part of this scheme is that a party ought to know in good time the case sought to be advanced by the other party and in this regard, the procedural law guiding the operations of this Court requires parties to file and serve witness statements and other documents with their primary pleadings.
29. The Appellants failed to take advantage of the Rules of this Court which was meant to facilitate the enjoyment of the right to a fair hearing. The Court also indulged them but they failed to comply with the directions of the Court to file and serve witness statements.
30. In the circumstances, the Court finds that the Appellants cannot cry foul that they were denied a right to be heard.
31. Equally, the Appellants should not accuse the Senior Principal Magistrate of having declined to make a finding on the request to attempt alternative dispute resolution avenues.
32. The Court gave them the opportunity and partial consent was agreed to and adopted by the Court.

Conclusion and Orders

33. From the foregoing, the Court finds no merit in the Appeal and it is dismissed with costs.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 29TH DAY OF NOVEMBER 2023

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Appellant Bigogo Onderi & Co. Advocates

For Respondent O.M. Otieno & Co. Advocates

Court Assistant Chrispo Aura

