



**Technik Diesel Limited v Ndiku (Appeal 65 of 2019)
[2023] KEELRC 3097 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3097 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 65 OF 2019
NZIOKI WA MAKAU, J
NOVEMBER 28, 2023**

BETWEEN

TECHNIK DIESEL LIMITED APPELLANT

AND

MILCAH MUTHENDI NDIKU RESPONDENT

JUDGMENT

1. Being aggrieved with the judgment and/or Order of the Hon. Senior Resident Magistrate D.O Mbeja (Mr.) delivered on 26th April 2019 in CMEC No. 95 of 2018 at Nairobi Milimani Commercial Courts, the Appellant filed to this Honourable Court the Memorandum of Appeal dated 18th December 2019 setting forth the following grounds:
 - a. The learned trial magistrate erred in law and in fact in allowing the respondent's claim without the appellant's input.
 - b. The learned trial magistrate erred in law and in fact by allowing the respondent's claim after effectively bulldozing the appellant out of the seat of justice.
 - c. The learned trial magistrate erred in law and by fact when he failed to capture in his judgment that during the hearing, a justified adjournment was sought but he declined to grant the same and bullied the appellant's advocate who had other matters before Honourable Lady Justice Hellen Wasilwa in Petition 139 of 2016 - Francis Titus Mwendwa vs. Kenya Pipeline Company Limited and in Criminal Case No. 798 of 2018 – Republic -v- Edwin Oduor all part heard.
 - d. The learned trial magistrate erred in law and by fact by failing to appreciate that in conducting proceedings, he ought to exercise discretionary powers judiciously and not by whim and ought to have granted adjournment of the matter as the inconvenient hearing date was taken ex-parte.



- e. The learned trial magistrate erred in law and by fact in failing to appreciate that during the conduct of the proceedings he ought to observe and adhere to the constitutional principles and right to a fair hearing as enshrined under Article 47 and the right to a fair hearing under Article 50 of the *Constitution*.
 - f. The learned trial magistrate erred in law and by fact in failing to appreciate the elements of a fair hearing, sufficient time to prepare and adequacy of notice and thus in a cruel manner drove the appellant out of the seat of justice.
 - g. The learned trial magistrate erred in law and by fact in failing to issue notice of judgment before delivering his judgment in the matter where the proceedings were taken out ex-parte.
 - h. The respondent ought to have notified the appellant of the judgment; her failure to do so vitiated the judgment.
 - i. The learned trial magistrate erred in law and by fact in failing to appreciate that one week was not sufficient for the appellant advocate to prepare for hearing for instance preparing witnesses.
 - j. The learned trial magistrate erred in law and by fact in failing to appreciate that the respondent served a hearing notice of a date obtained ex parte on the 21st February 2019, and the hearing date so obtained ex parte was slated to be 28th February 2019.
 - k. The learned magistrate failed to give sufficient consideration in his judgment of the defendant's case.
2. The Appellant thus prayed that this Honourable Court does allow the Appeal with costs and set aside the impugned judgment of the subordinate court dated 26th April 2019. The Respondent filed a Preliminary Objection dated 25th September 2023 asserting that the Appellant did not show that it presented a prima facie case and also failed to show that the trial Magistrate exercised his discretion wrongly. She affirmed that the Appellant's advocate was indeed served with a Notice of Service dated and served on 2nd October 2019 and that she also filed an Affidavit of Service to that effect. Further, it was the Respondent's averment that the Appeal herein was filed and never served within 30 days from the date of the Ruling delivered on 22nd November 2019 by Hon. Justice Stephen Radido under Order No. 20(b) but that the Appellant simply served the same in open court on 3rd March 2020.
 3. The matter was disposed of by way of written submissions.
 4. The Appellant did not file any submissions. The Respondent on the other hand submitted that it was clear that the Appellant was not interested in pursuing the appeal and only filed the same merely to obtain stay of execution to block her from accessing the fruits of the Judgment delivered in the lower Court on 26th April 2019. She alleged that during a mention on 23rd September 2020, the Court failed to accord her a fair opportunity to argue her then Preliminary Objection and 'colluded' with the Appellant to extend the stay of execution orders against her.
 5. It was the Respondent's submission that the Appellant did not deserve any equitable remedies as it had not come to court with clean hands. That this Court should reconsider the evidence, evaluate the same and draw its own conclusions and not to introduce extraneous matters not dealt with by the parties in the evidence. She urged this Court to order the Appellant to pay her compensation for the trouble and expenses incurred following the Appeal and for violation of her constitutional rights. Further, that the Court should strike out the Appeal herein, order the release of the payment balance and award the costs, interest and any other award the Court may deem fit to grant.



6. The Appellant and Respondent are not decent in their references to the Courts they appear before. They are callous in their assertions and perspectives without any iota of evidence. If they have such a warped view of the Judiciary, why are they here? One wonders whether they appreciate the judicial officers they insult will be there to hear their cases in future. The Respondent took pot shots against a Judge of this Court accusing him of collusion which is careless talk coming from someone seeking justice from the same court. Can't the parties who seem to have a warped sense of what justice is resolve their issues elsewhere if all they see are conspiracies? That said, the Appellant who thinks it was right to attack the learned Trial Magistrate and accuse him of all manner of things, was served with a hearing notice which was received under protest. It indicated on the face of it that the advocate handling the matter was engaged in other cases on the date. That is the only saving grace for this appeal.
7. Granted the appeal was filed on time – 19th December 2019 per the Court record, and given the inability of Counsel to attend at the hearing as dates fixed were obtained ex parte and without adequate notice to the Appellant, I set aside the judgment, decrees and orders of the learned trial Court and remit the file for hearing afresh. The Court notes the primary suit was heard and determined at the Chief Magistrates Court at Milimani Commercial Law Courts and granted it can be heard before another Magistrate, I refer the case for hearing before another Magistrate as will be determined by the Chief Magistrate Milimani. Each party to bear their own costs for the case before this Court and the one before the Magistrates Court which has been overturned by this Judgment. The funds that had been deposited in Court may be released to the Appellant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

