



SGA Security Solutions Limited & 2 others v Nyanumba & 8 others (Appeal E069 of 2023) [2023] KEELRC 3452 (KLR) (23 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 3452 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E069 OF 2023
M MBARÚ, J
NOVEMBER 23, 2023

BETWEEN

SGA SECURITY SOLUTIONS LIMITED & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS APPELLANT

AND

JOSECK NYANUMBA & 8 OTHERS RESPONDENT

RULING

1. The respondents herein, Joseck Nyanumba and 8 others filed application dated 25 September 2023 under the provisions of Article 28, 47, 50, 162, 165 and 259 of the *Constitution* and Sections 8, and 33 of the *Employment and Labour Relations Court (Procedure) Rules*, 2016 seeking for orders that;

The appeal instituted vide Memorandum of Appeal dated 24/07/2023 be struck out for having been instituted without leave being sought and without the appellant having complied with imperative procedural requirements.

The court lacks jurisdiction to entertain, hear and determine the incompetent appeal filed vide memorandum of Appeal dated 24/07/2023.

Costs of this application be awarded to the respondents.

2. The application is supported by the Affidavit of Joseck Nyanumba and on the grounds that the instant appeal is filed without leave of court. Following a negative order for review that was delivered on 30 June 2023 in Mombasa CMCC No.134 of 2020 - *Joseck Nyanumba & others v SGA Security Solutions Limited & 2 Others* and also following the ruling delivered on 21 September 2023 in ELRCA No. E067 of 2021 *SGA Security Solutions Limited & 2 others v Joseck Nyanumba & 8 Others*, the appellant moved court without leave rendering the appeal incompetent and the court lacks jurisdiction to hear and determine such matter. Upon the judgment of the lower court on 4 February 2022, the appellant opted to file an application for review and which application was dismissed. The procedural requirements



thereof were to obtain leave from the trial court before filing the instant appeal. Such steps were not taken within the allowed timelines hence denying this court jurisdiction to hear and determine this appeal.

3. In response, the appellants filed Notice of Preliminary Objections dated 28 September 2023 on the grounds that;

... the respondents' Notice of Motion dated 25th September 2023 is opposed on the grounds that

1. The instant application is time barred as the same should have been filed within 30 days of service of the appeal, as provided for under Rule 84 of the [Appellate Jurisdiction Act](#) Cap 9 of the Laws of Kenya ...
 2. The instant application offends Section 75(1)(h) of the [Civil Procedure Act](#) a particularly Order 43 rule 1(x) of the [Civil Procedure Rules](#) which provides that;

An appeal shall lie as of right from the following orders and rules under the provisions of Section 75(1)(h) of the [Act](#) ...
 3. The instant application ought to be dismissed with costs to the appellant.
4. Both parties attended and were directed to file their written submissions and attend oral highlighting. The respondents filed their written submissions dated 29 October 2023.
 5. Both the application and objections were heard together.
 6. The respondents submitted that the appellants filed application dated 17 January 2023 in Mombasa CMCC No. E134 of 2020 seeking for orders of review on orders issued on 15th December 2022. In reply, the respondents filed a Notice of Preliminary Objections to the application which was allowed and the application was dismissed. The appellants filed this appeal on 24 July 2023 without seeking leave to appeal against the negative orders of review from the lower court. This is contrary to procedure as held in [Phoenix EA Assurance Company Limited v S. M. Thiga t/a Newspaper Service; Gerlad Kitbu Muchange v Catherine Muthoni Ngare & Gibson Nyaga Ngari](#) Misc. Appl. No.5 of 2018.
 7. On the objections, the respondents submitted that Rule 84 of the [Appellate Jurisdiction Act](#) only applies to the Court of Appeal and not this court and the appellant cannot rely on such a matter to urge the objections made. Without leave to file the instant appeal, the same should be struck out with costs.
 8. The appellant submitted that the application by the respondents offends the mandatory provisions of Section 75(1)(h) of the [Civil Procedure Act](#) since an appeal before this court lies as of right and one does not need to seek leave to move this court.
 9. The ruling delivered in ELRC E061 of 2023 is sub judice and cannot apply in this case. A Notice of Appeal has already been filed and served and the objections made should be purely on matters of law and not call for facts. Any objections to the filed appeal ought to have been made within 30 days which the respondents failed to do and the court should allow the appellants to proceed with the appeal on the merits.



Determination

10. On the notice of motion dated 25 September 2023 and objections by the appellant dated 28 September 2023, the issues which emerge for determination are whether the appeal herein is proper and valid and whether the objects by the appellant to the notice of motion should be allowed.
11. On the one hand, under Section 17 of the *Employment and Labour Relations Court Act*, 2011 a party who is aggrieved by the judgment of the court has a right of appeal. Equally, upon the judgment or ruling of a magistrate designated to hear and determine employment disputes, there is a right of appeal.
12. Such an appeal is regulated under Rule 8 of the *Employment and Labour Relations (Procedure) Rules*, 2016 (the Court Rules) which must be filed with the court within 30 days from the date the judgment or ruling issued.
13. Where a party is not keen to address an appeal, the alternative is to apply and seek for a review in terms of Rule 33 of the Court Rules. Such is a matter allowed under all superior court in accordance with the *Civil Procedure Act* and the rules thereto. That where a party is aggrieved by the orders of the trial court, one should file an appeal and in the alternative, file an application for review.
14. Order 45 rule 1(b) of the *Civil Procedure Rules* allow a person aggrieved by a decree or order from which an appeal is allowed to prefer an appeal or to apply for a review. Hence a party who is not lodging an appeal has the unfettered right for a review.
15. Therefore, the court reading of these provisions together with Section 80 of the *Civil Procedure Act*, Section 17 of the *ELRC Act*, 2011 and Rule 8 and 33 of the *Court Rules* is that it is an either or situation. One cannot move on a review and then seek to file an appeal. Such would negate the purpose of an appeal or the need for the review. A review remedy is only available to a party who, though has a right to challenge the order in question in an appeal, such an appeal is not lodged as held in *Oreero v Seko* [1984] KLR, a person cannot exercise both the right of appeal and review at the same time.
16. This is clarified by the Court of Appeal in the case of *Kisya Investment Limited v Attorney General & another* Civil Appeal No.31 of 1995 where the court held that a party who filed a notice of appeal cannot apply for a review but a party against who such an application is filed, has a right of appeal. The first application seeking a review instead of an appeal is therefore estopped from filing an appeal at the same time in terms of order 44 of the *Civil Procedure Rules*.
17. The appellant herein has relied on a Notice of Appeal filed in in ELRCA E067 of 2023 to assert that the matter is sub judice and should not be relied upon in this case. However, a Notice of Appeal Is not an appeal but a formal notification of the intention to appeal.
18. Upon the judgment of the lower court in Mombasa CMELRC No.134 of 2020 delivered on 4 April 2022, the appellant herein opted to file an application seeking for a review of the judgment and hence filed application dated 17 January 2023 seeking for a review and a ruling was delivered 30 June 2023, aggrieved, the appellant filed the instant appeal.
19. As outlined above, the appellants should and ought to have filed the appeal in this court within 30 days in terms of the Court Rules. However, upon taking the option of filing an application for review, the appellant cannot proceed and asserts its rights of appeal without first seeking leave of the court against which the appeal is requested. It would negate and bring into disorder to apply a procedure that that one can do as they wish. One day they move a court for review and then the next day proceed for appeal. such is what is defined as abuse of court process as held in *Stephen Somek Takwenyi & another v David*



Mbutia Githate & 2 others HCCC No. 363 of 2009. The court jurisdiction to hear appeal should not be abused through misapplications of procedures without any good cause.

20. The provisions of Order 45 rule 1 are therefore meant to assist genuine litigants and not to assist parties who have deliberately sought orders in abuse of court process and effectively to delay the course of justice. The Order is emphatic that any person considering himself aggrieved and who finds an appeal feasible should do so instantly and not meander through an application for review as held in The *Chairman Board of Governors Highway Secondary School v William Mmosi Moi* Civil Application No.277 of 2005.
11. The appeal herein is filed without leave of the lower court making it invalid. The objection by the appellants that the respondents have moved outside time with regard to Rule 84 of the *Appellant Jurisdiction Act* cannot cure the invalidity of the appeal which is hereby struck out with costs to the respondents assessed at Kshs. 30,000.

DELIVERED IN OPEN COURT AT MOMBASA THIS 23RD DAY OF NOVEMBER 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

