



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

APPEAL NO. 44 OF 2021

(Being an appeal from the judgment and decree of Honourable Lesootia Saitaban, Principal Magistrate delivered on 15.06.2021 in Mombasa CM-ELRCC No. 418 of 2020)

TUREA LIMITED T/A DR. MATRESS.....APPELLANT

VERSUS

ALI MOHAMED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 01st April, 2022)

JUDGMENT

The appellant filed the memorandum of appeal dated 09.07.2021 through Oseku & Ouma Advocates LLP. The memorandum of appeal was against the entire judgment by the trial Court upon the grounds that the learned trial magistrate erred as follows:

- a) In law by hearing and determining the case while lacking jurisdiction to entertain the matter contrary to clause 27.2 of the Employment Agreement dated 01.04.2018 between the appellant and the respondent.
- b) In law by proceeding to hear and determine the case despite an oral preliminary objection being raised as to the jurisdiction of the trial Court to hear the matter on 27.01.2021.
- c) In law by proceeding to hear and determine the case the case without making a ruling on the appellant's written notice of motion preliminary objection filed on 07.10.2020.
- d) In law by proceeding to hear and determine the case without making a ruling on the appellant's written notice of preliminary objection filed on 20.03.2021.
- e) In law by dismissing the appellant's conditional memorandum of appearance dated 07.10.2020 and making a finding that the said conditional memorandum of appearance was unknown document in law and that the appellant was unrepresented in the proceedings before the Court.
- f) In law by rendering judgment on 15.06.2021 when an oral preliminary objection was raised by counsel for the appellant as to the jurisdiction of the trial Court to continue any more step in the proceedings before him.
- g) In law by failing to consider a pending interlocutory notice of motion dated 29.03.2021 before rendering the final judgment in the case on 15.06.2021.
- h) In law by denying the appellant the right to a fair administrative action and fair hearing under Articles 47(1) and 50 (2) of the Constitution respectively in the proceedings before the Court.
- i) In law by denying the appellant the right to be heard in the proceedings before the lower Court.

The Court has considered the record of appeal and the parties' submissions. The background to the appeal is as follows. The respondent filed the memorandum of claim dated 04.09.2020. He claimed a sum of Kshs. 888, 875.00 against the appellant in terminal dues and compensation for unfair termination duly particularised. The respondent also prayed for costs of the cause, certificate of service and interest. The appellant filed a document titled conditional memorandum of appearance through Oseku & Ouma Advocates LLP. The document narrated that conditional appearance be entered for the appellant. It was filed on 15.10.2020. It is not clear when the summons and the memorandum of claim had been served and assuming they had been served on that 15.10.2020, then the appellant was required to file, within 21 days from the date of such service, the statement of response to the claims and which would be lapsing on or about 05.11.2020 – and as required under

rule 13 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Court has perused the record of appeal and no statement of response to the memorandum of claim appears to have been filed. Thus the Court finds that the trial Court did not err in law and fact by finding in its judgment thus, **“The respondent did not respond to the claim, the same therefore proceeded as uncontested cause....”**.

While making that finding, the Court has considered the appellant’s concern that the preliminary objection that had been filed for it had been disregarded and the suit heard. The Court has considered the trial Court’s record of proceedings and it is not clear at what stage the appellant’s lamentations as per grounds of appeal may have been made. The only decipherable point is on the date of delivery of the trial Court’s judgment that counsel for the appellant addressed the Court stating that there was an application and a preliminary objection dated 29.03.2021 because there existed an arbitration clause – and counsel prayed that the preliminary objection be dealt with first. Counsel for the respondent replied that the preliminary objection had not been prosecuted and the appellant had not cleared the issue of representation – and respondent’s counsel prayed for judgment to be delivered. The trial Court then ordered that there was no stay and no application to arrest the judgment and further, **“The judgment is delivered in the present file. Applicant to serve the Application.”** By that direction the Court considers that the trial Court made orders about the preliminary objection and the further steps the appellant was to take, namely to serve the application. It appears the appellant did not seek review or appeal against that trial Court’s decision but instead filed the present appeal. The preliminary objection before the trial Court remained not heard and was not determined so that the lesser this Court says about it the better. It is sufficient to observe that it is trite law that a preliminary objection is based upon pleadings before Court and it appears the appellant had raised a preliminary objection not based on the respondent’s memorandum of claim and without, on its part, having filed a memorandum of response to the memorandum of claim.

Turning back to the grounds of appeal, on their face, they do not challenge any finding or holding in the trial Court’s judgment. The grounds would probably be properly against the orders by the trial court on 15.06.2021 prior to delivery of the judgment quoted earlier in this judgment. The Court finds that certainly, the scope of the lamentations falls outside the findings and holdings of the trial Court in the judgment and subsequent decree appealed against. To that extent the appeal is found misconceived and an abuse of due process of the Court.

While making that decision, it should be clear that appellate jurisdiction is exercised when a higher Court reviews or reconsiders a lower court’s decision based on the same facts, evidence and law as was available to or before the lower Court. Since the grounds of appeal in the instant appeal are outside the trial Court’s judgment purportedly appealed against, the court cannot properly exercise the appellate jurisdiction in that respect. The appeal is therefore amenable to dismissal. All matters in the grounds of appeal are found to be outside the findings and holdings in the trial Court’s judgment and the Court therefore finds that the matters are outside the Court’s appellate jurisdiction as purportedly invoked for the appellant. The issue of the competence and propriety of the appeal has been taken up by the Court of its own motion and the appellant will pay 50% only of the respondent’s costs of the appeal. In conclusion the appeal is hereby dismissed with orders the appellant to pay the respondent’s 50% of the costs of the appeal.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 01ST APRIL, 2022.

BYRAM ONGAYA

JUDGE