



**Kedar Builders Limited v Sammy (Appeal E043 of 2021)
[2022] KEELRC 4150 (KLR) (29 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4150 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E043 OF 2021
J RIKA, J
SEPTEMBER 29, 2022**

BETWEEN

KEDAR BUILDERS LIMITED APPELLANT

AND

ENOCK NZIVO SAMMY RESPONDENT

(Being an Appeal from the Judgment and Decree of the Senior Principal Magistrate's Court at Ruiru Hon. J.A. Agonda [Mr.] [PM] on 25th March 2021 in ELRC Case No. 27 of 2019)

JUDGMENT

1. The trial court entered judgment in favour of the respondent herein, in the sum of Kshs 258,720. The sum comprises notice, annual leave, house allowance, compensation, service and severance. The respondent was also awarded costs and interest.
2. The appellant filed a memorandum of appeal, challenging the judgment on 4 grounds: a] that the trial court did not appreciate the appellant's case as presented in the pleadings and evidence thereof; that the trial court did not consider appellant's last submissions; that the trial court erred in finding that termination was not based on valid reason and fair procedure; and lastly, that the trial court erred in finding that the respondent was entitled to the reliefs granted.
3. Parties agreed to have the appeal considered and determined on the strength of the record of appeal, and submissions, which were confirmed to have been filed and exchanged, at the last mention on July 17, 2022.

The Court Finds: -

4. The proceedings and judgment of the trial court on record, do not support ground 1, that the trial court failed to consider the pleadings and evidence of the appellant. Page 1 and 2 of the judgment contain a clear summary of the pleadings and evidence of both parties.



5. Page 3 to 8, contain a comprehensive discussion of the evidence, case law and relevant statute.
6. Ground 2, that the trial court failed to consider appellant's closing submissions is supported by the record of appeal. At page 3 of the judgment, the trial court states that at the time of writing its judgment, the appellant had not filed its submissions. The trial court states " hence, the same was not considered in this judgment."
7. The proceedings show that on January 20, 2021, Parties were granted 14 days apiece to file and exchange their closing submissions. The claim was scheduled for mention on February 23, 2021.
8. On this date, both parties confirmed filing and exchange of their submissions. The trial court reserved its judgment for March 25, 2021.
9. Having received confirmation from both parties, that parties had filed their submissions on February 23, 2021, it is not likely that the trial court did not have submissions from the appellant, at the time of writing its judgment.
10. The respondent's submissions on record are date- stamped by the trial court, February 22, 2021, supporting the position that the trial court was seized of the appellant's submissions, at the last mention date.
11. Ground 2 of the memorandum of appeal is well-founded.
12. Having omitted the submissions filed by the appellant, the legal findings of the trial court, on reasons and fairness of procedure, were placed in doubt. Submissions filed by the appellant contain case law and the appellant gives its own interpretation of the applicable law. Without taking into account the submissions filed by the appellant, the trial court would correctly be challenged on its legal findings, which ground 3 and 4 relate to.
13. he judgment can be revisited, without subjecting the parties to another full trial. Ideally, the appellant herein should have requested the trial court to review its judgment. As stated above, the trial court proceedings show that the pleadings and the evidence of the parties, were considered. The problem is with the closing submissions. Closing submissions are an important aspect in the proceedings, where parties get to assisting the court, with their appreciation of the pleadings, evidence and the law. They are integral to the concept of fair hearing. They provide the court with a bird's eye view of whole claim. Properly researched submissions, aid the court in writing its judgment, without necessarily excavating the tonnes of paperwork oftimes placed on record by parties. Submissions are a final step, in seeking a determination from the court, and failure to consider submissions which have been shown to be on record, has an adverse effect on the court's responsibility to administer justice fairly. Parties must not leave the seat of justice feeling that they were not evenly treated.
14. The court would therefore allow the appeal mainly on ground 2 of the memorandum of appeal, which as explained above, affects grounds 3 and 4.
15. The appellant prays that the appeal is allowed; judgment of the trial court is set aside; and the claim before the trial court dismissed with costs on trial and appeal borne by the respondent herein. The appellant prays the court to make any further orders as it deems fit.
16. The court has taken into account that the omission in the trial court does not relate to the pleadings, or the evidence adduced, before the trial court. There is no need to have a fresh trial. It would be a travesty, to order that the claim before the trial court, is dismissed with costs to the appellant. There was an omission which could have affected the outcome, and in the view of this court, omission was not immaterial. The court is not able to say that without the omission, and flowing from the pleadings



and the evidence, the outcome would have been the same. It is for the trial court to assess the pleadings and the evidence, against the closing submissions filed by both parties. The trial court should revisit its judgment, and take into account the submissions filed by the respondent.

It is ordered : -

- a. The appeal is allowed on ground 2.
- b. The trial court shall consider the submissions filed by the appellant, and deliver a fresh judgment to the parties, on a date to be notified to the parties.
- c. There shall be no fresh hearing before the trial court.
- d. No order as to costs on appeal.
- e. Costs on trial to be determined by the trial court.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, AT NAIROBI, THIS 29TH DAY OF SEPTEMBER, 2022.

JAMES RIKA

JUDGE

