Ngunya Building & General Contractors Ltd v Omondi (Appeal E004 of 2022) [2022] KEELRC 13390 (KLR) (5 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13390 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E004 OF 2022

JK GAKERI, J

DECEMBER 5, 2022

BETWEEN

NGUNYA BUILDING & GENERAL CONTRACTORS LTD .... APPELLANT

AND

FRANCIS ONYANGO OMONDI .... RESPONDENT

(an Appeal from the ruling by Hon L B Koech (Mrs), Principal Magistrate delivered on 15th December, 2021)

JUDGMENT

1. This is an appeal from the ruling by Hon L B Koech (Mrs), Principal Magistrate delivered on December 15, 2021. In the ruling, the learned magistrate dismissed the respondent's notice of motion application dated June 28, 2021 which sought the striking out of the suit on the ground that it was frivolous and vexatious or otherwise an abuse of the court process.

2. Aggrieved by the decision, the appellant filed a memorandum of appeal dated January 11, 2022 raising the following grounds of appeal.

   i. The learned magistrate erred in law by failing to appreciate sufficiently or at all that no action for service pay or gratuity pay can lie in favour of an employee who is a member of the NSSF under section 35 (6) of the *Employment Act*.

   ii. The learned magistrate gravely erred in law and fact by failing to appreciate sufficiently or at all that the employees entire claim as pleaded at paragraph 10 (a) of the memorandum of claim and as prayed at prayer (a) of the memorandum of claim was on service gratuity for 9 years worked which claim is statute barred.

iii. The learned trial magistrate gravely erred in law by failing to exercise her discretion judiciously nor in conformity with a binding authority placed before the court by the appellant in a brazen disregard of the doctrine of *stare decisis*.

iv. The learned trial magistrate gravely erred in law demonstrably shirking responsibility to exercise jurisdiction to strike out the memorandum of claim in a demonstrably deserving case contrary to law.

v. The learned trial magistrate erred in law and fact by failing to sufficiently to consider on record the merits or otherwise of the application giving rise to the impugned ruling and order.

3. The appellant prays that the appeal be allowed and the ruling set aside and costs of the parent suit and appeal be awarded to the appellant.

4. The appeal was disposed of by way of written submissions.

Appellant's Submissions

5. The appellant's submissions were substantially based on the merits of the case which are yet to be canvassed in evidence. The last two paragraphs of the submissions which address the exercise of discretion by the learned magistrate stated that the trial court did not identify any triable issue and the court arrived at an unjust and wrong decision and the claim was scandalous, frivolous, and an abuse of court process.

6. In sum, the appellant submitted that the learned magistrate

i. Unlawfully failed to demonstrate why the suit was not frivolous and an abuse of court process.

ii. Made a contradictory ruling that the suit was not hopeless and can be amended.

iii. Approached her duty in a perfunctory and mechanical manner and arrived at a wrong decision.

Respondent's Submissions

7. According to the appellant, the only issue for determination was whether the learned magistrate exercised her discretion judiciously by dismissing the application and holding that the claim was not hopeless and could be amended.

8. Reliance was made on the decision in *County Council of Nandi v Kibet Rutto and 6 others* (2013) eKLR to demonstrate the meaning of scandalous, vexation, frivolous and abuse of process of court.

9. Further, the decision in *Madison Insurance Co Ltd v Augustine Kamanda Gitau* (1982) eKLR was relied upon for the principles that guide the exercise of jurisdiction by the court in the striking out of cases.

10. It was urged that the power to strike out a case should be exercised sparingly. The decision in *Co-operative Merchant Bank v George Fredrick Wekesa* Civil App 1999 cited in *G.B.M Kariuki v Nation Media Group Ltd & 3 others* (2012) eKLR is relied upon.

11. It was submitted that whether or not the respondent was entitled to service gratuity, was a contested fact, not appropriate for determination without hearing both parties. That the appellant had gone into the merits of the case and concluded that no gratuity was due to the respondent. That the respondent had not been accorded opportunity to test the veracity of the appellant's evidence by cross-examination.

12. It was further submitted that allowing the appeal would be tantamount to slamming the door of justice in the face of the respondent since the case raised a triable issue.

13. Reliance was also made on the finding of the trial magistrate that the memorandum of claim was not hopeless and could be amended.

14. Finally, the respondent submitted that the learned magistrate exercised her discretion judiciously and in accordance with precedent.

Determination

15. This being a first appeal, the court is enjoined to conduct a retrial and reconsideration of the evidence afresh and draw its own conclusions. This has been stated in various decisions such as *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* (2013) eKLR where the court stated as follows;

> "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 trail judge are to stand or not and give reasons either way."

16. Similar sentiments were expressed in *Gitobu Imanyara & 2 others v Attorney General* (2016) eKLR.

17. The learned magistrate is faulted on the ground that she did not exercise her discretion judiciously in rather unpleasant language which was unnecessary.

18. The issue for determination is whether the learned magistrate exercised her discretion judiciously by dismissing the application by the appellant dated June 28, 2021.

19. The appellant sought the striking out of the suit on the ground that it was scandalous, frivolous and vexatious.

20. In *Kivanga Estates Ltd v National Bank of Kenya Ltd* (2017) eKLR, the Court of Appeal expressed itself as follows;

> "It is not for nothing that jurisdiction of the court to strike out pleadings had been described variously as draconian, drastic, discretionally, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has been heard on merit yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.
>
> Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences, order 2 rule 15 of the *Civil Procedure Rules* has established clear principles which guide the court in the exercise of that power . . .
>
> The language highlighted demonstrates that as a drastic measure in litigation, the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure hence the use of word "may."

21. Similarly, in *Co-operative Merchant Bank Ltd v George Fredrick Wekesa* (Supra) the court stated as follows;

> "The power of the court to strike out a pleading under order 6 rule 13 (1) (b) and (d) is discretionary and an appellate court will not interfere with the exercise of the power unless it is clear that there was either an error or principle or that the trial judge was plainly wrong . . . striking out a pleading is a draconian act, which may only be resorted to in plain cases. Whether or not a case is plain is a matter of fact . . .
>
> A court may only strike out pleadings where they disclose no semblance of a cause of action on defence and are incurable by amendment."

22. I will now proceed to apply the foregoing propositions of law to the facts of the instant case. The respondent avers that he was employed by the appellant on March 1, 2010 as packaging personnel at Kshs 22,328/= per month, 28 days leave, medical cover and a travelling allowance/ per diem of Kshs 1,000/= and served until February 1, 2020 when he resigned in compliance with the prescribed procedure.

23. The respondent further avers that since the termination was lawfully effected, he was suing for terminal dues and benefits namely; service gratuity of Kshs 161,636. 85 for the 9 years served.

24. Order 2 rule 15 (1) (a) and (b) of the *Civil Procedure Rules, 2010* provides:

    At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

    a. It discloses no reasonable cause of action or defence in law or

    b. It is scandalous, frivolous or vexatious.

25. In *Dawkins v Prince Edward of Save Weimber* (1976) 1 QBD 499, the court held that

> " A matter is frivolous if
>
> i. It has no substance; or
>
> ii. It is fanciful; or
>
> iii. Where a party is trifling with the court; or
>
> iv. When to put up a defence would be wasting the courts time; or
>
> v. When it is not capable of reasoned argument."

26. Relatedly, in *Madison Insurance Co Ltd v Augustine Kamanda Gitau* (supra), the court stated as follows;

> "The principles guiding the striking out of pleadings and cases are now settled. These principles are set out in *DT Dobie & Company (K) Ltd v Muchina* (1982) eKLR are that no suit ought to be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If the suit shows some semblance of a cause of action, provided it can be injected with real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it . . ."

27. The court is bound by these sentiments.

28. Without delving into the merits of the case, the respondent avers that the appellant did not pay accrued dues and terminal benefits that had accrued to him by virtue of the *Employment Act*, 2007 and was thus suing for the dues.

29. In its statement of defence dated June 21, 2021, the respondent admitted that the claimant was its employee but was silent on whether it paid the claimant all accrued dues and terminal benefits pursuant to contract of employment and the *Employment Act*, 2007.

30. Against this background, the court is in agreement with the respondent's submissions that payment of service gratuity was a contested issue and ought not be determined at the preliminary stage before the respondent is heard. This would undoubtedly drive the respondent from the judgment seat.

31. The court is of the view that it is only fair that the respondent be given his day in court to establish his claim as well as the opportunity to amend the claim, if need be.

32. As observed by the Court of Appeal in *Kivanga Estates Ltd v National Bank of Kenya Ltd* (supra),

> "There is no greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but it is seen to be done . . ."

33. Guided by the foregoing judicial authorities and reasons, the court is satisfied and finds no fault in the manner in which the learned trial magistrate exercised her discretion.

34. The learned magistrate exercised her discretion judiciously.

35. Accordingly, the appeal herein is dismissed.

36. Parties to bear own costs.

37. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF DECEMBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE