



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAIROBI

APPEAL NO.E022 OF 2021

JOSEPHAT MUOKI KILUTA.....APPELLANT

VERSUS

JAMES MURISHO T/A LAIBON HOTEL..... RESPONDENT

RULING

The appellant filed application dated 2nd March, 2021 and seeking for orders pending hearing and determination of the appeal there be stay of execution and further proceedings of the orders of ruling delivered on 5th February, 2021 by Hon. D.W. Mburu in Milimani CM ELRC No.362 of 2019 and the scheduled hearing of the respondent's case on 24th March, 2021.

The application is supported by the appellants Supporting Affidavit and on the grounds that following the ruling delivered by Hon. Mburu on 5th February, 2021 in CM, ELRC No.362 of 2019 the court allowed the respondent's application dated 6th August, 2020 and re-opened the respondent's case for hearing despite the respondent failing to file a witness statement and further informing the trial court that he was not calling any witness, such ruling has occasioned the appellant prejudice and amounts to miscarriage of justice. This allows the respondent to fill in gaps exposed by the appellant in his submissions on 21st February, 2020.

In his Affidavit, the appellant avers that on 28th January, 2020 the hearing before the trial court was closed after the respondents advocate informed the court that the respondent would not be calling any witness and parties were directed to file their final submissions within 14 days. In compliance, the appellant filed his submissions on 21st February, 2021.

On 28th February, 2020 the matter came up for mention to confirm filed submissions when the respondent requested for more time and instead of filing written submissions, filed application dated 6th August, 2020 seeking to re-open the case and bring new evidence that was deliberately not adduced.

The appellant is aggrieved by the ruling of the trial court allowing the respondent to re-open its case on 24th March, 2021 and also allowing for filing of a witness statement and adduce additional evidence which shall prejudice him. The trial court has applied its discretion unfairly and on unknown legal principles and hence rendered the whole trial unfair.

Mr Kiluta avers in his affidavit that the trial court issued various directions to the respondent who failed to comply and leading to 28th January, 2020 when the matter came up for hearing when the respondent was allowed to proceed without complying with various directions including paying adjournment fees and throwaway costs. After testifying and closing his case, counsel for the respondent informed the trial court they would not call any witness and in any event had not filed any witness statement and pleadings had closed on 28th November, 2019.

After the close of the hearing, parties were allowed to file written submissions which the appellant did but the respondent asked for more time and instead of filing written submissions filed application seeking to re-open its case and file witness statement which is prejudicial to the appellant and shall occasion him great loss and damage unless such orders are stayed and the trial court allowed to proceed and deliver its judgement.

In reply, the respondent filed the *Supporting Affidavit* of James Gitau Murichu and avers that in the year 2019 he instructed the firm of Ibrahim Mwangi & Company Advocates to enter appearance and act for him before the trial court and he only realised the mater had proceeded for formal proof without having filed his statement of response and documents to support his case. He informed his advocates to apply and set aside the orders and directions issued which the trial court allowed subject to payment of throwaway costs.

The court then delivered a ruling allowing him to tender his evidence. The appellant will have a chance to examine the witnesses called and

have the opportunity to examine the defence and documents filed. No prejudice shall be occasioned.

Parties addressed the application by way of written submissions.

The appellant submitted that stay of proceedings to allow for an appeal is derived from Order 42 Rule 6 of the Civil Procedure rules as well as the inherent jurisdiction of the court and this is meant to avoid waste of time and to avoid the court duplication of efforts and multiplicity of suits as held in **Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019] eKLR.**

Being aggrieved by the decision of the trial court on 5th February, 2021 the appellant wishes to challenge it on the grounds that the same is based on wrong principles of the law and hence erroneous. The court failed to safeguard against abuse of process by allowing the respondent to adduce evidence after expressly stating that he would not be calling any witness. The parties had been given full opportunity to file statements and call evidence and hearing closed and to allow the respondent to re-open its case is prejudicial to the appellant and this should not be allowed as held in the case of **Chairman, Secretary & Treasurer Suing as the officials/on behalf of House of Hope v Wotta – House limited [2018] eKLR.**

The respondent submitted that there shall be no prejudice against the appellant if the trial court is allowed to proceed and hear the respondent's case as the appellant will be allowed to cross-examine the witness. The respondent has filed and served the documents to be relied upon and given the appellant notice of the same.

In addressing an application whether to stay or not stay proceedings the court must weigh the pros and cons and bear in mind the need to expedite the determination of matters as held in **Glob Tours & Apparels Limited; National HC Wining up Cause No.43 of 2000.**

And application seeking stay of proceedings is a serious matter and such relates to interruption in the right that a party has conduct of his litigation and should only be allowed in the rarest of cases. The orders sought should not issue and application be dismissed with costs.

Determination

The subject ruling of the trial court leading to orders issued on 5th February, 2021 and directing hearing of the respondent's case on 24th March, 2021 is not attached to the application or affidavit of the appellant. This issue was addressed by the appellant on 18th March, 2021 and the court directed the appellant to file the ruling of the trial court in a Supplementary Affidavit, which has not been done.

The court is effectively denied the benefit of the decision challenged in the appeal.

From the appellants Supporting Affidavit I can surmise the following details;

On 19th March, 2019 he filed suit at the trial court;

On 16th July, 2019 and 29th August, 2019 parties attended for pre-trial directions when the respondent failed to attend and the matter was fixed for formal proof;

On 28th November, 2018 A date for formal proof was allocated when the respondent attended and requested for adjournment to be allowed time to file response which was allowed and 7 days allocated subject to payment of costs at Ksh.5,000 and hearing adjourned to 18th December, 2019;

The respondent failed to comply within the 7 days given and hearing adjourned subject to costs of Ksh.5,000 and hearing allocated for 28th January, 2020 and there was yet no compliance and the court directed parties to proceed on what the appellant avers at his paragraph 13 that;

... The court directed parties to address the competency of the defence filed by the respondent in their respective submissions.

Without the Record of Appeal, the veracity of these averments cannot be ascertained.

On 28th January, 2020 the appellant avers at his paragraph 14 that the respondent's advocate submitted that he would not be calling any witness and a witness statement had not been filed and that hearing closed on such date.

On 21st February, 2020 the appellant filed his written submissions; On 11th and 13th March, 2020 the respondent paid throwaway costs;

On 6th August, 2020 the respondent filed application seeking to re-open the case; and

By ruling delivered on 5th February, 2021 the trial court allowed his application and the subject of this appeal.

As noted above, the outline above cannot be verified as this is one-sided and from the appellant's affidavit in support of his application and without the benefit of the record of the trial court of the impugned ruling. Such omission is fatal.

On this basis, the background to the ruling taken into account, the same relating to directions of the trial court in directing for the re-opening

of the case to allow the respondent to be given a hearing vide application dated 6th August, 2020 and which application was allowed in the trial court ruling on 5th March, 2021 such orders are commensurate to the provisions of Rule 14 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which allow a party to file application and seek leave to be allowed to amend, file and exchange witness statements before judgement is issued.

Judgement of the trial court has not issued. Each party has the fair opportunity to urge its case on the merits.

On the material before this court, the hearing before the trial court shall proceed as directed on 5th February, 2021 save the appellant shall be equally allowed sufficient time and opportunity to cross-examine the respondent and its witnesses and to recall the appellant to respond to any matter that has now been introduced by the respondent.

Each party shall have the right to a fair bearing before the trial court.

Each party shall bear own costs.

Orders accordingly.

DELIVERED IN COURT AT NAIROBI THIS 20TH DAY OF DECEMBER, 2021.

M. MBARU

JUDGE

In the presence of: