



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CIVIL APPEAL NUMBER 8 OF 2016
BETWEEN
KENYA PORTS AUTHORITY..... APPELLANT
VERSUS
JENNIFER ALOIS WANDERA (ADMINSTRATRIX OF THE ESTATE
OF ALOIS WANDERA ODHIAMBO-DECEASED)RESPONDENT

RULING

1. The Respondent was the Claimant in the Chief Magistrates Court at Mombasa. She was granted Summary Judgment against the Appellant, in the sum of Kshs. 300,529. The Appellant lodged Appeal Number 61 of 2009 at the High Court Mombasa, against Summary Judgment. This Appeal was transferred to the Employment and Labour Relations Court through an order of the High Court issued on the 4th August 2016. It was registered at receiving Court as Appeal Number 8 of 2016. The Respondent has raised a point of preliminary objection, through a Notice dated 26th September 2016, submitting that the ***Appeal was filed without the leave of the Court, contrary to Order XLI Rule 8 [b] [f] of the old Civil Procedure Rules, and Order 42 Rule 13 [4] [f] of the present Rules.***

2. Parties agreed to have the objection considered and determined on the strength of their Submissions which they confirmed to have been filed, at the last mention in Court on the 11th October 2016.

Respondent's Submissions

3. The application for Summary Judgment in the Chief Magistrate's Court was made and granted under ***Order XXXV Rule 1 [a] of the Civil Procedure Rules.***

4. The Respondent relies on ***H.C.C.C No. 59 of 2004 between Hellen Njeri Kiarie v. Milling Corporation Kenya Limited,*** in urging the Court to find the Appeal does not lie as a matter of right, and it was mandatory to obtain leave.

5. As the Appellant did not have leave to file the Appeal, the Court is urged to disallow the Appeal with costs to the Respondent.

Appellant's Submissions

6. The Appellant's reply is that Order XLII 1[1] provides that an Appeal shall lie as of right. An application for leave would be a waste of time.

7. Following the enactment of **Section 1A and 1B of the Civil Procedure Act; Section 3A and 3B of the Appellate Jurisdiction Act; and Article 159 of the Constitution**, Courts strive to sustain rather than strike out pleadings on pure technicalities.

8. In **Nicholas Kiptoo Arap Salat v. IEBC & 6 others [2013] e-KLR**, the Court ruled that Courts do not apply or enforce words of statute, but rather their objects, purposes, spirit and core value. In **Githere v. Kimungu [1976-1985] E.A. 101**, the Court held that relation of rules of practice to the administration of justice is intended to be that of a handmaiden, rather than a mistress.

9. Appellant cites the case of **Equity Bank Limited v. Capital Construction Limited [2012] e-KLR** where the Court held that Courts must administer justice without undue regard to procedural technicalities, as required by **Article 159 of the Constitution**. Lastly the Appellant urges the Court to apply the Ruling in **CA Civil Application No. Nai. 173 of 2010, Abdirahman Muhumed Abdi v. Safi Petroleum Limited & 6 others**, which concluded that, "the overriding objective in civil litigation is a policy issue which the Court invokes to obviate hardship, expense, delay and to focus on substantive justice..."

The Court Finds:-

10. The first thing the Court must observe is that the Appeal was transferred from the High Court to the Employment and Labour Relations Court, on the basis of jurisdiction. It was removed from the ambit of the Civil Procedure Act and the Civil Procedure Rules, to the specialized regime under the Employment and Labour Relations Act 2007, and Industrial Court Procedure Rules.

11. The Court, to which, the Appeal was transferred, exercises a specialized jurisdiction, rather than a civil jurisdiction. Section 2 of the Civil Procedure Act defines a 'Court' to mean the '**High Court or a Subordinate Court acting in exercise of its civil jurisdiction.**'

12. Strictly speaking the Employment and Labour Relations Court should not be called upon to answer a procedural question which arose when the Appeal was under the civil regime.

13. It is accepted however, that with the reconstruction of the Employment and Labour Relations Court, and conferment of exclusive jurisdiction in employment disputes on the reconstituted Court, a good number of disputes pending in the civil regime have been transferred to the Employment and Labour Relations Court. This has taken place without a legislative framework, on how such matters are to be transferred and received, and eventually dealt with.

14. That said, this Court has always had substantive justice as its overriding objective. This has been the case since the Court's inception over 40 years ago. Where matters are brought from other Courts, the primary duty of this Court is to act on those matters guided by the Court's principal objective which is to do substantive justice.

15. This is a position that finds support in the decisions of the Civil Courts cited by the Appellant above, advancing the principle of substantive justice. The Court agrees **Section 1A and 1B of the Civil Procedure Act; Section 3A and 3B of the Appellate Jurisdiction Act; and Article 159 of the Constitution** all demand substantive justice is given greater weight than procedural technicalities, in administering justice. These laws find expression in other laws relevant to this Court, such as **Sections 3 and 20 of the Employment and Labour Relations Court Act**, and **Rule 36 of the Industrial Court Procedure Rules 2010** which allows the Court to regulate its own procedures, subject to the Rules.

16. The Court has observed that Summary Judgment obtained by the Respondent originated from a decision made by the Industrial Court. It is not clear why Parties went before the Chief Magistrate's Court in the year 2008, while the Industrial Court was in operation in 2008. Summary Judgment was given under **Order XXXV Rules 1 [1] and [2] of the Civil Procedure Rules**. Order XLII allowed for

appeals as a matter of right, on summary procedure under **Rules 5, 7 and 10 only**. The Respondent would be correct in submitting that under the Civil Procedure Rules, the Appellant needed the leave of the Court, as the order of summary dismissal did not issue under Rules 5, 7 and 10. The Court is of the view however that default in obtaining such leave, should not have the effect of invalidating this Appeal which has been moved from Civil to a Specialized Jurisdiction where the dispute has its roots. There is need to do substantive justice under both regimes. IT IS ORDERED:-

[a] Preliminary Objection is rejected.

[b] Parties to set down the Appeal for hearing.

Dated and delivered at Mombasa this 9th day of December, 2016.

James Rika

Judge