



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**INDUSTRIAL COURT**

**APPEAL NO. 1 OF 2014**

**(Originally Nakuru High Court Civil Appeal No. 321 of 2010)**

**Being an appeal from the judgment of Hon. Baraza H.O, Resident Magistrate in Nakuru Chief Magistrates Court Civil Case No. 788 of 2003 delivered on 16 November 2010**

**THEOPHILUS K. NZUMBI**

**1<sup>ST</sup> APPELLANT**

**SAMUEL K. MUCHIRI**

**2<sup>ND</sup> APPELLANT**

**V**

**WAIHAKA KIARE MBAYA & CO. (CPA (K)**

**RESPONDENT**

**RULING**

1. Theophilus K. Nzumbi and Samuel K. Muchiri (Appellants) filed a Complaint against Waithaka Kiarie Mbaya & Co. (Respondent) in the Chief Magistrate's Court Civil Case No. 788 of 2003. The Appellants alleged wrongful termination and sought terminal benefits and general damages.
2. In a judgment delivered on 16 November 2010, the learned Magistrate dismissed the Appellants case with costs to the Respondent.
3. The Appellants were dissatisfied and on 16 December 2010, they filed a Memorandum of Appeal before the High Court. A record of appeal was filed on 16 October 2012. It is not clear from the record of proceedings whether the Respondent filed any reply to the Memorandum of Appeal.
4. On 14 February 2014, the parties appeared before Mshila J and she directed that the Appellants move the Industrial Court within 30 days and in default the Appeal would stand dismissed.
5. On 11 March 2014, the appeal was placed before Ongaya J and in the presence of Mr. Kurgat for the Appellants and in the absence of the Respondent, he directed that the appeal be heard on 28 April 2014, and a hearing notice be served. The Court further directed the parties to file skeleton submissions.
6. When the appeal came up for hearing on 28 April 2014, the Respondent was absent and the hearing was postponed to 28 May 2014. The Court directed the Appellants to serve a hearing notice.
7. The appeal did not proceed as scheduled on 28 May 2014 (Respondent was absent though Court was informed service had been effected) and the Court directed that it proceed on 15 July 2014.
8. When the appeal was called on 15 July 2014, Mr. Nguru was present for the Respondent. There was no representation for the Appellants.
9. Mr. Nguru addressed the Court and submitted that the appeal was not ready for hearing. He further submitted that the appeal did not conform to the format stipulated by rule 8 of the Industrial Court

(Procedure) Rules, 2010.

10. In a brief ruling given after the submissions, the Court ordered that because of the absence of the Appellant the appeal would be dismissed with costs.
11. On the same day at 3.40 pm, Mr. Morintat for the Appellants appeared *ex parte* before Ongaya J and was directed to file a formal application to reinstate the appeal. The Appellants in complying with the directions of the Court filed a formal application to have the appeal reinstated on 23 July 2014. The application was given a return date of 31 July 2014.
12. The Respondent filed Grounds of Opposition to the reinstatement application on 31 July 2014.
13. The record indicates that both Mr. Koima for the Appellants and Mr. Nguru for the Respondent addressed the Court. For the record, it is germane to reduce the address of the parties on that day

Mr. Koima: Is for hearing of application of 21.7.2014. Am ready to proceed. We received grounds of opposition. We seek to reinstate an appeal dismissed on 18.7.2014.

Mr. Nguru- Application lacks merit. Cause list that he was before Mshila J. is not demonstrated. The appeal is also defective. If reinstated, it will serve no purpose.

Mr. Koima: We can compromise.

14. The record then bears the Court as stating I have considered issues raised. In view of application filed by Appellants to reinstate the appeal parties are encouraged to negotiate a compromise. Mention on 29.9.2014 at 9am for recording a compromise or further directions. Costs in the cause.
15. In my view, the Court already dealt with the reinstatement motion and the duty was shifted to the parties to agree failure to which the appeal would stand dismissed.
16. But assuming that the Court had left its decision in respect to the reinstatement in abeyance, and this Court has to look at the application on the basis of the submissions made on 9 October 2014, it is my view that the reinstatement application has no merit.
17. I say so because the Appellants advocate had deposed that he was before Mshila J on 15 July 2014, but no evidence has been placed before Court to verify the said deposition. The cause list of the matters before Mshila J on the material date was not annexed or produced. In the same vein, an extract of proceedings before Mshila J in regard to Petition No. 2 of 2014 were not exhibited.
18. The issue of rule 8 of the Industrial Court (Procedure) Rules, 2010 is not material because the appeal was initially filed in the High Court pursuant to the rules applicable in the High Court.
19. The Court would therefore dismiss the motion dated 21 July 2014 for lacking merit and failure to give sufficient reasons to explain the Appellants advocate's absence.
20. The said motion is dismissed with costs to the Respondent.

**Delivered, dated and signed in open Court in Nakuru on this 17<sup>th</sup> day of October 2014.**

**Radido Stephen**

**Judge**

**Appearances**

For Appellant      Mr. Cheruiyot instructed by Kiplenge & Kurgat Advocates

For Respondent    Mr. Nguru instructed by Nguru & Co. Advocates