



REPUBLIC OF KENYA



KENYA LAW
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**Masitsa v Standard Global East Africa Limited (Appeal E164 of 2021)
[2023] KEELRC 3440 (KLR) (21 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3440 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E164 OF 2021
NZIOKI WA MAKAU, J
NOVEMBER 21, 2023**

BETWEEN

ALEX INZAHULI MASITSA APPELLANT

AND

STANDARD GLOBAL EAST AFRICA LIMITED RESPONDENT

(Being an appeal against the decision of the Chief Magistrate's Court at Nairobi (Hon. Kagoni E.M (P.M)) delivered on 9th September 2021 in CMELRC No. 279 of 2019)

JUDGMENT

1. Dissatisfied with the decision of the Chief Magistrate's Court at Nairobi (Hon. Kagoni E.M (P.M)) delivered on 9th September 2021 in CMELRC No. 279 of 2019, the Appellant filed to this Honourable Court the Memorandum of Appeal dated 21st March 2023 setting forth the following grounds:
 - a. That the learned Magistrate erred in law and in fact by dismissing the Claimant's case and finding that the Claimant was lawfully terminated.
 - b. That the learned Magistrate erred in fact and in law by only relying on the contract of employment and thereby ignored the provisions of the *Employment Act* especially sections 41, 43 and 45 and precedents set by the Honourable Court.
 - c. That the learned Magistrate erred in fact and in law by finding that the termination of the employment of the Appellant was not a redundancy against weights of evidence.
 - d. That the learned Magistrate erred in fact and in law by not awarding the Claimant/ appellants herein the remedies sought/prayed as against evidence and facts presented before the Honourable Court.



2. The Appellant thus prayed for the decision of the Honourable Learned Magistrate dated 9th September 2021 to be set aside and the Appeal herein allowed together with costs of the proceedings in the Superior Court. Further, that this Honourable Court do issue such orders and directions as it may deem fit and just to grant to meet the ends of justice. The matter was disposed of by way of written submissions.

Appellant's Submissions

3. The Appellant submitted that being a first appeal, this Court should rely on the judgment in the matter of *Esther Chepkemoi Ngecher v John Kung'u & Charles Muthoka* [2022] eKLR that the court's duty is to re-evaluate the evidence tendered before the trial court and come to its own independent conclusion, taking into account the fact that it did not have the advantage of seeing and hearing the witnesses as they testified. It was the Appellant's submission that the issue in dispute before the trial Court was unfair termination of employment and or unfair termination of employment by way of redundancy. The Appellant disagreed with the trial Court's finding that the termination was lawful because he followed the terms of the Claimant's Contract of Employment in ending the relationship. According to him, the current law on termination of employment is as per sections 41, 43 and 45 of the *Employment Act*, 2007 providing for procedural and substantive justification. That this position was affirmed in the case of *Charles Wanjala Watima v Nyali Golf & Country Club Ltd* [2013] eKLR where Radido J. held that apart from justifying the grounds for termination, the employer must also comply with the procedural requirements of section 41. It was the Appellant's submission that his Appeal is meritorious because the lower Court failed to appreciate the law on termination of employment under aforementioned provisions of the *Employment Act* and that this Court should be persuaded by the several authorities and the holding of the Honourable Judges of this Court on the issue. In this regard, he referred to the cases of *Natasha Helle Kilonzo Kafara v Sheer Logic Management Consultants Ltd* [2020] eKLR, *Anthony Yamo Ihito v Basco Products (Kenya) Limited* [2022] eKLR and the decision of the Court of Appeal in *Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited* [2021] eKLR. The Appellant's position was that he captured the aforementioned arguments in his submissions at the lower Court, which he still stood by.
4. The Appellant noted that the Learned Magistrate found that following the determination that the Claimant's termination was lawful, the remedies he had claimed were unmerited and dismissed accordingly. In disagreement, the Appellant submitted that the Court of Appeal in *Kenya Union of Commercial, Food & Allied Workers v Kisii Bottlers Limited* (supra) cited the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR (Civil Appeal No. 42 of 2015) wherein the Court advised that the court has to take into account a raft of considerations as provided under section 49 of the *Employment Act*, such as the wishes of the employee, circumstances in which the termination took place and the extent of the employee's contribution, practicability of reinstatement, employee's length of service etc.
5. The Appellant further submitted that he claimed outstanding salary for May, June and July 2017, severance pay, leave pay as amended on 22nd July 2021, and 12 months' salary as compensation. That he had produced letters of salary increment to show that his salary was severally increased and that his three months' salary were outstanding at the time he exited the Respondent's company. That he handed over the clearance form to the Respondent who retained the same and failed to produce the same in court, a move aimed at frustrating the Appellant and to deny him his hard earned salaries. He argued that having been terminated unlawfully and contrary to section 40 of the *Employment Act*, the Respondent should be liable to pay him severance for the seven (7) years that he worked for it, maximum compensation for the unfair termination of employment. For leave pay, he submitted that



he had demonstrated to the Honourable Court his unutilized leave days that the Respondent did not compensate or pay him. That he was allowed 30 days leave per year as per his Letter of Appointment but never fully utilized all his leave days over the seven years that he worked for the Respondent. That the leave forms produced by the Respondent showed that his leave balance from 2013 to 2016 was 18 days (pages 50-57 of Record of Appeal). The Appellant thus asked for the Appeal to be allowed with costs as prayed for in the Memorandum of Appeal.

Respondent's Submissions

6. According to the Respondent, this Honourable Court vide a Ruling dated 8th March 2022 granted the Appellant leave of 60 days to file his appeal, on condition that the Appellant strictly complied with the timelines given and deposited the decretal sum in a joint interest earning account. That however, the Appellant failed to comply with the Court orders and instead filed his Appeal on 21st March 2023, which was 317 days after the lapse of the leave granted by this Court. The Respondent asserted that it subsequently sought to have the Memorandum of Appeal and the entire Record of Appeal struck out from the court record through an Application dated 20th September 2023 that stands unopposed because the Appellant never filed any response to the same. On the issues before this Court, the Respondent addressed whether the Record of Appeal should be struck out and whether the termination of the Appellant's employment was lawful. Firstly, the Respondent argued that having filed the Application dated 20th September 2023, it expected the Appellant to file grounds of opposition verified by an affidavit pursuant to Rule 17(9) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which states that a party may respond to an application by filing grounds of opposition verified by an affidavit. That the Appellant's failure to file any response in opposition to the said Application meant that the allegations of fact contained therein remain uncontroverted. It was guided by the case of *John Joel Koskei v Kenya Power & Lighting Co. Ltd [2005] eKLR* wherein the Court found the evidence tendered by the plaintiff to be truthful and correct since the same was not challenged or uncontroverted. The Respondent therefore asked this Court to allow the Application dated 20th September 2023.
7. Further, the Respondent submitted that the primary suit having been filed in the Chief Magistrate's Court, it was subject to section 79G of the Civil Procedure Rules 2010 as read with Rule 8(1) of the Employment and Labour Relations Court (Procedure) Rules, 2016 which provisions provide as follows:

79G. Time for filing appeals from subordinate courts

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

Appeals
8.
 - (1) Where any written law provides for an appeal to the Court, an appellant shall file a memorandum of appeal with the Court within the time specified for that appeal under the written law.



8. The Respondent submitted that with judgment in the primary suit having been delivered on 9th September 2021, the Appellant ought to have filed his appeal within 30 days thereof being on or before 8th October 2021, but he did not. That nevertheless, this Court allowed him to file his appeal out of time vide the Ruling of 8th March 2022 in the following terms:

The intended appeal be filed within 60 days of today.

There be a stay of execution upon deposit of the entire decretal sum in a joint interest earning account in the names of the Advocates for the Appellant and the Respondent within 21 days of today.

The Appeal be listed for directions before any other Judge of this Court for directions as to hearing after the lapse of the 60 days.

If no appeal is filed within 60 days the orders granted in i) and the stay granted in ii) above to automatically lapse.

9. It was the Respondent's submission that the above Orders of this Court granting leave to the Appellant were unequivocal and clear that the Appeal herein was to be filed within 60 days, failure to which the said Orders would automatically lapse. That this ideally meant that the Appellant, who should have filed his Appeal on or before 8th May 2022, failed to do so within the stipulated timelines and the leave he was granted automatically lapsed on 9th May 2022. It submitted that the conditional leave to file the appeal out of time was mandatory as supported by the decisions in:

- a. *Mae Properties Limited v Joseph Kibe & another* [2017] eKLR wherein the Court of Appeal held that the timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before it and that the Rules, expressed in clear and unambiguous terms, command obedience.
- b. *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR in which the Court found that no appeal lies without seeking leave of Court as the Court would have no jurisdiction to entertain, hear or determine the applicant's appeal.
- c. *Sino Hydro Corporation Limited v Tumbo t/a Dominion Yards Auctioneers (Civil Appeal E105 of 2021)* [2022] KEHC 15545 (KLR) (17 November 2022) (Ruling) wherein the Court held that where a proceeding or appeal is filed out of the stipulated statutory timelines, the Court is deprived of jurisdiction to hear and determine the appeal on its merits and its decision would amount to a nullity. The Court went on to find the appeal before it as incompetent and struck the same out for having been filed out of the stipulated statutory timelines without seeking leave of court to enlarge the time.

10. The Respondent's stance was that the Appellant was consequently required to seek fresh leave from this Honourable Court before filing his Memorandum of Appeal and Record of Appeal. That since he did not, the said pleadings were improperly on record as was affirmed by the Supreme Court in the cases of *Bookpoint Limited v Guardian Bank Limited & another* [2021] eKLR and *Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others (Application E029 of 2023)* (2023) KESC 69 (KLR). The Respondent noted that the Appellant had not offered any explanation for his failure to comply with the orders of this Court and was guilty of laches and underserving of this Court's discretion being exercised in his favour. It submitted that the Memorandum of Appeal and the Record of Appeal were filed without leave of this Court thus rendering the whole record of appeal as incompetent, an abuse of court process and for striking out by this Court at the first instance. It urged the Court to so find and hold.



11. The Respondent submitted that Article 159 of *the Constitution* of Kenya cannot cure the failure by the Appellant to file his Memorandum of Appeal and Record of Appeal within the conditional leave period granted by this Court. It noted the observations of the High Court in *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others - Civil Appeal No. 290 of 2012* [2013] eKLR wherein the Court rendered itself that it is a misconception to claim that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle of sections 1A and 1B of the *Civil Procedure Act* and that procedure is also a hand maiden of just determination of cases. That also in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR (Civil Appeal No. 154 of 2013) the Court of Appeal held that it did not consider Article 159(2)(d) of *the Constitution* to be 'a panacea, nay, a general whitewash, that cures and mends all ills, misdeeds and defaults of litigation'.
12. The Respondent submitted secondly and without prejudice to its foregoing submissions, that a plain reading of clause 9 of the Appellant's Contract of Employment dated 1st January 2011 demonstrates that either party to the contract had prerogative to terminate the employment relationship by giving the other party a one-month notice. That the Appellant having consented to the said clause by executing the contract, was duly bound by its express terms in the absence of allegations of fraud or misrepresentation. That the Appeal herein was an attempt by the Appellant to have this Court rewrite the agreement between parties and which invitation this Court should decline. The Respondent relied on the case of *Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited* [2017] eKLR wherein the Court of Appeal held that:
 - “ 38. We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. See *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd* [2002]2 EA 503. The primary task of the court is to construe the contract and any terms implied in it. See Megarry, J. in the case of *Coco vs A. N. Clark (Engineers) Ltd.* - [1969] RPC 41.”
13. It was the Respondent's submission that the only instance where a court may interfere with a contract between parties was when there was evidence that the contract was illegal, void, voidable or unconscionable. That however, the Appellant proved none of these vitiating factors during trial in the lower Court as envisaged by the decision in *Stanley Kamere & 26 others v National Housing Corporation & 2 others* [2015] eKLR. The Respondent further submitted that the Appellant was given reasons for termination of his employment in line with section 45 of the *Employment Act*. It invited this Court to peruse the termination letter dated 11th February 2019 which indicated that the reason for terminating the Appellant's employment was because the Respondent no longer required his services. It submitted that it exercised its right to terminate the contract of employment vide the termination clause and also fully complied with the termination procedures set out in the *Employment Act*, 2007. Further on the claims sought, it was the Respondent's submission that the Appellant was not entitled to service pay since he was a member of the National Social Security Fund (NSSF) and it duly deducted and remitted his social security to the NSSF. In this regard, it relied on section 35(6) (d) of the *Employment Act* and the case of *Monica Wanza Mbavu v Roofspec & Allied Works Co. Ltd* [2021] eKLR where the Court held that the prayer for service pay failed because the claimant was a registered member of the NSSF to which monthly contributions was made for her. The Respondent thus invited this Court to find and hold that the Appellant's Appeal has no merit and to dismiss the same with costs awarded to the Respondent.



14. The Appeal herein hinges on the orders granted to the Appellant in seeking time to admit the appeal filed out of time. The Respondent asserted that the Appeal was filed outside the timelines set by court and therefore amenable to striking out. The Respondent's notice of motion application of 20th September 2023 remained unopposed. Nevertheless the Court will consider the merits of the arguments advanced by the Respondent. The Court record in this Appeal will show that this Court vide a Ruling dated 8th March 2022 granted the Appellant herein leave of 60 days to file his appeal. This was primarily on condition that the Appellant strictly complied with the timelines given. The Appellant was required to deposit the decretal sum in a joint interest earning account within the time given and file the said record in the 60 days. The record before me reveals that however, the Appellant failed to comply with the Court orders and instead filed his Appeal on 21st March 2023, which was 317 days after the lapse of the leave granted by this Court. The orders of this Court granting leave to the Appellant were unequivocal and clear that the Appeal herein was to be filed within 60 days, failure to which the leave granted would automatically lapse. This ideally meant that the Appellant, who should have filed his Appeal on or before 8th May 2022. Having failed to do so within the stipulated timelines, the leave the Appellant was granted automatically lapsed on 9th May 2022. The Court takes comfort in this view from the case of *Mae Properties Limited v Joseph Kibe & another* (supra) wherein the Court of Appeal held that the timelines appointed for the doing of certain things and taking of certain steps are indispensable to the proper adjudication of the appeals that come before it and that the Rules, expressed in clear and unambiguous terms, command obedience. Further in the case of *Peter Nyaga Muvake v Joseph Mutunga* (supra) the Court of Appeal found that no appeal lies without seeking leave of court as the court would have no jurisdiction to entertain, hear or determine the applicant's appeal. In addition, in the case of *Sino Hydro Corporation Limited v Tumbo t/a Dominion Yards Auctioneers (Civil Appeal E105 of 2021)* (supra), the High Court in a persuasive decision held that where a proceeding or appeal is filed out of the stipulated statutory timelines, the Court is deprived of jurisdiction to hear and determine the appeal on its merits and its decision would amount to a nullity. The High Court went on to find the appeal before it as incompetent and struck the same out for having been filed out of the stipulated statutory timelines without seeking leave of court to enlarge the time. The final nail on the coffin for the Appeal before me is the Supreme Court decision in the cases of *Bookpoint Limited v Guardian Bank Limited & another* (supra) and *Okoiti & 3 others v Cabinet Secretary for the National Treasury and Planning & 10 others* (supra) which I am in agreement with.
15. The Appellant has not offered any explanation for his failure to comply with the orders of this Court. I find and hold that the Memorandum of Appeal and the Record of Appeal were filed without leave of this Court thus rendering the whole record of appeal incompetent, an abuse of court process and is for striking out by this Court. Appeal struck out with costs to the Respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

