Ojiambo & Compnay Advocates v Muki Sacco Society Limited & another (Civil Appeal E047 of 2021) [2024] KEHC 15134 (KLR) (Civ) (27 November 2024) (Judgment)

Neutral citation: [2024] KEHC 15134 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E047 OF 2021

JN NJAGI, J

NOVEMBER 27, 2024

BETWEEN

OJIAMBO & COMPNAY ADVOCATES .... APPELLANT

AND

MUKI SACCO SOCIETY LIMITED .... 1ST RESPONDENT

JULIUS NDIRANGU WAHOME .... 2ND RESPONDENT

(Being an appeal from the ruling of Hon. B. Kimemia, in Nairobi Cooperative Tribunal case No. 385 of 2018 delivered on 7th January 2021)

JUDGMENT

1. The 2nd Respondent was a former employee and a member of the 1st respondent. During the pendency of this relationship, the 2nd respondent obtained loans from the 1st respondent but failed to repay them on time. The 1st respondent instituted a suit against the 2nd respondent at the Co-operative Tribunal vide CTC No. 385 of 2018, Muki Sacco Society Limited v Julius Ndirangu Wahome. The 1st respondent was successful and obtained a judgment against the 2nd respondent for a decretal sum of Ksh. 3, 718, 825/=.

2. In a separate suit, Employment Labour Relations Court No. 48 of 2017 (Nakuru), the 2nd respondent sued the 1st respondent for unfair termination of employment. The case was heard and determined in favour of the 2nd respondent for a sum of Ksh. 819,202/=. The 2nd respondent then released the said amount to the 2nd respondent's advocates, the appellant herein.

3. The 1st respondent then instituted Garnishee proceedings before the Co-operative Tribunal through an application dated 16/3/2020 seeking that the Garnishee be restrained from releasing to the 2nd respondent the said amount of money pending the hearing and determination of the application and

the tribunal matter. The Tribunal issued a Garnishee Decree Nisi on 19/3/2020 barring the Garnishee from releasing to the 2nd respondent the decretal sum of Ksh. 843,787/=. The Garnishee opposed the application through a replying affidavit sworn on 20/5/2020 stating that at the time the Garnishee Order Nisi was being issued they had already released the funds to the 2nd respondent on 18/3/2020.

4. The ruling of that application was delivered on 7/1/2021, wherein the tribunal issued a Garnishee Decree Absolute for Kshs. 340,000/= being the difference between the Garnishee Decree Nissi sum of Kshs. 819,202/= and the amount already released to the 2nd respondent of Kshs. 479,202/=. The Garnishee advocates were aggrieved by the orders of the tribunal and lodged the instant appeal.

5. The appellant advocates have in the meantime filed an application dated 28th November 2023 seeking leave to file a document in the form of a fee note dated 16/10/2017 to show that at the time the decretal sum was released to their firm, the 2nd respondent owed his firm legal fees to the sum of Ksh.340,000/= which was deducted by his firm and the balance was released to the 2nd respondent. It is that application that is the subject of this ruling.

6. The application was supported by the affidavit of the appellant/applicant in which he deposes that he was representing the 2nd respondent in ELRC No.48 of 2017 in which they had agreed at a sum of Ksh.340,000/= as the legal fees to be paid to the applicant. That when the applicant received the decretal sum of Ksh.819,202/=, he deducted his legal fees of Ksh.340,000/= and paid the balance of Ksh.479,202/= to the 2nd respondent.

7. It is the averment of the applicant that the evidence of the fee note if admitted will assist the court to make a fair, just, and effectual determination of the appeal and is likely to impact upon the outcome of the appeal. More so that the same would have altered the ruling of the Tribunal. That the fee note is not voluminous and will not in any way prejudice the 1st respondent.

8. The application was opposed by the 1st respondent vide the replying affidavit of its Chief Executive officer, Violet Wanjiru Ndung`u wherein she deposes that the document sought to be included in the appeal was authored by the applicant and has all along been in their custody even at the time the 1st respondent filed the application dated 16th March 2020. That the applicant has not provided any plausible explanation as to why the document was never availed during the trial of the motion before the Tribunal. That the application is an afterthought aimed at introducing additional evidence to make a fresh case in appeal, fill up omissions and rebuild a weak case. That the introduction of the same will be extremely prejudicial to the 1st respondent as it will not be able to adduce additional evidence in response. Consequently, the 1st respondent urged the court to dismiss the application.

9. The application was disposed of by way of written submissions of the respective advocates appearing for the parties.

Applicant`s Submissions

10. The appellant submitted that the issue of whether the applicant was entitled to or did not retail his legal fees from the decretal sum was never disputed in the pleadings or canvassed in the submissions before the tribunal. There was no occasion requiring the applicant to prove this new issue of fact. That it is the Tribunal which sprung up the issue for the first time in its ruling, thus leaving the applicant undefended on that question.

11. It was submitted that as there was no dispute on legal fees, the fee note was not relevant or essential to the proceedings and as such the applicant was justified in not producing it.

12. The applicant submitted that the fee note is capable of influencing the determination of the appeal and clear doubt on whether there was any legal fees pending. Therefore, that the same is needful evidence.

13. It was submitted that the Tribunal entered an adverse finding of fact without hearing the parties on the fact which has put the applicant through trial by ambush and unfounded inference which put the applicant`s right to fair trial at stake. The applicant consequently urged the court to allow the application as prayed.

Respondent`s Submissions

14. The respondent submitted that the new evidence was well within the knowledge of the appellant and if he had exercised due diligence the same would have been adduced before the tribunal.

15. It was submitted that the applicant in his supporting affidavit referred to the issue of deduction of legal fees and costs. There is then no reason why he did not present the fee note before the tribunal.

16. It was submitted that the main issue that was canvassed before the tribunal and which is also on appeal is whether the appellant upon receiving an order nisi as a garnishee, unlawfully failed to effect the same. That the fee note that the appellant desires to bring on board will not in any way assist this court in determining the said issue. That the application is an afterthought aimed at patching up a weak case. The respondent urged the court to dismiss the application with costs.

Analysis and determination

17. I have considered the grounds in support of the application and the grounds in opposition to it. The application is made pursuant to the provisions of section 78(1) (d) of the *Civil Procedure Act* that grants power to an appellate court to take additional evidence or to require such evidence to be taken.

18. The power to order for additional evidence to be taken in a case is a discretionary one that must be exercised judiciously. In Samwel Kiti Lewa v Housing Finance Co. Ltd & another {2015} eKLR, the court held:

> " That in exercising the discretion, the Court is duty bound to ensure that the proposed re-opening of a party's case does not embarrass or prejudice the opposing party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence."

19. The appellant contends that admission of the document is needful evidence as it will be capable of influencing the determination of the appeal. The respondent on the other hand argues that the appellant has not given a plausible explanation as to why he did not present the document during the trial before the tribunal.

20. The Supreme Court in the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others 2018) eKLR laid down the principles for admitting additional evidence as follows:

    79. "…We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

        (a) the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

        (b) it must be such that, if given, it would influence or impact upon the result of the verdict although it need not be decisive;

(c) it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

(d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

(e) the evidence must be credible in the sense that it is capable of belief;

(f) the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

(g) whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

(h) where the additional evidence discloses a strong prima facie case of willful deception of the Court;

(i) The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful;

(j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case;

(k) The court will consider the proportionally and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

21. I have considered the above principles. I have at the same time perused the replying affidavit of the appellant sworn on 28th May 2020 in reply to the 1st respondent`s application dated 16th March 2020. The appellant in the said replying affidavit stated in paragraph *10* as follows:

> " That on 18/3/202, we received the said amount in our accounts and duly informed the respondent to collect the amount due to them after deducting our legal fees and costs".

The appellant continued to state in Paragraph *11* as follows:

> " That on 18/3/2020 the respondent picked his cheque from our offices and cashed it, (see annexed copy of cheque dated 18/3/2019 received by the respondent on 18/2/2020 marked CO-1)".

22. The annexed copy of cheque shows that it is for Ksh. 503,789/=, which amount is less than what the appellant had received on behalf of the 2nd respondent of Ksh.819,202/=.

23. In view of the averment by the appellant that he paid the 2nd respondent his dues less the appellant`s legal fees and costs, it would not be prejudicial to the 1st respondent for this court to allow the fee note to be produced even at this stage. The admission of the fee note would not amount to entirely new evidence as the deduction of legal fees was referred to in the appellant`s replying affidavit of 28th

May 2020. The CEO for the 1st respondent in her supplementary affidavit sworn on 28/8/2020 did not specifically deny that the deductions were made. I therefore find the evidence on the fee note to be relevant and needful and may impact on the result of the appeal as the tribunal made an adverse inference on the deductions on an issue that was not properly canvassed by the parties. This prejudiced the appellant. I am further satisfied that the additional evidence is not meant to be utilized for the purpose of filling the gaps in the evidence for the appellant.

24. I find the application to have met the threshold laid out in the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others (supra). In my consideration, it would serve the interests of justice for the document to be admitted even at this stage. I accordingly allow the application as prayed and order that the document be filed within 7 days from the date hereof failure to which the leave given will lapse.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 27TH DAY OF NOVEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr. Ojiambo for Appellant/Applicant

Mr. Gesicho HB for Mr. Getange for Respondent

Court Assistant – Amina