



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 102 OF 2019

BALOZI KENGAAPPELLANT/APPLICANT

VERSUS

KENYA POWER & LIGHTING CO. LTDRESPONDENT

(Being an appeal arising from the Judgment of the Chief Magistrate Hon. Dr. Julie Oseko delivered on 19th November 2019 in Malindi CMCC No. 400 of 2013)

Coram: Hon. Justice R. Nyakundi

Richard O. Advocate for the appellant/applicant

Kiarie Kariuki Advocatess for the respondent

RULING

The applicant **Balozi Kenga** brought this application under Order 42 Rule 27 (10) (b), Order 51 Rule 1 of the Civil Procedure Rules, Section 78 (1) (d), 1A, 1B, 3 and 3A of the Civil Procedure Act for Orders that:

(a). The applicant be granted leave to produce additional documentary evidence in the appeal in support of the notice of motion and the grounds deposed therein include:

(1). The evidence which is crucial to enable the Court conclusively deal with the grounds on quantum.

(2). That in actual fact it was pure mistake for the advocate on record not to avail the intended evidence before the trial Court.

The respondent opposed the application vide a replying affidavit filed in Court on 15.12.2020. According to the averments by **Irene Walala**, deposed that the applicant has not given any reason on why the said evidence was not prepared and presented before the trial Court.

Further, the applicant has not stated what prevented him from obtaining the said documentary evidence after due diligence before the hearing of the suit by the trial Court.

The Learned Counsel for the respondent in his submissions argued that the application lacks merit and inapplicable for the Court to exercise discretion. Counsel cited the cases of **Mohamed Abdi Mahamud v Ahmed Abdulahi Mohamad & 3 others {2018} eKLR, Gold Lida Ltd v NIC Bank Limited & 2 others {2018} eKLR**, which are relevant to this Court's discretion to decline or to admit additional evidence on appeal. Counsel argued that the applicant's application has not met the test and circumstances for grant of leave of the Court to adduce additional evidence.

Determination

Having considered the application, the record, affidavits filed and both counsels submissions, the issue for determination is whether leave to admit additional evidence on appeal should be permitted by this Court. The operative Section which vests jurisdiction upon the Court to exercise discretion to take additional evidence or to require the evidence to be taken is provided for under Section 78 (1) (D) of the Civil Procedure Act.

In identifying the dominant issues and the yardstick by which the Court should exercise discretion to intervene in reference to additional evidence the Supreme Court in **Mohamed Abdi Mahamud (supra)** stated interalia:

- (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 results 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 for 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 issues 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 proportionality 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.*

[80] we must stress her that this Court even with the application of the above stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”

In the case of **Brown v Dean {1910} AC 373 Lord Loreburn L.C.** held thus:

“When a litigant has obtained a Judgment in a Court of justice... he is by law entitled not to be deprived of that Judgment without very solid grounds, and where as in this case, the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive.”

Similarly in **Saluja v Gill t/a P Gill Estate Agents Property Services & another {2002} EWHC 1435** the Court considered the question on the principles of fairness in the conduct of the trial and the context in which an exercise of discretion may be exercised against the applicant seeking leave of the Court to admit additional evidence by stating as follows:

“Litigants should be disciplined into ensuring that they only fight an action once. For that reasons in most cases, it will be unfair to a litigant to subject him to a retrial, for example because his opponent culpably failed to put all the best relevant evidence before the Court at the first trial.”

Before the trial Court was a case premised for an order of permanent injunction restraining the respondent, its agents, servants, employees and any other person acting on its behalf from disconnecting, cutting off and or interfering in any manner whatsoever with electricity supply in the plaintiff’s premises situated at Kijiwe Tanga. Secondly, general damages and loss of business earnings.

In the persuasive authority in **Ampthill Peerage {1977} AC 547** the Court used the language that I unhesitatingly accept as one of the applicable test namely for declining to exercise discretion by an appeal’s Court to admit additional evidence thus:

“English Law, and it is safe to say, all comparable legal systems, place high in the category of essential principles that which requires that limits be placed upon the right of citizens to open or to re-open disputes. Any determination of disputable fact may, the Law recognizes, be imperfect; the Law aims at providing the best and safest solution, compatible with human fallibility and having reached that solution it closes, the book. The Law knows, and we all know, that sometimes fresh material may be found, which perhaps might lead to a different result, but in the interest of peace, certainty and security, it prevents further inquiry. It is said, that in doing this, the Law is preferring justice to truth. That may be so, these values cannot always concede. The Law does its best to reduce the gap. But there are cases where the certainty of justice prevails over the possibility of truth and these are cases where the Law insists on finality. For a policy of closure to be compatible with justice. It must be attended with safeguards so the Law allows appeals; so the Law, exceptionally, allows appeals out of time But these are exceptions to the general rule of high public importance and as all the cases show, they are reserved for rare and limited cases, where the facts justifying them can be strictly proved.”

What is before this Court is an appeal arising out of the Judgment of the trial Court delivered on 19.11.2019. Its required of the Court to be

heard and determined on the merits as correctly stated in **Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates {2013} eKLR**

The Court in exercising its discretion under Section 78 (1) (D) of the Act to give leave to a party to call for additional evidence should do what is right and fair in all the circumstances. It is therefore incumbent on the Court to consider not only whether the applicant standing pursuant to Section 78 (1) (D) of the Act establishes a prima facie case to properly invoke the jurisdiction on additional evidence.

Further, on the authorities of **Andrew Mugandi & 2 others v China Dakar International Group {2020} eKLR**. The jurisdiction is a discretionary one and is to 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.”

The Court in **Raila Odinga & 5 others v IEBC & 3 others {2013} eKLR** has spoken of this cardinal principles albeit in the context of Section 78 (1) (D) of the Civil Procedure Act as follows:

“The parties have a duty to ensure, they comply with their respective time lines, and the Court must adhere to its own. There must be a fair and level ploughing filed, so that no party or the Court loses the time that he or she is entitled to, and no burden should be imposed on any party or the Court as a result of omissions or characteristics which were foreseeable or could have been avoided. The other issue, the Court must consider when exercising its discretion to allow a further affidavit is the nature, context of the new material intended to be provided and relied upon The Court must act with abundant caution and care in exercise of its discretion to grant leave for the taking of further affidavits or admissions of additional evidence.”

With tremendous respect, I cannot accept the applicant’s explanation on the reasons why that suggested additional new evidence was never accessed and produced before the trial Court. In stating so, I note that in the particulars pleaded in the Plaintiff, the applicant alleged loss of business earning. Given this very clear pleadings, the tabulated income trajectory report for the period from 15th November 2013 to 31st October 2020 should have found its way to the trial Court.

The Court cannot therefore accept the applicant’s explanation of the alleged failure by his legal counsel to accord the trial Court such evidence on loss of income, so that the jurisdiction may be invoked on appeal.

The Court in **Hing v Hing {1978} 25 WLR 391** held:

“The dominant consideration is the interest of justice, and it is for this Court to determine in every individual case as it arises, whether recourse to the rule is demanded it is neither possible nor desirable to attempt to define or to categorize the circumstances which can or will do so. This Court’s sense of justice must be its guide. But it must be interest of justice according to Law, this consideration includes not only the interests of the dissatisfied litigant who wishes to pursue right of an appeal, but also those of the successful one in the satisfaction of the Judgment in his favour without undue delay, as well as regard for the important administrative principle against the undue protraction of litigation.”

In the present case, some of the issues the applicant intends to ventilate by way of additional evidence, were decisively dealt with in the impugned Judgment. It is the view of the Court that there is significant distinction between appeals and trials and the test as to whether to admit or reject evidence ought to satisfy the criterion in **Mohamed Abdi Mahamud case (supra)**.

For all these reasons, the application is incompetent and the discretion to grant leave to adduce new and additional evidence for purposes of this appeal is denied with costs to the respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 22ND DAY OF DECEMBER 2020

.....

R. NYAKUNDI

JUDGE

NB: This Ruling has been dispatched electronically to the respective emails of the advocates in the matter.