



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Appeal 117 of 2004

WIGGLESWORTH EXPORTERS LTD.....APPELLANT

VERSUS

VICTOR W. BARASA.....RESPONDENT

RULING

This is an application for the review of this court's appellate decree given in this appeal on the 28th April 2006. A recap of the facts of the case giving rise to this appeal will make the issues raised in this application clear.

Wigglesworth Exporters Limited, the Appellant in this appeal was the second defendant in Mombasa CMCC No. 998 of 2001. The first defendant was its sister company, Wigglesworth Clearing Limited and the Respondent in this appeal was the plaintiff.

The Respondent's case in that suit was that sometimes in 1972 he was employed by a company known as Wigglesworth & Company Kenya Limited. In 1988, for what that company called practical reasons, its operations were taken over by two newly formed companies, Wigglesworth Clearing Limited and Wigglesworth Exporters Limited, the two defendants in that case. By its letter dated 3rd May 1988 Wigglesworth & Company Kenya Limited advised the Respondent that Wigglesworth Clearing Limited was with effect from 1st October of that year taking over the clearing and forwarding aspect of that company's business and that the services of the various members of staff including those of the Respondent connected with the clearing and forwarding business were going to be taken over by Wigglesworth Clearing Limited. The letter further advised the Respondent that the benefits accruing to him in the form of leave, pension and medical care were being taken over by Wigglesworth Clearing Limited and that there was not going to be any loss to him or erosion of his benefits in any manner whatsoever. The Respondent signed a copy of that letter signifying his acceptance of employment by Wigglesworth Clearing Limited and waiving any rights he may have had in Wigglesworth & Company Kenya Limited for severance pay or other terminal benefits.

By an agreement dated the 30th November 1997, the Appellant, apparently being the sole shareholder in Wigglesworth Clearing Limited, sold the assets and all the shares in that company to one Leonard Fitzgerald who was an employee of the Appellant. The agreement provided that the employees of Wigglesworth Clearing Limited would continue being employed by that company notwithstanding the provisions of the agreement and that upon transfer of the shares to Leonard Fitzgerald Wigglesworth Clearing Limited would change its name. That was done on the 10th December 1998 and the company

became known as FASTNET LIMITED.

The Respondent claimed both in his further amended plaint and his testimony in the lower court that notwithstanding the offer of employment by Wigglesworth Clearing Limited which he accepted on 31st march 1990 he continued working in all departments of the two newly formed companies as before. In 1999 he went to his home and on his return he was declared redundant. His terminal dues were worked out at Sh. 562,810/= but he was paid only Sh. 90,000/= leaving a balance of Sh. 472,810/= which he claimed in that case from both the Appellant and Wigglesworth Clearing Limited. The latter did not enter appearance or file a defence and judgment was entered against it. The Appellant entered appearance and filed a defence and after trial both he companies were held liable to the Respondent for the sum claimed plus costs and interest provoking this appeal by the Appellant. After hearing the appeal I dismissed it on the 28th April 2006.

The Appellant now seeks the review of the order dismissing its appeal on the ground that it has recently discovered new and important evidence which despite the exercise of due diligence on its part was not discovered at the time the order was made.

I have perused the affidavit of Ian Hodson in support of this application and the annexures thereto. What those annexures show, and that is the point the Appellant wants to prove, is that, Wigglesworth Clearing Limited which later changed its name to Fastnet Limited was a legal entity operating independently.

For this application to succeed the Appellant must show that the documents it says it recently discovered contain “new and important matter or evidence which, after the exercise of due diligence, was not within [its] knowledge or could not be produced by [it] at the time when the Order was made.” In other words it must show that the evidence was not in its possession at the time the order was made and that even though it is the kind of evidence it was required to produce it had done all it could to produce it without success. The Appellant, I am afraid, has not satisfied these tests. In his said affidavit, Mr. Hodson states:

“4. That recently, upon clearing out the old filing cabinets at the Appellants premises I discovered some personal records of one Mr. Leonard Fitzgerald, which contained certain documents and Correspondence constituting additional evidence in support of the Appellant’s appeal.

5. That I believe these records ended up in the Appellants possession by mistake in the process of moving from its Old premises at Nedlloyd House, Mombasa which at the time were being shared with Wigglesworth Clearing Limited, (subsequently Fastnet Limited), of which company Mr. Leonard Fitzgerald was at the time the managing Director.”

He has not said when exactly he discovered those documents. When is “recently”? It may have been before the order sought to be reviewed was made. He has also not said what prompted him to clear out the old filing cabinets “recently” when those cabinets had been with the Appellant for several years. My hunch on this is that those documents must have been in the Appellants possession all along and the Appellant knew or ought to have known of them. I say this because of Appellants defence in the lower court.

In the lower court the Appellant’s defence was that the Respondent was not its employee at the material time. It was therefore incumbent upon the Appellant to adduce evidence to prove that allegation. One would have therefore expected the Appellant to go fishing for evidence from Wigglesworth Clearing Limited and or Fastnet Limited that at the material time the Respondent was its employee and not to wait and stumble on it after the appeal has been decided.

Even if the Appellant had convinced me that it belatedly discovered new or important evidence there is not much I could have done for it as this is not an application for leave to adduce additional evidence on appeal. Worse still this appeal has already been decided.

I have read all the authorities cited by Mr. Brayant for the Appellant on this point. They all dealt with applications for leave to adduce additional evidence before the appeals were heard not after.

In prayer (b) of its application the Appellant prays that, on the basis of the documents allegedly discovered recently, I should set aside the order dismissing its appeal and allow it as prayed in the memorandum of appeal. I cannot do that. To accede to that prayer would be irregularly admitting additional evidence on appeal.

Most of the documents the Appellant wants me to consider in this application are from Fastnet Limited. As I said in the appeal judgment the Respondent was not party to the agreement between the appellant and Leonard Fitzgerald and there is nothing on record to show that the Respondent accepted the terms of that agreement in relation to his employment and the transfer of his terminal dues to Fastnet Limited.

I find no merit in this application and the same is hereby dismissed with costs.

DATED and delivered this 31st day of October 2006.

D. K. MARAGA

JUDGE