



**Amuri Investments Limited v Aswani (Employment and Labour Relations Appeal E092 of 2021) [2024] KEELRC 1682 (KLR) (4 July 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1682 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E092 OF 2021**

**MN NDUMA, J**

**JULY 4, 2024**

**BETWEEN**

**AMURI INVESTMENTS LIMITED ..... APPLICANT**

**AND**

**BENSON ASWANI ..... RESPONDENT**

**RULING**

1. The applicant filed an application dated 5/11/2023 seeking for an order in the following terms:-
  1. That the court be pleased to grant leave to the appellant/applicant to call and produce on the record, additional evidence by way of documents in support of the appeal herein.
  2. That the affected supplementary list of documents be and is hereby deemed as having been duly filed.
  3. That the costs of the application be provided for.
2. The application is premised on grounds '1' to '11' set out on the face of the notice of motion and buttressed in a supporting affidavit of Stanley Ngaine sworn to on 5<sup>th</sup> December 2023, the nub of which is that the appellant/applicant filed a memorandum of appeal dated 6/9/2023 appealing against the decision of the Chief Magistrates Court at Milimani in Civil suit No 1904 of 2019 delivered on 9/8/2021.
3. That the applicant would like to adduce additional documentary evidence to further support his appeal.
4. That the additional documents sought to be adduced were not available during the hearing in the trial court. That the additional documents are likely to settle the factual and legal questions that are in dispute in the pending appeal on the issue of the scope of the respondent's employment and the issue



- of service pay. That the additional documents are valid and relate to the subject matter in the appeal. That the additional evidence is not voluminous and the respondent will be able to easily respond to it.
5. That it is in the interest of justice and fair play that the application be granted and that the respondent will not suffer any prejudice that cannot be remedied by an award of costs.
  6. The said documents are:
    - a. Extract of a staff register book showing attendance and leave days.
    - b. Letter of appointment of the respondent's successor
    - c. Correspondence between one Stanley Ngaine, the MD of the appellant and the respondent.
    - d. Letter of transfer of the respondent from the appellant.
    - e. NSSF provisional member statement of account and records.
  7. The application is supported by submissions of the applicant and is brought under section 78 of the *Civil Procedure Act* Cap 21 Laws of Kenya which provides for powers of appellate court in appeals from the subordinate court to the High Court as follows: -
    1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power:
      - a. To determine a case finally;
      - b. To remand a case;
      - c. To frame issues and refer them for trial
      - d. To take additional evidence or to require the evidence to be taken;
      - e. To order a new trial
    2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are charged, conferred and imposed by this Act on courts of original jurisdiction, in respect of suits instituted therein.
  8. That, it is settled that adducing of additional evidence has to be strictly confined to the scope and ambit of order 42 Rule 27(1) of the *Civil Procedure Rules* which provides that a party cannot be allowed to adduce additional evidence on appeal unless:
    - a. The trial court refused to admit the evidence which ought to have been admitted;  
or
    - b. The appellate court requires the additional evidence to be able to deal with the matter;  
or
    - c. There is any other substantial case
  9. This application is premised on the ground that the appellate court requires the additional evidence to be able to deal with the matter.



## Replying affidavit and submissions

10. The respondent filed a replying affidavit sworn to by Willies Wetaba Nanjendo Advocate of the respondent who deposes that the application is incompetent and lacks merit. That application to adduce additional evidence is an admission of anemic defence provided before the trial court showing that on the evidence before the trial court, the court arrived at the correct decision.
11. In terms of section 10(7) of the *Employment Act*, the employer is the sole maker and custodian of employment records and it is inconceivable that the documents sought to be adduced were not available to the appellant during the trial.
12. That the documents sought to be adduced require cross-examination on authenticity of the same an act that cannot be done at this stage of appeal taking into consideration that it would re-open the hearing and require the taking of fresh evidence.
13. That there must be an end to litigation and the appellant had sufficient time to prosecute its case at the trial.
14. That allowing the application would be unjust and prejudicial to the respondent the appellant having not provided any good reason for the failure to adduce the said documents during trial.
15. That the application be dismissed with costs.
16. In the submissions, the respondent cites section 10(7) of the *Employment Act* which provides:-

If in any proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (i) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.”

## Determination

17. In determining the merits and demerits of this application, the court has considered the case of *Jackson Kaindi Musau v Chairman of BoG of Kitheini Secondary School and 2 others* [2013] eKLR in which the court cited the case of *Wanjia and others v Sakwa and others* [1984] KLR 275 where Chesoni JA observed at page 280:

This rule is not intended to enable a party who had discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful ante time to patch up the weak points in his case and fill up omissions in the Court of Appeal.”

18. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence” (Emphasis added).
19. The Court in *Jackson Kaindi* (*supra*) cited the Supreme Court decision in *Mohammed Abdi Mohammed v Ahmed Abdulabi Mohammed and 3 others* where the court laid out the following principles for allowing additional evidence: -

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 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;
- d. Where the additional evidence sought to be adduced remove any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;
- e. The evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively.
- f. Whether a party would reasonably have been aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process.
- g. Where the additional evidence discloses a strong prima facie case of willful deception of the court.
- h. The court must be satisfied that the additional evidence is not for the purpose of removing omissions and filling gaps in evidence. The court must find the further evidence needful;
- i. 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;
- j. The court will consider the proportionality and prejudice of allowing the additional evidence. This requiring 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 arise from the additional evidence on the other.” (Emphasis added).

20. The respondent submitted that the applicant has particularly failed to meet requirements (g) (i) and (j) in the Supreme Court guidelines above.

21. This court could not agree more with the submissions made by the respondent. Extracts for staff register book showing attendance and leave days; letter of appointment of the respondent’s successor; correspondence between the appellant and the respondent; letter of transfer of the respondent from the appellant and NSSF provisional member statements are documents that were readily available to the appellant upon exercise of minimal diligence. The appellant has failed to explain why these documents were not available to it during the trial especially in view of the provisions of section 74 of the [Employment Act](#) 2007 which provides:

“An employer shall keep a written record of all employees employed by him whom he has entered into a contract under this Act which shall contain the particulars –

- a. Of policy statement under section 7(2) where applicable.



- b. Specified in section 10(3)
- c. Specified in section 13;
- d. Specified in section 21 and 22
- e. Of an employee's weekly rest days specified in section 27;
- f. Of an employee's annual leave entitlement; days taken and days due specified in section 28;
- g. Proof maternity leave specified in section 29
- h. Of sick leave specified in section 30
- i. Where the employer provides housing, particulars of accommodation provided and, where the wage rate are deconsolidated particulars of the house allowance paid to the employee
- j. Of food rations were applicable
- k. Specified in section 61
- l. Of a record of warning letters or other evidence of misconduct of an employee and
- m. Any other particulars required to be kept under any written law or as may be prescribed by the written.

22. It is the court's considered finding that the applicant has failed to satisfy all the principles set out by the Supreme Court in the Mohammed Abdi Mohammed case above.

23. The appellant's effort is aimed at making a fresh case in appeal and filling up omissions by patching up weak points in its case. All the additional evidence sought to be adduced by the applicant was readily available to the applicant at the time of trial.

24. Accordingly, the application is dismissed with costs

**DATED AT NAIROBI THIS 4<sup>TH</sup> DAY OF JULY, 2024.**

**MATHEWS NDERI NDUMA**

**JUDGE**

Appearance:

Mr. Njenga for appellant/applicant

Mr. Wetaba for respondent

Mr. Kemboi, Court Assistant

