Unigroup Transporters Limited v Mwasame (Civil Appeal E088 of 2021) [2024] KECA 567 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KECA 567 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E088 OF 2021

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

UNIGROUP TRANSPORTERS LIMITED .... APPELLANT

AND

ANDREW WANYONYI MWASAME .... RESPONDENT

(Being an appeal against the ruling and order of the Employment and Labour Relations Court of Kenya at Mombasa (Byram Ongaya, J.) dated 11th June 2021 in Employment and Labour Relations Court Appeal No. 30 of 2020)

JUDGMENT

1. The litigation the subject of this appeal has its origin in the claim lodged by the respondent against the appellant before the Chief Magistrate's Court at Mombasa in ELRC No. 460 of 2018. The claim was in respect of terminal dues arising from unfair termination of employment. That claim was undefended. On 27th November 2019, the learned trial Magistrate (C. N. Ndegwa, SPM) ordered the appellant to pay the respondentterminal benefits and compensation amounting to Kshs 878,565 together with costs and interests.

2. By an application dated 18th February 2020, the respondent sought to have that judgement set aside and leave to defend the suit on the ground that the appellant had instructed the firm of Ambwere TS & Associates, who failed to defend the claim. That application was dismissed on 7th December 2020 by the learned trial Magistrate. Aggrieved by the said decision, the appellant lodged Mombasa ELRC Appeal No 30 of 2020, which was dismissed on 23rd April 2021 on the ground that no triable issue was raised by the appellant.

3. Undeterred by the dismissal of its appeal, the appellant filed an application dated 28th April 2021 seeking to review the dismissal of the appeal, and for the reopening and rehearing of the dismissed appeal on the grounds that the appellant had discovered new evidence which could not have been

procured during the trial process till after judgement was delivered on 23rd April 2021. According to the appellant, the new evidence was that the memorandum of appearance and a statement of reply had in fact been filed. On 11th June 2021 the said application was dismissed with costs to the respondent.

4. In arriving at his decision, the learned Judge (B. Ongaya, J.) found that no explanation was offered as to why, with knowledge of the preferred appeal, the two documents said to be fresh evidence could not have been placed before the Court prior to the judgment on the appeal; that the appeal was throughout being handled by Advocates and the in-house Counsel, hence there was ample opportunity to avail the two documents; that , with due diligence on the part of the appellant by itself and by its in-house counsel and advocates on record, the two documents ought to have been availed in the proceedings prior to delivery of the judgment on 23rd April 2021; that, in the absence of certification or correspondence with the court as to the whereabouts of the two documents, the fact of their filing was doubtful; that there was no evidence that the two documents were ever served upon the respondent's Counsel; that the issue of filing of the said documents and their validity amount to administrative and case management issues that ought to have been raised with the trial court in the first instance; that the two documents were essentially part of pleadings and not evidence and, therefore, could not justify a review on account of fresh evidence.

5. It was the dismissal of the said application that provoked the present appeal. The grounds preferred against the said decision are that the learned Judge exercised his discretion wrongly by: rejecting offhand the explanations proffered by the appellant as to why the memorandum of appearance and the statement of reply filed on 19th December 2018 could not be produced prior to the judgement of 23rd April 2021; and by penalising the appellant for mistakes of its counsel as well as administrative mistakes that were beyond the appellant concerning the existence of the memorandum of appearance and statement of reply filed on 19th December 2018. It was further contended that the learned Judge erred in law: in failing to find that discovery of the memorandum of appearance and statement of reply filed on 19th December 2018 constituted new and important matters warranting a review of the judgement of 23rd April 2021; and by readily impeaching the veracity of the memorandum of appearance and statement of reply filed on 19th December 2018, yet the documents were duly embossed with the court's stamp and accompanied by a court receipt, which is a public document within the meaning of section 79(1) (a) (iii) of the *Evidence Act*. Further, it was contended that the decision to refuse the appellant's motion for review dated 28th April 2021 was wrong given the peculiarities of the case, and was inimical to the fundamental duty of the court to do justice. We were urged to allow the appeal, reverse the ruling and order of 11th June 2021 dismissing the appellant's Notice of Motion, and substitute it for an order allowing the same; and to award the appellant the costs of this appeal and costs in the court below.

6. We heard this appeal virtually on the Court's GoTo platform on 5th February 2024 when learned counsel, Mr. Muriithi, appeared for the appellant while Ms. Munene appeared for the respondent. Both counsel relied entirely on their written submissions.

7. In the appellant's submissions dated 5th August 2022 filed by Muriithi & Masore Law Advocates, it was submitted that, although the appellant is challenging the exercise of the court's discretion, this Court can interfere if it is demonstrated that the court below misdirected itself in some matter and, as a result, arrived at a wrong decision, or where it is manifest from the case as a whole that the court was clearly wrong in the exercise of discretion and that, as a result, there has been misjustice. The case of *Mbogo & Another v Shah* [1968] EA 93 was cited as an authority for this submission. The appellant submitted that, since the determination was based on affidavit evidence, this Court has a wider latitude to depart from the findings of the trial Judge since the trial Judge enjoyed no greater advantage than this Court, the material to be considered being the same.

8. Citing rule 33(1) (a) of the *Employment and Labour Relations Court (Procedure) Rules*, it was submitted that review may be available where there is either discovery of new and important matter, or where there is discovery of new evidence, the two limbs being disjunctive; that although the two documents may not have been evidence as found by the learned Judge, they constituted new and important matters; that they were important since the issue of entry of appearance and filing of the reply was central to the proceedings right from the trial court; that, initially, the appellant was under the wrong impression that it had not entered appearance or filed a reply only to discover later on in April 2021 that the said documents were filed; that the appellant was unable to discover the said filings as it was not kept abreast of the same by its then advocates; that, due to re-organisation, the appellant's staff who were not well conversant with the court processes did not appreciate the full import of the same; that the learned Judge imposed on the appellant an unachievable test of due diligence in the circumstances of the case; that the existence of those documents could not have been known either by the appellant's new advocate nor by the in house counsel; that the circumstances were compounded by the covid 19 measures; that, had the learned Judge analysed the cogency and plausibility of the factual explanations, he would have found in favour of the appellant. The case of *Andrew Leteipa Sunkuli & Another v Southern Credit Banking Corporation* [2017] KLR was cited for the need for a judge to consider all important matters and explanations before exercising any discretion against a litigant. Citing the cases of *Hui Commercial Enterprise (Africa) Company Limited aka Hui Commercial & Another v Salif Michael Ngunguli & 13 Others* [2021] KLR; and *Bamanya v Zaver* [2002] 2 EA 329, we were urged to consider that the appellant was let down by its advocates. According to the appellant, the court's power to remit a matter to the trial court for reconsideration upon admission of the additional material was appreciated in the case of *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR.

9. The appellant contended that the learned Judge had no reason to cast doubt on the veracity of the two documents since the circumstances under which the documents were not in the court file as well as their non-service were well explained; that the documents were accompanied with a corresponding receipt for court filing fees issued by the registry on 19th December 2018; that the said document being a public document under section 79(1) (a) (iii) of the *Evidence Act*, was, on the authority of *Kibos Sugar & Allied Industries Limited & Another v Benson Ambuuti Adega & 5 Others* [2019] eKLR, decisive; and that the court, of its own motion, could have directed that the documents be authenticated by the Deputy Registrar upon making inquiries from the cash office.

10. Opposing the appeal, the respondents relied on the submissions dated 26th October 2022 filed by Otieno Asewe & Company Advocates. In their submissions, it was contended that the learned Judge did not misdirect himself as alleged and, based on the case of *Parliamentary Service Commission v Martin Nyaga Wambora & Others* [2018] eKLR, the appellant reiterated the conditions under which this Court interferes with the exercise of discretion by a judge; that in this case the learned Judge correctly found that there was no reason why the memorandum of appearance was not placed before the court before the judgement in the appeal was delivered on 23rd April 2021; that on the authority of the case of *Rajesh Rughani v Fifty Investments Limited & Anothe*r [2016] eKLR, there was no credible explanation for their failure to act diligently; that the learned Judge did not err in finding that the two documents were pleadings as opposed to evidence; that the appellant cannot claim that the documents were public documents when they never formed part of the court record; that the circumstances under which the documents were allegedly discovered soon after delivery of the judgement cast doubt as to their authenticity.

11. The respondent sought dismissal of the appeal with costs.

12. We have considered the submissions put to us by the parties herein as well as the material placed before us. Although technically speaking this is a second appeal, the decision being appealed against is in respect of a decision made by the Employment and Labour Relations Court (the ELRC), not from an appeal from the Magistrate's Court but on an application for review its decision made on appeal. To that extent, the law and principles regarding this Court's jurisdiction on a second appeal may not strictly apply since the decision being appealed from did not entail the taking of oral evidence, save for the affidavit evidence. Accordingly, the general caution as regards the handicap arising from the inability to gauge the demeanour of witnesses does not arise in such circumstances.

13. It is not in doubt that in determining an application for review, the court exercises judicial discretion. See this Court's decision in *Veronica Rwamba Mbogoh v Margaret Rachel Muthoni & Another* [2006] 1 KLR 199; [2006] 1 EA 174. Black's Law Dictionary, 10th Edition defines judicial discretion as:

> " The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court's power to act or not act when a litigant is not entitled to demand the act as a matter of right." [Emphasis added].

14. The Supreme Court of Uganda in *Kiriisa v Attorney-General and Another* [1990-1994] EA 258 expressed itself as to what constitutes judicial discretion in the following words:

> "Discretion simply means the faculty of deciding or determining in accordance with circumstances and what seems just, fair, right, equitable and reasonable in those circumstances."

15. In determining the appeal, we are guided by the decision of the Supreme Court in the case of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 Others* (2019) eKLR in which the Court reiterated that:

> " ...in an appeal from a decision based on an exercise of discretionary powers, an Appellant has to show that the decision was based on a whim, was prejudicial or was capricious. This was as determined in the New Zealand Supreme Court case of Kacem v. Bashir (2010) NZSC 112; (2011) 2 IVZLR 1 (Kacem) where it was held:
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> 'In this context a general appeal is to be distinguished from an appeal against a decision made in the exercise of a discretion. In that kind of case, the criteria for a successful appeal are
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> stricter: (l) error of law or principle; (2) taking account of irrelevant considerations; (3) failing to take account of a relevant consideration; or (4) the decision is plainly wrong.'"

16. This Court in *Price & Another v Hilder* [1986] KLR 95 held that it would be wrong for it to interfere with the exercise of the trial court's discretion merely because this Court's decision would have been different. Madan JA (as he then was) in United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] E.A had this to say:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account;

fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

17. The application before the learned Judge was based, inter alia, on rule 33(1) (a) of the *Employment and Labour Relations Court (Procedure) Rules* which provides that:

    A person who is aggrieved by a decree or an order from which an appeal is allowed but from which no appeal is preferred or from which no appeal is allowed, may within reasonable time, apply for a review of the judgment or ruling—

    a. if there is discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the knowledge of that person or could not be produced by that person at the time when the decree was passed or the order made;

    1. This Court, while dealing with an application brought under Order 45 rule 1 (formerly Order 44 rule 1) of the *Civil Procedure Rules* which is in pari materia with rule 33(1) (a) of the *Employment and Labour Relations Court (Procedure) Rules*, cited Indian Civil Procedure Code, 15th Edition, at page 2726 by Mulla and *D J Lowe & Company Ltd v Banque Indosuez* Civil Application Nai. 217 of 1998 in Kaiza v Kaiza [2009] KLR 499 and held that:

        "An application for review under Order 44 rule 1 must be clear and specific on the basis upon which it is made. The motion before the Superior Court was based on the discovery of new facts. However, it is not every new fact which will qualify for interference with the judgement or decree sought to be reviewed. In the words of the rule itself, it is '....discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed....'. Applications on this ground must be treated with great caution and as required by rule 4(2)(b) the Court must be satisfied that the materials placed before it in accordance with the formalities of the law do prove the existence of the facts alleged. Before a review is allowed on the ground of discovery of new evidence, it must be proved that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge; where review was sought for on the ground of discovery of new evidence but it was found that the petitioner had not acted with due diligence, it is not open to the Court to admit evidence on the ground of sufficient cause. It is not only the discovery of new and important evidence that entitles a party to apply for a review, but the discovery of any new and important matter which was not within the knowledge of the party when the decree was made. Where such a review is based on the fact of the discovery of fresh evidence the court must exercise greatest of care as it is easy for a party who has lost, to see the weak part of his case and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion. In such event, to succeed, the party must show that there was no remissness on his part in adducing all possible evidence at the hearing.

19. In the present case, the appellant's case as deposed in the supporting affidavit to the application dated 28th April 2021 was that the appellant had no in-house counsel and, being a lay person, was unable to follow the legal process until it retained the services of an in-house counsel; that it was only then that the in-house counsel was able to carry out the audit of the matters being handled by the external lawyers; that, upon that audit, it was discovered that the then advocates for the appellant did file the memorandum of appearance and statement of reply to the claim; that these documents were not placed

on the court file, and that the respondents were not served with them. The learned Judge considered these averments and found that there was lack of diligence on the part of the appellant.

20. Although the blame is placed on the doorstep of the appellant's erstwhile advocates, there was no disclosure of the action that the appellant took upon realising that judgement had been entered against it. A diligent person would have been expected to inquire from the firm of Ambwere TS & Associates whether appearance had been entered and reply to the claim filed. In fact, to-date, there is no confirmation from that firm of the position now being adopted by the appellant that the said firm did enter appearance and file the reply on behalf of the appellant. If that had been done, and assuming that the appellant's contentions were true, the application for setting aside the judgement would have been based on an unassailable ground of irregularity in the proceedings. Instead of taking such basic and obvious step, the appellant,proceeded on the basis that the said documents did not exist. In those circumstances, we do not see how the learned Judge can be blamed for finding that there was lack of diligence on the part of the appellant.

21. The law is that a case belongs to the parties and not to the advocates and, as held by the High Court in *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR; and *Tana and Athi Rivers Development Authority v Jeremiah Kimigho Mwakio & 3 Others* [2015] eKLR, it is not enough for a party in litigation to simply blame the advocate on record for all manner of transgressions in the conduct of the litigation and that, while the mistake of counsel is excusable if accompanied by a litigant's carelessness and inactivity, then the refusal by the court to exercise discretion in favour of such a party cannot be impugned.

22. Visram, J (as he then was) in *Wabidonge v Okemo* & 2 Others (No 2) [2008] 3 KLR 723 cited Air Commentaries, *The Code of Civil Procedure [1951] Edition Vol. III* at pp 3534 and held that:

> "When review is sought on the ground of the discovery of new evidence the evidence must be (1) new and relevant and (2) of such character that if it had been given in the suit it might possibly have altered the Judgement. As was stated by Lord Loreburn, LC in Brown v Dean [1910] AC 373 at 374:
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> 'When a litigant has obtained a judgement in a Court of Justice.....he is in law entitled not to be deprived of that judgement without very solid grounds; and where the ground is the alleged discovery of new evidence, it (new evidence) must at least be such as is presumably to be believed, and if believed would be conclusive.'
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> Applications on this ground must be treated with great caution. Review cannot be sought to supplement the evidence or to introduce new evidence. The applicant must show that he could not have produced the evidence in spite of due diligence; that he had no knowledge of the existence of the evidence or that he had been deprived of the evidence at the time of the trial. It is so easy to the party who has lost his case to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that part and put a different complexion upon that part of the case must be very strong. The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limitations and the party asking for a new trial must show that there was no remissness on his part in adducing all possible evidence at the trial...Review cannot be used to supplement evidence or to produce new evidence. Here, the evidence was indeed available all along. To succeed, the applicant has to show due diligence; that the evidence was not within his knowledge or could not be produced at the time of the trial. This is not the case here.

23. The exercise of due diligence on the part of an applicant seeking review on the ground of discovery of new and important matter or evidence may well be the determining factor in such applications. The applicant ought to explain to the court whether any steps which are ordinarily expected of a diligent litigant keen to monitor the progress of its case were taken in the matter.

24. We agree with the finding by the learned Judge that no due diligence was exhibited by the appellant after judgement was entered against it in order to establish the circumstances under which the same was entered against to enable it make the proper application, assuming its position is correct. We are not convinced that the learned Judge misdirected himself in law; that he misapprehended the facts; that he took into account considerations of which he should not have taken account; that he failed to take account of considerations of which he should have taken account; or that his decision, albeit a discretionary one, is plainly wrong.

25. Consequently, we dismiss this appeal with costs.

26. Orders Accordingly.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR