Manga v Prime Bank Limited (Civil Appeal (Application) 563 of 2019) [2024] KECA 850 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KECA 850 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 563 OF 2019

PO KIAGE, P NYAMWEYA & PM GACHOKA, JJA

JULY 12, 2024

BETWEEN

LIBERATO KIVANGA MANGA ..... APPLICANT

AND

PRIME BANK LIMITED ..... RESPONDENT

(An application for leave to adduce additional evidence from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Radido, J.) delivered on 30th November, 2018) in Nairobi ELRC No. 1208 of 2014)

RULING

1. The Notice of Motion for our determination is dated 15th February, 2022. Invoking Article 159 (2) (d) of the *Constitution*, section 3, 3A and 3B of the *Appellate Jurisdiction Act* and rule 29 (1) (b), (2) and 42 (the *Court of Appeal Rules* 2010, (now 31(1)(b)), the applicant seeks leave of this Court to adduce additional evidence in this appeal. In pursuit of this leave, the applicant seeks to adduce a certified copy of the judgment arising from the Chief Magistrate's Court in Kibera, Criminal Case No. 719 of 2011; Republic v. Solomon Ndunda Kitonyi and Liberato Manga Kivanga.

2. The application is supported by the grounds on the body of the Motion and the supporting affidavit of the applicant. According to the applicant, he was employed by the respondent from 2nd May, 2001 until 20th July, 2011 when he was dismissed from employment on account of allegedly stealing Kshs. 4,611,490.00 from the respondent in the course of his employment.

3. To put the application in context, we shall give a short abridgment of the facts. On 7th June, 2011, the applicant was jointly charged with another in Kibera Criminal Case No. 719 of 2011 with two counts of forgery and one count of stealing a sum of Kshs. 4,611,490.00 from the respondent. During the pendency of those criminal proceedings, the applicant filed Nairobi ELRC No. 1208 of 2014 in the Employment and Labour Relations Court (herein after ELRC) on 18th July, 2014 seeking for:

a. A declaration that subjecting the claimant to fixed term employment contract for the years that he served the respondent was an unfair labour practice contrary to Article 41 of the Kenya Constitution 2010;

b. A declaration that the termination of the claimant by the respondent was unfair, unlawful, illegal ab initio and null and void;

c. A declaration that it was not legally open for the respondent to exercise its powers of terminating the claimant from employment on the same grounds as those constituting the particulars of the pending criminal case that the claimant was facing at the time;

d. A declaration that the claimant is deemed to have been an employee of the respondent for the entire period of his suspension from 24th February, 2011 until such time as the criminal case has been finalized by the court and entitled to half pay or full pay of his basic salary for the period depending on the outcome of the trial;

e. An order the (sic) respondent does pay the claimant the total sum of Kshs. 2,271,072.89 itemized as follows:

   i. Kshs. 245,037.50 equivalent of unpaid salary from February to June 2011;

   ii. Kshs. 65,343.33 equivalent of unpaid salary for 20 days in July 2011;

   iii. Kshs. 39,206.00 equivalent of unpaid leave for 12 days;

   iv. Kshs. 1,176,180.00 equivalent of twelve (12) month's salary for unfair and unlawful dismissal;

   v. Kshs. 294,045.00 equivalent of 3 month's salary in lieu of notice;

   vi. Kshs. 490,075.00 equivalent of service pay for 10 years worked at ½ month's salary for every year.

f. The respondent do pay the claimant the costs of this cause;

g. The respondent do pay the claimant interest on (d) and (e) above;

h. Any other relief the Honorable Court may deem fit and just.

4. In response and answer to the applicant's memorandum of claim, the respondent filed a response and counterclaim. In the counterclaim, the respondent sought the sum of Kshs. 4,611,490.00 from the applicant on account of theft and fraud allegations.

5. By judgment dated 30th November 2018, the learned judge (Radido, J.) found that the applicant was liable to settle the sums sought by the respondent. It is those findings in the said suit that precipitated the filing of the present appeal.

6. According to the applicant, the criminal case thereafter proceeded and on 8th September, 2021, he was acquitted of the charges. He argued that both the counterclaim in Nairobi ELRC No. 1208 of 2014 and the charges giving rise to Kibera Criminal Case No. 719 of 2011, arose from the same facts and events, the subject matter being fraud and theft. He deposed that since the judgment, the subject of this appeal, was delivered long before he was acquitted in the criminal case, he should be allowed to adduce further evidence by introducing the judgment in the criminal case.

7. The application was heard on 13th March, 2024 in the presence of learned counsel Mr. Mureithi for the applicant and learned counsel Mr. Kimani for the respondent.

8. The applicant relied on his written submissions dated 10th March, 2024 and case digest dated 11th March, 2024 to submit that it had met the threshold set out in the Supreme Court case of *Mohammed Abdi Mahamud v. Ahmed Abdullahi Mohammed & 3 others* [2018] eKLR. The applicant urged that the counterclaim filed by the respondent in Nairobi ELRC No. 1208 of 2018 was not a labour-related issue but one bearing criminal attributes. As a result, since he was acquitted of the offences relating to theft and fraud, and which proceedings bore a standard of proof higher than that of the ELRC, the criminal judgement ought to be admitted into evidence. For those reasons, and to avoid what he termed 'judicial embarrassment' and conflicting decisions from the courts, the appellant urged this Court to grant the application as prayed. Finally, he denied that there was an inordinate delay in lodging the present application.

9. The respondent on its part relied on its written submissions, together with its case digest, both dated 8th March, 2024 to argue that the applicant was attempting to retry his case at the appellate stage because he, on his own volition, did not participate in the proceedings at trial.

10. The respondent summarized the facts giving rise to the appeal to oppose the application on the following grounds: the claimant's suit was dismissed on 15th May, 2018 on the motion of the respondent; the dismissal was based on the court's refusal to give the applicant an adjournment; the applicant never appealed against that decision of 15th May, 2018; neither the applicant nor his counsel attended the hearing of the dispute; the hearing of the counterclaim, the subject of the present appeal, took place on 22nd October, 2018 and the additional evidence sought to be adduced, has no effect on the outcome of the judgment delivered on 30th November, 2018; the judgment sought to be introduced has a separate and distinct standard of proof; the applicant had not met the threshold for grant of the orders sought; the respondent would be greatly prejudiced as it would be denied the benefit of enjoying the fruits of its judgment noting that a period of over four years had lapsed; and the applicant was guilty of inordinate delay having lodged the application five months after the judgment had been delivered.

11. Citing the decisions of this Court namely *Wanjie & another v. Sakwa & others* (1984) KLR 275, *Joe Mburu v. Abdul Shakoor Sheikh & 3 others* [2015] eKLR and *Attorney General v. Torino Enterprises Limited* [2019] eKLR, the respondent urged this Court to dismiss the application with costs.

12. We have considered the application, the rival affidavits and the submissions thereto. The applicant seeks leave of this Court to adduce additional evidence. The discretion on whether to allow admission of additional evidence is donated by rule 31 of the Court of Appeal Rules 2022 which provides that: "on any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner." What constitutes sufficient reason was addressed by this Court, differently constituted, in *Attorney General v. Torino Enterprises Limited* [2019] eKLR as follows:

> " 13. In *Dorothy Nelima Wafula v. Hellen Nekesa Nielsen & Paul Fredrick Nelson* [2017] eKLR, it was expressed that under Rule 29(1) (b), additional evidence will be introduced on appeal in the discretion of the Court, "for sufficient reason." Though what constitutes 'sufficient reason' is not explained in the rule, through judicial practice the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing; two, the new evidence would probably have had an important influence

on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible."

13. The Supreme Court in *Mohammed Abdi Mohamud v. Ahmed Abdulahi Mohamad & 3 Others* [2018] eKLR laid down 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 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."

14. Guided by the above ruminations, we now turn to the present application. It is not denied that the applicant was acquitted of the charges of fraud and theft where the complainant was the respondent. It is also not gainsaid that the judgment in respect to those proceedings was delivered on 8th December, 2021, about three years after the impugned judgment in Nairobi ELRC No. 1208 of 2014 had been delivered.

15. The applicant has attempted to create a nexus between the two proceedings by stating firstly that they arose out of the same facts or events and secondly, the crux of the matter revolved around the same issues of fraud and theft. He contended that since he was acquitted of all the charges, in a criminal matter, where the standard of proof was higher than that in civil matters, then he ought to have been absolved from any wrongdoing in the civil dispute.

16. Critically, however, it is significant that it is the applicant who filed the suit but on his own volition, elected not to participate in the proceedings, the subject of application. It is common ground that when the suit was out for hearing on 15th May, 2018, the applicant applied for an adjournment as he was not ready to proceed. That application was denied. On that premise, the respondent successfully applied to have the applicant's suit dismissed. The applicant did not appeal against the dismissal of his suit. Further, the applicant elected not to participate in the hearing of the counterclaim on 22nd October, 2018, where he had the opportunity to ventilate his defence and at least challenge the evidence of the respondent.

17. Taking the history of this matter, it is clear that the applicant's attempt to adduce additional evidence is based on shaky grounds. The applicant is trying to seal loopholes and retry the suit in which he willfully failed to participate. He is looking for a second chance to litigate. We opine that there would be no end to litigation if we sanitize such conduct of proceedings.

18. Additionally, the fact of a finding in a criminal dispute does not automatically absolve or hold a person liable for a dispute in a civil matter. This is because the standards of proof are separate and distinct and as such, one cannot make a finding on behalf of the other.

19. Withal, we note that the applicant filed the application on 15th February, 2022, five months after the judgment it seeks to adduce into evidence was delivered. That, in our view amounted to inordinate delay that was not explained by the applicant. He did not seek to establish why he took so long to bring the application before us.

20. Having considered the application, the affidavits as well as the submissions thereto, we arrive at the inescapable conclusion that this application is wholly devoid of merit. We unwaveringly dismiss the application with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF JULY 2024.

P.O. KIAGE

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

M. GACHOKA C.Arb, FCIArb

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR