



**DHL Worldwide Express Kenya Ltd v Mutuma (Civil Appeal
E526 of 2022) [2024] KECA 938 (KLR) (2 August 2024) (Judgment)**

Neutral citation: [2024] KECA 938 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL E526 OF 2022
P NYAMWEYA, JM MATIVO & PM GACHOKA, JJA
AUGUST 2, 2024**

BETWEEN

DHL WORLDWIDE EXPRESS KENYA LTD APPELLANT

AND

ANDREW MUTUMA RESPONDENT

(An appeal against the ruling and order of the Employment and Labour Relations Court of Kenya at Nairobi (M.Onyango, J.) delivered on 12th July 2022 in ELRC No. 1005 of 2021)

JUDGMENT

1. When ELRC No. 1005 of 2021 was placed before Lady Justice M. Onyango at the Employment and Labour Relations Court (ELRC) at Nairobi for hearing on 12th July 2022, the respondent herein sought to have the appellant’s supplementary bundle of documents filed on 29th June 2022 expunged from the court record. Galvanized, the appellant orally sought leave of the court to admit them as properly filed and be deemed to be on record.

The appellant and the respondent extensively submitted on this issue. Ultimately, the learned judge held as follows:

“I have heard the submissions for counsels (sic) for both parties on the admission of the respondent’s bundle of documents filed on 29th June, 2022.

The rule of thumb is that once the claimant has closed his case, any new documents filed should be by consent of the parties after counsel for the claimant has considered the documents and discussed them with his client, to ensure there is no prejudice against him in admitting the document.

The other rule is that parties are not allowed to litigate in installments. The bundle of documents filed by the respondent is substantive, running into 133 pages.



Counsel for the respondent has repeatedly stated that the purpose for admitting the documents is to provide a level playing ground for the parties.

Counsel has also stated that the purpose for filing the documents is to respond to certain issues that arose during the testimony of the claimant, and that the claimant will have an opportunity to respond to the same. Counsel has not stated whether the contents of the documents can be adduced at any stage.

The court has not had the opportunity to look at the authorities cited by counsel for the respondent as the same were not brought to the court's attention earlier. The court can therefore not comment on the relevance of the said authorities to the instant suit. In view of the fact that the bundle has been brought at cross examination after the claimant had gone through lengthy cross examination which was to be concluded today, I am inclined not to admit the bundle of documents dated 29th June, 2022."

2. It is these findings that have provoked the present appeal. The appellant filed its notice of appeal dated 13th July 2022 on 21st July 2022. It thereafter filed its memorandum of appeal dated 4th August 2022 that raised nine grounds impugning the findings of the learned judge. In precis, the appellant is aggrieved that the failure of the trial court to admit its supplementary list of documents as additional evidence was tantamount to a denial of its constitutional right to a fair hearing; the trial court failed to take into account the relevance, materiality and probative value that the supplementary documents attached as well as its right to reply to the further list of documents filed by the respondent on 16th May 2021; the learned judge erred when she expunged the supplementary list of documents on the basis that the appellant did not state that the contents of the documents can be adduced at a later stage through its witnesses; it insisted that no prejudice would be occasioned upon the respondent if the orders sought were granted; that since the respondent had ample time to examine those documents, it had not reason to, and in fact did not dispute the adduction of that additional evidence; the learned judge's reasons led to an injudicious exercise of discretion; the learned judge erroneously ignored its authorities relied upon during its oral submissions; that courts have discretion to adduce additional evidence even at the appellate stage; and the trial court failed to appreciate that justice ought to be administered substantively without due regard to procedural technicalities.
3. For those reasons, the appellant urged this Court to set aside the ruling of the learned judge dated 12th July 2022 and substitute the same with an order admitting the supplementary bundle of documents dated 29th June 2022. The appellant further prayed for the costs of the suit.
4. During the hearing of the appeal on 8th April 2024, learned counsel Mr. Macharia appeared together with Ms. Ouma representing the appellant while learned counsel Ms. Guserwa was present for the respondent. The appellant highlighted its written submissions dated 16th January 2023 together with its case digest similarly dated. Equally, the respondent, highlighted the written submissions and case digest both dated 17th February 2023 filed on his behalf.
5. The appellant abridged the facts at trial to submit that the learned judge improperly exercised her discretion in refusing to admit its supplementary documents. That the learned judge failed to take into account the correct guiding principles or rules and the prejudice to be suffered by the appellant if leave was not granted. In its view, the trial court had powers to admit additional evidence even after the close of pre-trial conferencing as envisaged in order 18, rule 10 of the Civil Procedure Rules 2010 (sic), section 146 of the *Evidence Act* and Article 50 (1) of *the Constitution*. In addition, it argued that this power, extended to matters at the appellate stage.



6. The appellant questioned the credibility and fairness of the learned judge's findings since the respondent, without leave of the court, and after pleadings closed on 4th March 2022, filed an additional list of documents on 16th May 2022, the eve of the first hearing. It emphasized that justice ought to be administered without undue regard to procedural technicalities as set out in Article 159 (2) (b) of *the Constitution*. It added that a court ought not to sacrifice justice at the altar of procedure. That the court is a court of fair playing procedure. It posed the question: if the respondent was graced with tolerance, why should the appellant not be graced with the same treatment?
7. The appellant pointed out that the matter did not undergo pre-trial listing as provided in rule 15 (1) of the Employment and Labour Relations Court (Procedure) Rules 2016. That instead, the respondent applied to have the application and the main suit expeditiously heard without justifiable cause. Be that as it may, the appellant submitted that the purpose of pretrial conferencing was never meant to lock a party from filing additional documents.
8. The appellant justified that the inclusion of those additional documents was intended to clarify certain issues raised by the respondent that were not credible or verifiable. The documents were thus relevant, material and weighty. For those reasons, it submitted that the trial court erred in stating that a litigant should not litigate in installments.
9. On time, the appellant submitted that it had filed the documents 14 days prior to the hearing. It thus opined that the respondent had ample time to review those documents. That although the documents spanned 133 pages, they were not bulky. It stated that the introduction of the evidence at the respondent's cross examination stage was timeous and in any event, would have had an opportunity to cross examine the appellant's witness. In the circumstances, no prejudice would be occasioned upon the respondent.
10. The appellant also lamented that the learned judge inconsiderably failed to consider its authorities. It was of the opinion that had the learned judge retired and looked at them when writing her ruling, she would have ruled differently.
11. It is for the above reasons that the appellant urged this court to interfere with the trial court's discretion which it posited, was exercised injudiciously.
12. The respondent opposed the appeal. At the onset, the respondent observed that the record of appeal was incomplete. In his view, the appellant deliberately omitted certain documents and urged this Court to frown upon such conduct.
13. After laying out a summarized background, the respondent submitted that the learned judge gave the appellant an opportunity to state reasons why its documents ought to be admitted into evidence but the explanation was unsatisfactory. Counsel argued that the court observed that prejudice would be occasioned on the respondent whose case was at cross examination. Furthermore, the reasons advanced to admit the additional documents were unsatisfactory. Thus, the trial court, properly exercised its discretion.
14. Continuing, the respondent submitted that the learned judge had a duty to uphold the principles behind pre-trial directions and admission of documents at the trial stages. That the trial court saw the crafty machinations of the appellant to sneak in additional documents and arrested the mischief. Finally, the unfairness and prejudice principle shifted towards the respondent and as such, those documents could not be admitted in evidence. The respondent urged this Court not to interfere with the discretion of the trial judge which was properly exercised. He urged this Court to dismiss the appeal with costs.



15. We have examined the record of appeal and the impugned ruling and considered the submissions by the parties and the authorities cited. We are reminded that we should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence or based on a misapprehension of the evidence or the judge had been shown demonstrably to have acted on a wrong principle in reaching the finding he/she did. (See *Musera v Mwechelesi & another* [2007] 2 KLR 159).
16. The appellant has urged this Court to interfere with the discretion of the trial judge and admit its supplementary list of documents filed on 29th June 2022. The issue for determination is thus whether the trial court exercised its discretion judiciously in denying the appellant leave to file additional documents. The Supreme Court in *Mohammed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 Others* [2018] eKLR laid down the following guiding 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 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.”

17. In order to determine the issue before us substantively, it is imperative that we lay out a brief background of the facts leading up to the impugned ruling. The respondent filed his memorandum of claim in the ELRC on 10th December 2021. Contemporaneously, the respondent filed an application dated 10th December 2021. When the application was listed for hearing on 9th February 2022, learned counsel for the respondent informed the court that she was amenable to having the application and the substantive cause heard together. In response, learned counsel for the appellant, who is counsel in these proceedings conceded to that proposition.
18. The court thus consolidated the application with the claim.

Directions were issued that they both be heard on 17th May 2022. Parties were further directed to fully comply in readiness for the hearing. When the matter came up for hearing on 17th May 2022, the respondent’s counsel informed the court that she had been served with the appellant’s witness statement on the eve of the hearing.
19. The respondent confirmed that he was in receipt of the following documents filed by the appellant: response to the statement of claim with counterclaim dated 14th January 2022, replying affidavit sworn on 14th January 2022, list of documents filed on 13th May 2022 and two witness statements dated 12th May 2022 and 16th May 2022.
20. The hearing of the respondent’s case proceeded thereafter. The respondent was subjected to a rigorous cross examination exercise by counsel for the appellant. However, due to paucity of time, the hearing was adjourned to 11th July 2022 and 12th July 2022.
21. On 11th July 2022, before the hearing could proceed, counsel for the respondent expressed dissatisfaction with the manner in which the appellant introduced a supplementary list of documents. Counsel urged the trial court to strike out the said documents on the ground that the bundle of documents was introduced midstream on 29th June 2022.
22. The appellant acknowledged that it had indeed filed that bundle on that said date. Resultantly, it made an oral application urging the trial court to admit the documents. In support of the application, it submitted that looking at the nature and impact of the additional documents and in the spirit of a balanced pendulum, the respondent would not be prejudiced as the cross examination exercise had not been concluded. In addition, the documents were not novel to the respondent. Furthermore, the said documents offered clarity in comparison to what the respondent had submitted into evidence. It observed that since the respondent filed its further list of documents on 16th May 2021, then it should also benefit from such a pardon by the court.
23. In response, the respondent submitted that documents cannot be introduced once the hearing has commenced. In his view, the appellant was introducing the documents because he had denied certain documents. He accused the appellant of stealing a march to gain advantage in the determination of the present case. He concluded by stating that there is no basis for admitting the additional documents. In his view, they ought to have been filed in the beginning if they were indeed useful.
24. In rejoinder, the appellant submitted that the application to admit the documents had been made at the earliest opportunity. It stated that striking out documents is draconian in its nature and should only be applicable in the rarest of circumstances if found to be scandalous, frivolous or vexatious. It prayed that its application be allowed.



- 25. We have carefully looked at the proceedings and the submissions before the trial court and in this Court. It is not gainsaid that the parties herein were not subjected to pre-trial directions in readiness for hearing in line with the dictates of rule 15 (1) of the Employment and Labour Relations Court (Procedure) Rules 2016. It is trite law and practice that amongst the reasons intended for the said procedure is to ensure that parties have filed their requisite documents so as to prevent unnecessary adjournments.
- 26. In any form of dispute resolution before a court of law, a court is called upon to do and be seen to do justice to all the parties concerned. Courts are obliged to provide a level playing field for parties and not be seen to favor one party against the other. If one party benefits from a pardon, then the other party should similarly enjoy such benefits; otherwise, a court will be seen to be biased.
- 27. In the present case, it has been established that the respondent was granted implied leave to file its supplementary list of documents on the eve of the hearing. That leave ought to similarly be granted to the appellant who in fact filed its documents 14 days prior to the cross examination of the respondent. We think that the ends of justice connote that the appellant does benefit from the same. Be that as it may, the respondent will have ample opportunity to cross examine the witness or witnesses intending to adduce those documents. We say so because in this case, pretrial conferencing did not take place.
- 28. The learned judge, in her ruling, stated that she was unable to rely on the appellant’s authorities for being filed late in the day. With due respect to the learned judge, nothing would have been pragmatic than to adjourn the matter and consider the authorities cited and make an informed decision after looking at the same. Thereafter, she would have delivered the said ruling on the same date.
- 29. Looking at the totality of the foregoing, we find that the learned judge injudiciously exercised her discretion in refusing to admit the appellant’s supplementary documents. We find that the application complies with the guiding principles set out by our apex Court in Mohammed Abdi Mohamud vs. Ahmed Abdulahi Mohamad & 3 Others [2018] (supra).
- 30. Consequently, we shall interfere with the findings of the trial court as follows:
 - a. The appellant’s supplementary bundle of documents filed on 29th June 2022 be and is hereby deemed to have been duly filed in the court record;
 - b. The matter shall proceed with pretrial directions before parties agree on how the matter shall proceed thereafter;
 - c. The matter shall be placed before any judge of the Employment and Labour Relations Court at Nairobi other than Lady Justice M. Onyango for further directions, hearing and disposal of the matter;
 - d. The appellant shall have costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST, 2024.

P. NYAMWEYA

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JUDGE OF APPEAL

J. MATIVO

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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.

