



**Watuku v Industrial & Commercial Development Corporation (Civil Appeal  
(Application) E206 of 2022) [2024] KECA 934 (KLR) (2 August 2024) (Ruling)**

Neutral citation: [2024] KECA 934 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E206 OF 2022  
DK MUSINGA, MSA MAKHANDIA & P NYAMWEYA, JJA  
AUGUST 2, 2024**

**BETWEEN**

**ANTHONY KIBANDI WATUKU ..... APPLICANT**

**AND**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT  
CORPORATION ..... RESPONDENT**

*(Being an application to adduce additional evidence pending the hearing and determination  
of an appeal from the Judgment of the Employment & Labour Relations Court  
(Nduma Nderi, J.) dated 20th December 2021 in ELRC Petition No. 128 of 2018)*

**RULING**

1. Before this Court is a Notice of Motion dated 14<sup>th</sup> April 2024, which is brought by the applicant pursuant to the provisions of Article 159 (2) (d) of *the Constitution* of Kenya, 2010, Sections 3A and 3B of the *Appellate Jurisdiction Act*, and rule 29 of the *Rules* of this Court, 2010. The applicant seeks a multiplicity of orders, to wit, that: this Court be pleased to grant him leave to adduce additional evidence at the hearing of the appeal; this Court be pleased to give directions as to the mode of adducing the additional evidence; this Court be pleased to recognize that there was unpaid salary for the Financial Year 2016/2017 of Kshs.162,084.12 to the applicant; this Court expeditiously handles this application to allow the applicant to travel to India for further and specialized treatment as he is in continuous pain; and that costs of this application be provided for.
2. A brief background is necessary to put the application in context. The applicant, who is a former employee of the respondent, filed a Constitutional petition before the Employment and Labour Relations Court at Nairobi, Petition No. 128 of 2018, alleging violation of his right to fair labour practices. The petition was informed by, inter alia, the respondent's failure to promote him at work; bias in performance appraisals; unfair warnings; unfair deductions, surcharge, withholding of salary increments; failure to pay special duty allowance and bonuses, overtime, accrued leave, withholding



- of terminal dues, as well as constructive dismissal. The applicant sought several reliefs from the trial court including: a declaration that his fundamental rights under Articles 26, 28, 40, 41, 43 and 47 of *the Constitution* of Kenya 2010 had been and continued to be infringed by the respondent; special damages of a cumulative sum of Kshs.10,003,929.90 as itemised at paragraph 125 of the petition; general damages for gross violation of fundamental rights; interest on the special damages at court rates from the date of filing suit until payment in full; interest on the general damages at court rates from the date of judgment until payment in full; costs for the suit and interest thereon at court rates; and any other appropriate relief that the court deemed fit to grant to protect his fundamental rights.
3. The trial court (Nduma Nderi, J.) vide a judgment dated 20<sup>th</sup> December 2021, held that the matters raised in the petition were an afterthought upon the applicant's resignation and therefore dismissed the suit, setting the stage for the filing of this appeal, which is pending hearing and determination.
  4. Turning to the instant application, it is supported by the grounds appearing on the face thereof and by the applicant's own affidavit. The applicant, who describes himself as a person with physical disabilities (PWD) resulting from sickness, diabetes and hypertension, craves the leave of this Court to adduce additional documents, to wit: minutes of the respondent's Special Board of Directors Meeting held on 13<sup>th</sup> July 2010; overtime tabulated summary; Information Technology interviews held on 12<sup>th</sup> and 13<sup>th</sup> January 2006; Employment & Labour Relations Court Cause List for 27<sup>th</sup> September 2021; Employment & Labour Relations Court Cause List for 16<sup>th</sup> September 2021; Employment & Labour Relations Court Cause List for 20<sup>th</sup> December 2021; Replying Affidavit sworn by Grace Magunga dated 14<sup>th</sup> December 2021; and National Council for Persons with Disabilities membership waiting card.
  5. He contends that on 25<sup>th</sup> October 2021 he was taken ill and was admitted at the Nairobi West Hospital for treatment and was discharged on 31<sup>st</sup> October 2021, and shortly thereafter, the trial court dismissed his petition. He avers that he lost the petition without the knowledge of the additional evidence which he now seeks to adduce.
  6. The applicant avers that the judgment of the trial court was pre- meditated and was the product of collusion between the trial court and the respondent. This is informed by what the applicant states is a replying affidavit from the respondent dated 14<sup>th</sup> December 2021 which was filed in a different matter between the parties to wit, High Court Misc Criminal Application No. E403 of 2021, wherein the respondent's Corporation Secretary, Grace Magunga, at paragraph 23 of the said affidavit alluded to the dismissal of the petition, whereas judgment was delivered on 20<sup>th</sup> December 2021. The applicant therefore avers that based on the contents of paragraph 23 of the said affidavit, the respondent was at times aware of the outcome of the petition, even before a decision was rendered by the trial court.
  7. As regards the specific documents sought to be adduced as additional evidence, it is contended that the overtime tabulation/matrix summarizes the number of hours worked by the applicant and the equivalent money thereto, thereby making the work of the court easier in dealing with the issue of overtime. The Cause Lists on the other hand are meant to show the ongoing in the trial court in December 2021. The applicant also pleads for a sum of Kshs.162,084.12 for 312 days worked for the respondent in the FY2016/2017 and which sum was not itemized as part of special damages in the Petition.
  8. The applicant avers that it is in the interest of justice that the application be allowed so as the enable the court arrive at a correct decision.
  9. The application is opposed by the respondent by way of replying affidavit sworn by Grace Magunga, its Corporation Secretary. It is averred that the additional documentary evidence sought to be introduced



- by the applicant includes confidential minutes of a meeting of 13<sup>th</sup> July 2010 by the respondent's board, and that the applicant has not stated how he came by them; that the deliberations of the respondent's apex decision making organ are not made available to general staff of the respondent; and that the applicant could only have obtained the said minutes without lawful authority.
10. As regards the overtime computation matrix which the applicant seeks to introduce, it is averred that the said document has no foundation, as computation of overtime is done by the respondent's Human Resource Department after proper confirmation that the said overtime had been approved by the relevant authority and department. In any case, the respondent avers that the issue of overtime was sufficiently addressed before the trial court, and that the said computation should have been within the knowledge of the appellant, which he never put to test when the witness for the respondent was before the trial court.
  11. Rebutting the allegation that the respondent was aware of the decision of the trial court before it was delivered, it is averred that the replying affidavit sworn in respect to a criminal matter between the parties was erroneously dated 14<sup>th</sup> December 2021. It is further averred that the respondent only became aware of the decision of the trial court on 20<sup>th</sup> December 2021 when they were informed of the outcome thereof by their advocate. It is further deposed that the said replying affidavit was filed after delivery of the impugned judgment, hence the averment at paragraph 23 thereof alluding to the dismissal of the petition.
  12. Regarding the applicant's disability status, it is averred that when he was in the respondent's employment he was not classified as a PWD, and that his current classification as a PWD is not as a result of his employment with the respondent. It is further averred that as at the time the applicant resigned from respondent's employment, he was physically sound in body and mind.
  13. In sum, the respondent avers that this application is unmerited and prays that it be dismissed.
  14. At the hearing hereof, Mr. Watuku, the applicant, appeared in person, while learned counsel Mr. Mbeche was present for the respondent. Highlighting his written submissions, the applicant contended that the documents which he intended to adduce came to his attention after conclusion of proceedings before the trial court, and that they would help this Court determine what really happened before the trial court.
  15. On his part, Mr. Mbeche submitted that the applicant had not demonstrated how the additional documents would assist in the determination of the appeal pending before this Court; and that the documents sought to be adduced did not have any probative value as alleged by the applicant.
  16. We have considered the application, the response thereto, the respective submissions as well as the applicable law. The power to re-appraise evidence and to take additional evidence is provided for under rule 31(1) of the Rules of this Court, which was rule 29(1) (b) of the 2010 Rules. The rule provides:
    - a. ....; and
    - b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court.”



17. In *Attorney General v Torino Enterprises Limited* [2019] eKLR, this Court stated thus:

“13. In *Dorothy Nelima Wafulav 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 be incontrovertible.”

18. The Supreme Court in *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR laid out guidelines on admission of additional evidence before appellate courts in Kenya. These guidelines were stated thus:

“[79] Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case-by-case basis exercise our discretion and call for and allow additional evidence to be adduced before us. 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 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 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. Whether 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 on appeal, fill up the 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.

[80] We must stress here that this Court even with the application of the above stated principles will only allow additional evidence on a case-by-case basis and even then sparingly, with abundant caution.”

- 19. The principles set out by the Supreme Court in Mohamed Abdi Mohamedv Ahmed Abdullahi Mohamed (supra) are not, in our view, necessarily conjunctive, but an applicant must substantially comply with the guidelines.
- 20. Among the documents sought to be introduced by the applicant are minutes of a special meeting of the Board of Directors of the respondent which took place on 13<sup>th</sup> July 2010. In seeking to introduce these minutes, the applicant has not explained to this Court his inability to acquire and produce them before the trial court, or indeed the efforts he made to acquire and produce before the said court. In this regard, we note that the applicant was able to acquire and produce before the trial court minutes of the respondent’s board meetings held on 23<sup>rd</sup> November 2016 and 13<sup>th</sup> February 2017 respectively. In the absence of sufficient proof to the contrary, the logical conclusion which we make is that with reasonable diligence he could have obtained and produced the said minutes before the trial court if he thought they had any probative value to his petition.
- 21. Regarding the overtime summary/matrix, it is not possible for this Court to determine the authenticity of the said document and/or how the figures contained therein have been tabulated. This document appears to have been prepared by the applicant, and as such, nothing really would have prevented him from preparing and producing it before the trial court.
- 22. The applicant also seeks to introduce several cause lists of the trial court for the months of September and December 2021. Other than showing the ongoings before the trial court on those particular dates, the cause lists read together with the respondent’s replying affidavit dated 14<sup>th</sup> December 2021 in respect of the High Court criminal matter between the parties are intended to show that the respondent was aware of the decision of the trial court before 20<sup>th</sup> December 2021. This allegation, in our view, appears far-fetched. We say this in light of the averments contained in the replying affidavit of Grace Magunga sworn in response to this application that the respondent only became aware of the decision of the trial court when they were informed of the said outcome by their advocate. If indeed the applicant wanted us to believe that the respondent had influenced the outcome of the petition, he could have demonstrated to us that the affidavit dated 14<sup>th</sup> Decmeber 2021 was in fact filed in court before 20<sup>th</sup> December 2021 when the impugned decision was delivered. The respondent averred in its reply that the said date of 14<sup>th</sup> December 2021 was in error, and that in fact, the affidavit was filed after delivery of the judgment by the trial court. In the absence of evidence to the contrary, we are prepared to agree with the respondent’s averment that the date appearing in their replying affidavit



dated 14<sup>th</sup> December 2021 was in error, which effectively means that the cause lists and the replying affidavit sworn by Grace Magunga on 14<sup>th</sup> December 2021 have absolutely no probative value.

23. Whereas we empathize with the applicant on his current medical and health status, he had legal representation before the trial court unlike before this Court where he is appearing in person, and as such, his advocate ought to have known which documents to obtain and to produce in evidence and their probative value. The applicant has not demonstrated the difficulties he experienced in obtaining and/or producing each of the documents he now seeks to adduce in evidence.
24. In the circumstances, we are not persuaded that the applicant has satisfied any of the principles set out by the Supreme Court in *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed* (supra) for grant of the orders sought in this application. The applicant is trying to fill in gaps in his suit, which was dismissed in its entirety by the trial court.
25. In the upshot, the notice of motion dated 14<sup>th</sup> April 2024 is unmerited and is hereby dismissed with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF AUGUST, 2024.**

**D. K. MUSINGA, (P.)**

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**JUDGE OF APPEAL ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**Signed**

**Deputy Registrar.**

