Odhiambo v Coca-Cola Central East and West Africa Business Unit Limited (Successor in Title to Coca-Cola East and Central Africa Division Limited) (Civil Appeal (Application) 577 of 2019) [2024] KECA 1664 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KECA 1664 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 577 OF 2019

DK MUSINGA, SG KAIRU & JM MATIVO, JJA

NOVEMBER 22, 2024

BETWEEN

CLARICE ODHIAMBO ..... APPLICANT

AND

COCA-COLA CENTRAL EAST AND WEST AFRICA BUSINESS UNIT LIMITED ..... RESPONDENT

SUCCESSOR IN TITLE TO COCA-COLA EAST AND CENTRAL AFRICA DIVISION LIMITED

(Being an application for leave to file additional evidence in the appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Nairobi (O. Makau, J.) dated 15th March, 2019 in ELRC Cause No. 694 of 2013)

RULING

1. By an application dated 10th September, 2021 brought under Sections 3A and 3B of the Appellate Jurisdiction Act and Rule 29 (2) of the Court of Appeal Rules 2010, (now 31 (1) (b) of the Court of Appeal Rules, 2022), the applicant (Clarice Odhiambo) seeks this Court's leave to adduce additional documentary evidence. The applicant has in her application grouped the bundle of documents into two. The first group is listed in prayer (1) of the application. These are:

   (a) her P9 Form dated 2018 and the respondent's letter forwarding it to her dated 6th March, 2020,

   (b) her pay slip for her 2007 terminal benefits paid out in May 2007 and the respondent's letter forwarding it to her dated 5th March, 2020,

   (c) her December, 2018 PAYE tax returns and the respondent's forwarding letter dated 5th March, 2020,

(d) her Coca Cola East Africa Staff Provident Fund 2004 Member Statement dated 31st December, 2018,

(e) letter dated 20th February, 2018 from the respondent's advocate to her advocate,

(f) letter dated 5th March, 2018 from her advocate to the respondent's Advocates,

(g) e-mail dated 16th May, 2018 from the respondent's advocate to her advocate, and,

(h) letter dated 18th December, 2020 from her advocate.

2. In prayer two the applicant also prays for an order that this Court admits additional evidence that has been produced at the trial court between December 2019 and November 2020 after the delivery of the trial court's final judgment. The documents sought to be introduced under this category are:

a. the respondent's notice of motion and supporting affidavit dated 10th December, 2019;

(b) the applicant's grounds of opposition dated 24th January, 2020;

(c) the respondent's further affidavit sworn on 5th February, 2020;

(d) the applicant's written submission dated 21st April, 2020;

(e) the respondent's written submission dated 7th May, 2020;

(f) the applicant's further affidavit sworn on 15th September, 2020;

(g) the applicant's notice of motion dated 25th September, 2020;

(h) the respondent's further affidavit sworn on 8th October, 2020;

(i) the trial court's ruling dated 29th October, 2020; and,

(j) the respondent's further affidavit sworn on 10th November, 2020.

3. The application is supported by the grounds listed on the face of the application and the applicant's supporting affidavit annexed thereto dated 10th December, 2021 together with annexures thereto. It has been opposed by the respondent vide replying affidavit sworn on 27th June, 2023 by Angela Mukora, the respondent's legal counsel together with annexures thereto.

4. The grounds relied upon as we glean them from the application and the supporting affidavit are that grounds listed in paragraph 1(a) to (g) of this ruling were in exclusive custody of the respondent and they were not supplied to the applicant until March 2020 well after the delivery of the judgment on 15th March, 2019, and, that despite requesting for the documents through her advocate, they were not provided. Further, the documents listed in paragraph 2 (a) – (j) above were introduced during the prosecution of the respondent's application dated 10th December, 2019 in which it sought to stay the judgment and that the trial court allowed the production of the said documents. The applicant contents that the said are relevant and that they were withheld from her during the trial.

5. At this juncture, in order to put arguments presented by the parties in support of their respective positions, it is useful for us to provide a brief background to the litigation before the trial court which culminated in the appeal before this Court. The applicant was employed by the respondent in various capacities and served in different countries until she was terminated on account of redundancy on 30th April, 2007. By an amended memorandum of claim filed on 29th July, 2016, the applicant sued the respondent at the Employment and Labour Relations Court (ELRC) accusing the respondent

of unlawfully terminating her contract of employment and sought the following reliefs against the respondent:

(a) General damages for wrongful or unlawful redundancy;

(b) General damages for wrongful, unlawful or constructive dismissal;

(c) General damages for racial and gender discrimination;

(d). Aggravated and or exemplary damages for racial and gender discrimination;

(e) Reasonable notice period;

(f) Salary from May 2007 until age of maturity;

(g) An inquiry into and an order for payment of lumpsum and monthly pension;

(h) An inquiry into an order for payment of 10 years' service award;

(i) An inquiry into and payment of eligible annual incentive awards;

(j) An inquiry into and payment of eligible vested stock options;

(k) Interest on (a), (b), (c), (d), (f), (h), (i) above at court rates from June 2007 until payment in full;

(l) interest on (g) and (j) above at commercial rates from June 2007 until payment in full;

(m) Costs and interest on such costs at court rates from the date of Judgment until payment in full; and

(n) any other relief the honourable court may deem fit to grant.

6. In its statement of defence filed on 2nd July, 2013 and amended on 28th October, 2016, the respondent maintained that the termination was lawful, that the applicant was paid her terminal benefits, and prayed for the dismissal of the suit with costs.

7. The trial court (O. Makau, J.), in his judgment dated 15th March, 2019 held that the applicant was the respondent's employee as at 15th May, 2007 when she was terminated on account of redundancy, and, that the redundancy was unlawful for failure to comply with the mandatory procedure laid down under sections 16 A of the repealed Employment Act, Cap 226 (repealed) and section 4 (5) of the repealed Trade Disputes Act. Accordingly, the learned judge held that the applicant was entitled to compensation for wrongful redundancy and pension subject to the applicable rules of the 3rd respondent's Pensions Scheme. Consequently, the learned judge entered Judgment for the applicant against the respondent for:

(a) Kshs.11,165,766.00 being compensation for wrongful redundancy.

(b) Costs and interest at court rates from the date of the judgment.

(c) The said award is subject to statutory deductions; and,

(d) the said award is in addition to the claimant's right to severance pay for the period from April 1997 to May 2007, three months' salary in lieu of notice and accumulated leave as at 30th April, 2007 as calculated in paragraph 9 of the amended defence. The learned judge ordered that the amount of severance pay shall however be rectified by calculating it based on the correct service period being April 1997 to May 2007 as opposed 1998 to May 2007.

8. The applicant avers that she only learnt about the documents sought to be introduced upon being served with the respondent's application dated 10th December, 2019 in which it seeks stay of execution before the trial the trial court. The applicant also avers that the new evidence will demonstrate that the information relied upon by the trial court and supplied to the Kenya Revenue Authority concerning her was false, misleading and it has been acted upon. She also averred that the respondent withdrew Kshs.4,678,866.00 and Kshs.1,079.506.00 which was her pension contribution to the provident fund without her knowledge and approval, yet the respondent's witness in her witness statement and evidence falsely alleged that she had withdrawn part of her pension fund without providing details or proof. Consequently, the additional documents will enable this Court reach a just conclusion and no prejudice will be suffered by the respondent if the said documents are admitted. Conversely, the applicant will be prejudiced if the new evidence is not admitted.

9. The respondent strenuously opposed the application. It maintained that the additional evidence sought to be introduced relates to events that occurred post-delivery of the judgment which are not relevant to the appeal before this Court since it will be decided on the basis of documentation which was before court prior to the judgment of 15th March, 2019. Further, such evidence would be prejudicial to it because it will be considered out of context and without any explanation or cross-examination and it lacks probative value. The respondent contended that the letters dated 20th February, 2018 and 5th March, 2018 exchanged between the parties advocates are marked "without prejudice," therefore they are inadmissible and in addition, no explanation has been provided as to why the applicant never applied for production of the said documents prior to the hearing of the suit.

10. The respondent also averred that the said evidence is not relevant to the appeal as it involves the applicant's disputed pension payments which are currently the subject of ongoing arbitration proceedings, and the trial court lacked jurisdiction to deal with the issues pertaining to pension which is a preserve of the Retirement Benefits Authority.

11. The application was canvassed through rival pleadings, oral and written submissions and authorities cited. The applicant's submissions are dated 11th March, 2024 while the respondent's submissions are dated 8th March, 2024. When the application came up for virtual hearing before us on 26th June, 2024, learned counsel Ms Kethi Kilonzo instructed by the law firm of Kilonzo & Company Advocates appeared for the applicant while learned counsel Ms Esther Opiyo instructed by the firm of Kaplan and Stratton Advocates appeared for the respondent. Both counsel relied on their respective written submissions which they briefly highlighted.

12. Ms Kilonzo maintained that the application meets the threshold for production of new evidence laid down by the Supreme Court in Mohammed Abdi Mahamud vs. Ahmed Abdullahi Mohammed & 3 Others [2018] eKLR. It was her submission that the appellant could not have been reasonably aware of or procured the additional evidence in the course of the trial because the respondent was in possession of the evidence. She asserted that there has been no delay in filing the application and urged this Court to allow the application with costs.

13. Ms. Opiyo also relied on her written submissions and argued that some of the evidence sought to be introduced arose after the delivery of the judgment, and therefore, such evidence will highly prejudice the respondent. She maintained that the trial court lacked jurisdiction to entertain issues pertaining to pension benefits.

14. This Court's power to admit additional evidence was previously provided for under 29 (1) (b) of the Court of Appeal Rules, 2010 (now replicated under Rule 31 (1) (b) of the Court of Appeal Rules, 2022 which provides:

> "31 (1) On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
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> a. ... and
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> b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court."

15. The Supreme Court in Patrick Kinuthia Kanyuira vs Kenya Airports Authority Petition Application No. 7 of 2017 stated:

> "(1) The principles that a party must bring forward his entire case when instituting an action, and that a party should not be vexed twice, are both exemplified by the Latin maxims, interest reipublicae ut sit finis litium (it is in the interest of the State that there be an end to litigation) and Nemo debet bis vexari pro una eteadem causa (no one shall be twice vexed for the same cause). These principles are the foundation of the doctrine of res judicata.
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> 2. Put differently, once a party brings before the court his entire case, he will be bound by the resulting decision and will not be permitted to re-open that decision on the basis of matters which could have been raised, but which were not at the trial.
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> 3. Typically, after analysing all the evidence, the trial court will determine the controversy based on the evidence before it... But if, subsequent to the judgment, and before the decision of the appellate court, the appellant wishes to present evidence that he ought to have tendered at the trial but did not, certain prescribed conditions must be satisfied." (Emphasis added)

16. In Ladd vs. Marshall [1954] 1 WLR 1489, the English Court of Appeal established three-part test to be applied for the Appellate Court to accept fresh evidence in a case on which a judgment has already been delivered. Laying down the definitive rule for the admissibility of new evidence Denning LJ, explained that:

> "In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial: second, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive: thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".

17. These criteria enunciated in the above decision, today known as the rule in Ladd vs. Marshall has been applied in many decisions in this country. For instance, this Court in Mzee Wanje & 83 Others vs. A. K. Saikwa & Others [1982-88] 1 KLR 462 stated as follows:

> "The principles upon which an appellate Court in Kenya in civil cases will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning L.J. (as he then was) in the case of Ladd vs. Marshall [1984] 1 WLR1489 at 1491 and those principles are:
>
> a. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial.
>
> b. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive.
>
> c. The evidence must be such as it presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

18. The Supreme Court in Mohamed Abdi Mohamed vs. Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR refined the original three-part test laid down in Ladd vs. Marshal (supra) through its interpretation of Rule 18 of the Supreme Court Rules, 2012 (presently Rule 26 of the Supreme Court Rules, 2020), and set out guidelines on admission of additional evidence before appellate courts in Kenya as follows:

> "(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:
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> a. The additional evidence must be directly relevant to the matter before the Court and be in the interest of Justice;
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> 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;
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> 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;
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> 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;
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> e. The evidence must be credible in the sense that it is capable of belief;
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> 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 filing 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. A reading of the rule in Ladd vs. Madision as enunciated in numerous decisions of this Court and the Supreme Court such as this Court's decision in CMC Aviation Ltd vs. Kenya Airways Ltd (Cruisair Ltd) [1978] eKLR and the Supreme Court decision in Petition (Application) No. 38 of 2019, Cyrus Shakhalaga Khwa Jirongo vs. Soy Developers Limited & 9 Others (4th day of August, 2020), (Ruling) shows that for an applicant to succeed in an application of this nature, he must satisfy the Court that the evidence sought to be adduced is "new". Evidence is "new" if - (a) it was not adduced in the original trial, and (b) it could not have been adduced in those proceedings despite the exercise of due diligence. The words "due diligence" have not been defined in the Civil Procedure Code or in the Rules of this Court. The Black's Law Dictionary (18th Edn.), defines "diligence" as- "means a continual effort to accomplish something, care; caution; the attention and care required from a person in a given situation. "Due diligence" means the diligence reasonably expected from, and ordinarily exercised by a person who seeks to satisfy a legal requirement or to discharge an obligation." According to Words and Phrases by DrainDyspnea (Permanent Edn. 13-A), "due diligence", in law, means doing everything reasonable, not everything possible. "Due diligence" means reasonable diligence; it means such diligence as a prudent man would exercise in the conduct of his own affairs."

20. We have carefully examined each of the documents sought to be introduced to satisfy ourselves whether they constitute "new" evidence and whether they could not have been procured by the applicant despite the exercise of due diligence. The applicant seeks to introduce his P9 Form dated 2018, pay slip in respect of his 2007 terminal benefits paid out in May 2018 and his December 2018 PAYE tax returns. In our view, there is nothing to suggest that the said documents are "new" and were not available or could not be procured during the trial or prior to the delivery of the judgment on 15th March, 2019 despite the exercise of due diligence. There is nothing to show that the applicant ever requested to be supplied with the P9 Form or his pay slip or his PAYE tax returns. The applicant also seeks to introduce

forwarding letters for each of the above documents all of which are dated months after the delivery of the judgment.

21. The applicant also seeks to introduce his Coca Cola East Africa Staff Provident Fund 2004 Member Statement dated 31st December, 2018; a letter dated 20th February, 2018 from the respondent's advocate to his advocate, a letter dated 5th March, 2018 from his advocate to the respondent's Advocates, an e-mail dated 16th May, 2018 from the respondent's advocate to his advocate, and a letter dated 18th December, 2020 from his advocate. Notably, the above evidence relates to payment of terminal dues to the applicant including pension benefit which as correctly submitted by the respondent, the Superior Court lacks jurisdiction to adjudicate on. It is also uncontroverted that the above evidence or the bulk of it is the subject of ongoing arbitration proceedings before Timothy K. Njenga, Arbitrator and according to the respondent, the applicant should let the arbitration proceedings run their course up to filing of any appeals with the Retirement Benefits Authority. We agree with this position and opt not to say more since the evidence relates to a live dispute before the arbitrator, save to stress that the said evidence does not pass the threshold of new evidence to be admitted at this appellate stage.

22. Lastly, all the other documents sought to be adduced as new evidence listed in paragraph 2 (a) to (j) of this judgment are basically pleadings relating to a post judgment application filed before the trial court. We fail to understand how pleadings filed in court long after the delivery of a judgment can be said to have been in existence during the trial and they could not have been procured despite due diligence. In our view, the attempt to categorize such pleadings as "new" which has just been discovered is an oxymoron. It is settled law that the Appellate Court should not travel outside the record of the Lower Court.

23. It is also equally well-settled that additional evidence cannot be permitted to be adduced so as to fill in the lacunae or to patch up the weak points in the case. The only exception is that additional evidence may be produced in the Appellate Court if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted or the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other sufficient reason as decreed in Rule 31 (1) (b).

24. It is not the business of the Appellate Court to supplement the evidence adduced by one party or the other in the lower Court. In the absence of satisfactory reasons for non- production of the evidence in the trial court, additional evidence should not be permitted in an appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence or to re-litigate before the appellate Court. A party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal.

25. A reading of Rule 31 (1) (b) and decided cases shows that parties are not entitled, as of right, to the admission of new evidence at this appellate stage. Conversely, admission of "new" by an Appellate Court is a matter of judicial discretion and the applicant must satisfy the Court that there exists sufficient reason(s) to take additional evidence or direct that additional evidence be taken by the trial court. The matter is entirely within the discretion of the Court and is to be used sparingly. Such a discretion is only a judicial discretion circumscribed by the limitation specified in the rule itself. The Appellate Court should not, ordinarily allow new evidence to be adduced in order to enable a party to raise a new point in appeal. The unfettered power of the Court to receive additional evidence is only sparingly used and only where it is shown that the evidence is new and would make a significant impact in the determination of the appeal.

25. Arising from our analysis of the facts, the authorities and the law, the inevitable conclusion is that the applicant's application dated 10th September, 2021 is devoid of merit. Consequently, we dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER, 2024.

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

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

Signed.

DEPUTY REGISTRAR.