Kenya Forest Research Institute & another v Ndungu (Civil Appeal 2 of 2019) [2023] KECA 738 (KLR) (22 June 2023) (Ruling)

Neutral citation: [2023] KECA 738 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 2 OF 2019

DK MUSINGA, HA OMONDI & KI LAIBUTA, JJA

JUNE 22, 2023

BETWEEN

KENYA FOREST RESEARCH INSTITUTE .... 1ST APPLICANT

THE HON. ATTORNEY GENERAL .... 2ND APPLICANT

AND

STEPHEN MURIITHI NDUNGU .... RESPONDENT

(Being an application to introduce new evidence in the pending appeal and file a Supplementary Record of Appeal in the appeal arising from the judgment and decree of the Employment and Labour Relations Court of Kenya at Nairobi (Makau, J.) dated 28th September 2018 in ELRC No. 2188 of 2014)

RULING

1. The Notice of Motion dated 20th December 2018 and supported by the affidavit of even date, sworn by the applicant's Deputy Director of Human Resource, Evelyn I. Oroni, and brought pursuant to rules 29, 42 and 43 of the Court of Appeal Rules, seeks orders that leave be granted to the applicants to adduce additional evidence before hearing of their appeal consisting of the following documents:

    a. Scheme of Service for Research Scientist dated 29th July 1996;

    b. a copy of the letter of re-designation (transfer from Director KEFRI to one Evans Akaranga Busaka dated 7th March 2014;

    c. a copy of the letter of promotion from Director KEFRI to one Stephen Omondi dated 8th February 2014;

    d. a copy of the letter of promotion from Director KEFRI to one Chemuku Wekesa dated 8th February 2014;

e. a copy of the letter of promotion from Director KEFRI to one Mayunzu Sabwa Oscar dated 15th October, 2015;

f. a copy of the letter of promotion from Director KEFRl to one Mrs. Pauline Achien'g Bala;

g. a copy of the letter of promotion from Director KEFRI to one Leila Ndalilo dated 28th August 2018; and

h. a copy of the letter of promotion from Director KEFRI to one James Maina Maina dated 28th August 2018.

It is proposed that we allow the additional evidence to be filed as a supplementary record of appeal within 14 days from the date that the orders are granted.

2. A brief background of this matter is that, on 1st June, 2011, the 1st applicant Kenya Forest Services Institute, the 1st applicant, adopted a new scheme of service which, as it explains, was intended to ensure that serving officers adopted and converted appropriately to the new grading structure and designation, but not to promote or upgrade any staff. The respondent, being an employee of the applicant, filed in the Employment and Labour Relations Court (herein after referred to as ELRC) Cause No. 2188 of 2014 seeking, inter alia, an order compelling the 1st applicant to place the respondent in the correct job group of Research Scientist II Job Group RF 9 effective 1st June 2011 and payment of salary arrears for the position of Research Scientist II Job Group RF 9 retrospectively from 1st June 2011 in the tune of Kshs.268,732.00/- to 31st October 2014.

3. At the trial court, the applicant was represented by the office of the Attorney General. The matter was duly heard, and, on 28th September 2018, the learned trial Judge allowed the respondent's claim and ordered that the respondent be placed in the post of Research Scientist II Job Group RF 9 effective 1st June 2011, and be paid his salary arrears for the position of Research Scientist II Job Group RF 9 retrospectively from 1st June 2011 in the tune of Kshs.175, 704.00/- plus any further arrears that would accrue.

4. Immediately after the judgment, the 1st applicant discovered what it describes as additional and very important evidence that is directly relevant to the matter before court; that the said evidence could not have been obtained with due diligence for use at the trial, and was not within the applicant's knowledge and, therefore, it could not have been produced during the trial.

5. Aggrieved by the outcome, the applicant filed an appeal as well as the present application. One of the issues the 1st applicant is aggrieved by is the respondent's intimation to the trial court during examination in chief, and which the trial court accepted as reflected in its judgment, that all the respondent's colleagues in the scrapped job grade 8 were converted to Research Scientist II Job Grade RF 9, but that he was retained in the scrapped post alone without any salary increment.

6. The applicant explains that the additional evidence was not available to its counsel at the time the suit was heard, and therefore was not included in its list of documents; that the reasons for the omission was due to the high turnover of officers who handled the case in the department; that the last officer who handled the case did not officially hand over; and that, consequently, the matter was not re-allocated to anyone until Friday 5th May 2015 when the last counsel on record was partially allocated the matter and, therefore, had very short notice to procure the witness statement.

In addition, the applicants averred that the available documents for which the additional evidence now sought to be produced were locked in the office of the applicant's Chief Executive Officer who was not

in office at the material time. It is the applicant's contention that if the said additional evidence was produced before the trial court it would have impacted on the verdict.

7. In its written submissions, the applicant argues that the additional evidence demonstrates that the position of Assistant Research Scientist Job Group RF 8 was never scrapped; that the lowest position was never raised to Research Scientist Job Group RF 9 under the Schemes of Service adopted by the management of KEFRI on 1st June 2011; that further, the additional evidence demonstrates that before promoting officers under Job Group RF 8 to Job Group RF 9, the officers concerned, the (respondent included), were and are still required to obtain a Masters Degree; that the management of KEFRI was, and is still is, required to undertake performance evaluation; award an overall score, and then recommend for promotion based on availability of vacancy; and that the respondent herein has obtained promotion through the court contrary to the procedure provided by the 1st applicant and which all officers under the itemized documents were taken through.

8. The respondent describes the application as frivolous and an abuse of the court process. The application is opposed by the respondent's replying affidavit dated 25th January 2019, rule 29(1) of the *Court of Appeal Rules* to submit that the evidence that the 1st applicant wants to submitting ranges from the year 1996 to August, is not new in any way, and had always been readily available, and could have been obtained by the applicant if some reasonable effort had been applied; that, from the supporting affidavit of Evelyn I. Oroni dated November 20, 2018, paragraphs 4, 5 and 6; show that the 1st applicant was infact in possession of the evidence; and, that the applicant has shown that despite the 2nd applicant being allocated the matter way back in 2015, no efforts were made by either party to have the documents admitted in evidence.

9. The respondent urges us not to allow the application, insisting that the 1st applicant only wishes to adduce this evidence for the purpose of filling gaps as well as trying to patch up the weak points in their case. He argues that the applicant has not met the threshold set in the decision by this Court in the case of *Mount Elgon Beach Properties Limited vs. Harrison Shikaru Mwanongo & another* [2019] eKLR citing the Supreme Court decision in Mohamed Abdi Mohamud vs. Ahmed Abdullahi Mohamad & 3 Others (2018) eKLR.

10. The appellant further contends that, if the documents relating to the promotions are admitted; into evidence, he will be greatly prejudiced; as the persons who made them would neither called as witnesses at the trial court, and nor are they party to the present suit nor the initial suit; and that this would in effect be trying to make a fresh case on an already decided matter.

11. It is also pointed out that the applicant wants to adduce the copy of the Scheme of Service dated 29th July 1996 as new evidence. This scheme of service is obsolete and irrelevant to this matter as it was retired by the new scheme of service that was implemented and deliberated upon by the board of directors of the 1st appellant on 1st July 2011, a position which was confirmed on oath by the 1st applicant's witness during the trial.

12. The respondent also points out that the new evidence to be adduced should have an important influence on the case, and yet this has not been met by the appellants as the documents tabled have no relation to the respondent as they relate to other employees whose qualifications and terms of employment may differ from that of the respondent. Thus, they, serve no purpose in influencing the outcome of this matter. We are thus urged to dismiss the application.

13. The Supreme Court decision in *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR, laid down guidelines for admission of additional evidence before appellate courts as follows:

> "(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;

14. In addition, this Court in the case of *Mzee Wanjie & 93 others vs. AK Saikwa & others* (1982-88) 1 KAR 642, and as restated in Edgar Ogechi & 12 Others CA No. 130 of 1997, held that before the court permits adduction of new evidence, the applicant must show; one, that the additional evidence could not have been obtained by reasonable diligence during the trial in the superior court; and, secondly, that if such evidence had been made available to the trial court, it would have likely affected the outcome of the suit.

15. From the record, it is clear that the office of the Attorney General was first instructed to represent the applicant in the year 2014, but it appears counsel on record did not act diligently, but simply prepared witness statements based on the documents he had, and that it was only after the judgment that he realized that there were other documents in the custody of the applicant. This gap in preparation is blamed in the high turnover of counsel at the State Law Offices, with some leaving without proper handing over. According to the applicant, the current counsel was assigned the brief on 5th May 2015, and proceeded to hearing on May 7, 2018.

16. The applicant explains at paragraph 6 of the supporting affidavit thus:

> "…that on very short notice, counsel on record managed to prepare witness statement and list of documents which were readily available. Most of the documents was [sic] locked in the CEO's office and the CEO was not available as from 4th May 2018 to 10th May 2018".

17. Has there been a demonstration of due diligence presented by the applicant? We recognise that rule 29 is categorical that an applicant cannot benefit from the provision if the intended additional evidence could have been obtained with due diligence. In the present case, counsel in conduct of the matter was instructed in May 2015, yet for undisclosed reasons, it only dawned on him in May 2018 (three years later), that the listed documents were necessary. The applicant confirms that these documents were all along within the possession of the applicant's CEO; it is not the absence of the CEO between 4th May 2018 to 10th May 2018.

18. The case of Mohamed Abdi Mohamud (Supra) gave guidelines on admission of new evidence in appellate courts, namely that:

    i. The Court must be satisfied that the additional evidence is not utilised for the purpose of removing lacunae and filling gaps in evidence.

       The Court must find the further evidence needful, and

    ii. 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.

19. We must emphasize that a case belongs to the litigant who must be diligent, and, as a matter of fact, the documents were readily available all along; in the possession of the CEO. It is just that no one asked

or inquired of them. Then the applicant waits until the court makes a decision, becomes alive to the lacunae created by its failure to present the documents, and believes that cure lies in patching up the loophole that led to the unfavourable outcome.

20. Rule 29 (1) of the *Court of Appeal Rules* states that:

    1. On any appeal from a decision of superior court acting in the exercise of its original jurisdiction, the Court shall have power:

        a. to re-appraise the evidence and to draw inferences of fact; and

        b. 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.

21. We take to mind the fact that rule 29 was not tailored to aid an indolent litigant to patch up its case. Our finding is that no reasonable steps were ever taken so as to merit leave to adduce additional evidence. What this communicates is that there was a lot of laxity on the part of the applicant and its counsel. The application lacks merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JUNE, 2023.

D. K. MUSINGA, (P.)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR