National Cereals and Produce Board v Erad Supplies Andgeneral Contractors Limited; Ethics & Anti-Corruption Commission (Interested Party) (Civil Application 9 of 2012) [2022] KECA 1410 (KLR) (16 December 2022) (Ruling)

Neutral citation: [2022] KECA 1410 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 9 OF 2012

HM OKWENGU, JM MATIVO & WK KORIR, JJA

DECEMBER 16, 2022

BETWEEN

NATIONAL CEREALS AND PRODUCE BOARD ..... APPLICANT

AND

ERAD SUPPLIES AND GENERAL CONTRACTORS LIMITED . RESPONDENT

AND

ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

((Nambuye, Kiage & Kairu JJA) on July 11, 2014))

RULING

(An application by the Ethics and Anti-Corruption Commission to be permitted to adduce additional evidence)

1. Vide an application dated November 5, 2014 expressed under rules 29, 31 and 42 of the *Court of Appeal Rules, 2010* and section 3A of the *Appellate Jurisdiction Act*, the Ethics and Anti- Corruption Commission (the applicant) sought orders that it be joined in this appeal as an interested party or in any other capacity the court may deem fit. It also prayed for orders that this court takes additional evidence by way of affidavit and the annexed affidavit of Kipsang Sambai together with the evidence received from South African Authorities attached thereto be deemed duly filed and served and be part of the record.

2. The prayer for joinder was allowed by this court vide a ruling delivered on December 18, 2014 (Alnashir Viosram, JW, Mwera & K M'noti JJA) after the court was satisfied that the applicant is a person who is directly affected by the appeal by virtue of its mandate. Therefore, before us for determination are the prayers for additional evidence to be taken by way of an affidavit and for the affidavit of a one Kipsang

Sambai together with the evidence received from South African Authorities attached thereto to be deemed duly filed, served and be part of the record.

3. The core ground in support of the application is that the applicant investigated allegations of corruption, irregularity and fraud in the manner in which the respondent was procured to supply 40,000 metric tons of maize to the appellant and the manner in which the tender the subject of this appeal was awarded. The investigations established that the award was procured fraudulently by means of false documents.

4. The applicant states that pursuant to mutual legal assistant, it obtained evidence from South African firms demonstrating that the documents purported to have emanated from South African firms on the basis upon which huge awards were claimed were forged; that a document pursuant to which storage charges of USD 1,146,000.00 was awarded to the respondent was forged and it did not emanate from the purported supplier/bailee, M/s Chelsa Freight, CK 2002/046548/23 of 14th Floor, John Ross House, Suite 496/407, Johnson Lane, Durban, 40001, South Africa. As a consequence, the applicant states that the respondent's director, a one Grace Sarapayi Wakhungu lied on oath and produced false evidence. Lastly, it is in the interests of justice that this application be allowed.

5. The appellant (the National Cereals and Produce Board) supports the application through the replying affidavit of one John Ngetich, its corporation Secretary dated July 21, 2020. The salient averments are that the main grounds cited in the application to set aside the arbitration award in the High Court was that the award was tainted with mischief and corruption; that the respondent and its directors were convicted of criminal charges and fined; that the judgment of the Anti-Corruption Court is vital in the appeal because the respondent had always dismissed the appellant's assertion of fraud stating that neither itself nor its directors had been charged and or convicted of any offence; lastly, that the additional evidence will allow the court to adjudicate the matter fairly and justly in the interest of the general public.

6. The respondent opposed the application vide the replying affidavit of a one Grace Sarapay Wakhungu, its Managing Director dated April 23, 2015. Briefly, she denied the alleged irregularities and fraudulent conduct. She averred that the appellant had filed an application seeking to adduce additional evidence which was heard and dismissed by this court on July 11, 2014, so the instant application is an abuse of court process.

7. The applicant filed written submissions which he highlighted orally in court. It cited *Elizabeth Chepkoech Salat v Josephine Chesang Chepkwony Salat* [2014] eKLR which laid down the following principles for allowing additional evidence :-

   (a) That the evidence could not be produced at the trial despite exercise of due diligence.

   (b) That the evidence is relevant, and,

   (c) That the evidence is credible.

8. Regarding (a) above, the applicant argued that the evidence was recorded in October 2014 in a foreign jurisdiction following a request for mutual legal assistance undertaken by the applicant pursuant to its investigative mandate, unlike the appellant, who has no powers to undertake investigations.

9. On the test for relevancy, the applicant submitted that the evidence sought to be introduced is relevant and compelling. It argued that the amount awarded by the arbitrator is over Kshs 100 million, that the company which was purported to have issued the invoice the basis upon which the said sum was claimed denied issuing the invoice or dealing with the respondent and that the denial of the invoice renders the rest of evidence worthless.

10. Lastly, on the credibility of the evidence, the applicant submitted that as a competent and credible investigative authority, it procured the evidence, so, the evidence is credible. To buttress its arguments, it cited a passage from *Halsbury's Laws of England* vol 3 (1), *Charles Koigi Wamwere and 2 others v Republic* Cr Case No 29 of 1991 and *R v O'connel* [2884] LR 261 at p 321.

11. The appellant (the National Cereals & Produce Board) supported the application. It relied on *Tana River Development Authority v County Government of Tana River & another* [2018] eKLR which set out the following tests for allowing additional evidence : (a) that it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; (b) it 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 is presumably to be believed, or in other words, it must apparently be credible, though it need not be incontrovertible; and (d) the power to adduce additional evidence should be exercised sparingly and with caution. Further, it argued that the evidence should not be intended to allow a party to re-litigate a case and fill in gaps in evidence and the appellate court must find the evidence useful. It submitted that the application meets all the above tests.

12. The respondent opposed the application through the replying affidavit of Grace Sarapay Wakhungu, its Managing Director dated April 23, 2015. It did not file written submissions, but its counsel made oral submissions in court. The main submission was that a similar application filed by the appellant was dismissed vide a ruling dated July 11, 2014, so the instant application is an abuse of court process and it does not meet the laid down tests.

13. First, we will address the respondent's contestation that a previous application filed by the appellant seeking to introduce additional evidence was dismissed by this court (Nambuye, Kiage & Kairu JJA) on July 11, 2014. However, a reading of the said ruling shows that the appellant sought to introduce a special report by the public investments committee adopted by the national assembly on November 12, 2013 relating to a contract between the appellant and the respondent which it argued contained new and important evidence which was necessary for the fair determination of the appeal. The applicant before us seeks to be allowed to introduce evidence received from South African Authorities copies of which are attached to the affidavit of Kipsang Sambai. The evidence sought to be introduced seeks to demonstrate that the invoice upon which over Kshs 100 million was claimed by the respondent was disowned by the company which allegedly issued it, that the subject tender was procured fraudulently and that in subsequent criminal trials, the respondent and its directors were found culpable and they were convicted and fined.

14. There was no attempt by the respondent to draw a parallel between the evidence sought to be introduced in the earlier application and the instant application to suggest that what this court is being invited to admit is a replication of the evidence which was sought to be adduced in the earlier application. This was a crucial hurdle for the respondent to surmount for its objection to be sustained. This failure notwithstanding, we have taken the liberty to satisfy ourselves whether the evidence in the earlier application is substantially or wholly similar to evidence sought to be adduced in the instant application. Our reading of the ruling dated July 11, 2014 shows that in the said application, the appellant sought to introduce a report by the public investments committee adopted by the national assembly on November 12, 2013. The instant application seeks to introduce evidence obtained following investigations undertaken in South Africa pursuant to mutual legal assistance which seeks to establish that the tender award the subject of the dispute in the main appeal was tainted with irregularities and fraud. For the above reasons, we find no merit in the respondent's attempt to erect the ruling dated July 11, 2014 as a barrier to the instant application.

15. We now address the merits or otherwise of the application. Undeniably, under the scheme of the *Civil Procedure Rules, 2010*, it is the trial court before whom parties are required to adduce their evidence. As a general rule, a Court of Appeal decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards. An appeal is intended to test the correctness of the decision of a trial court. But in exceptional circumstances, an appellate court may take additional evidence. In determining the ambit and scope of the exceptional circumstances, the court has to be mindful of its powers set out in rule 31 (1) (b) of the *Court of Appeal Rules, 2022* which provides as follows:

> "1. On an appeal from a decision of s superior court acting in the exercise of its original jurisdiction, the court shall have power-
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> a. To re-appraise the evidence and to draw inferences of fact;
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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.
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> 2. When additional evidence is taken by the court, the evidence may be taken orally or by affidavit and the court may allow the cross- examination of any deponent."

16. The judicially developed conditions to be met in applications to adduce additional evidence at the appellate stage are due diligence, relevance, credibility and decisiveness. The Supreme Court of Canada in *R v Palmer* [1980] 1 SCR 759 set out a four point criteria for appellate courts to admit new evidence: (a) the evidence should generally not be admitted if, by due diligence, it could have been adduced at the trial; (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial; (c) the evidence must be credible in the sense that it is reasonably capable of belief; (d) the evidence must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

17. An appellate should not pass an order to patch up the weakness of the evidence of the unsuccessful party before the trial court. The rule of thumb is if the court requires the evidence to do justice between the parties. Mere difficulty is not sufficient to issue directions on such an application. However, the above list is not exhaustive. Each case stands or falls on its own peculiar facts and circumstances. For example, the Supreme Court if India in *A Andisamy Chettiar v A Subburaj Chettiar* [2015] 17 SCC 713 emphasized on the test being whether the appellate court requires the additional evidence to enable it to pronounce the judgment or for other substantial cause. It stated-

> " The admissibility of additional evidence does not depend upon the relevancy to the issue on hand, or on the fact, whether the applicant had an opportunity for adducing such evidence at an earlier stage or not, but it depends upon whether or not the appellate court requires the evidence sought to be adduced to enable it to pronounce judgment or for any other substantial cause. It is further observed that the true test, therefore is, whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced."

18. Rule 31 (1) (b) grants this court power to exercise its discretion for "sufficient reason." A common definition of judicial discretion is the act of making a choice in the absence of a fixed rule, i.e. statute, case, regulation, for decision making; the choice between two or more legally valid solutions; a choice not made arbitrarily or capriciously; and, a choice made with regard to what is fair and equitable under

the circumstances and the law. The classic definition of "discretion" by Lord Mansfield in *R v Wilkes* 1770 (98) ER 327 is that "discretion" when applied to courts of justice, means sound discretion guided by law. It must be governed by rule, not by humour; it must not be arbitrary, vague, and fanciful, "but legal and regular."

19. Broadly speaking, the exercise of the court's discretionary power is influenced by considerations of justice and fairness, having regard to the facts and circumstances in the particular matter before it. In this regard what an applicant is required to show, in essence, is a reasonable explanation for his default (it has also sometimes been described as an "acceptable" explanation). (See *Monica Malel & anor v R*, Eldoret Civil App No Nai 246 of 2008). It is incumbent upon an applicant for leave to adduce further evidence to satisfy the court that it was not owing to any remissness or negligence on his or her part that the evidence in question was not adduced at the trial.

20. The rule requires an applicant to demonstrate "sufficient reason." The term "sufficient reason" has nowhere been defined in the rules; however, courts have construed it quite liberally in order to meet the ends of justice. In determining what constitutes "sufficient reason" courts should adopt a liberal and justice-oriented approach. The approach is that the court has a discretion, to be exercised judicially upon a consideration of all facts, and in essence, it is a matter of fairness to both parties. Whether or not the furnished reason would constitute a "sufficient reason" will depend on facts of each case. In a case where a party has been negligent, the approach cannot be the same and liberal interpretation of the term will be discouraged.

21. The court must be appraised of all the facts and circumstances relating to the inability or failure to adduce the evidence during the trial. The applicant seeking to be allowed to adduce additional evidence must therefore provide a satisfactory explanation as to why the evidence was not available during the trial. An unsatisfactory explanation for the failure will normally be fatal to the application. In this context, "sufficient reason" means that a party had not acted in a negligent manner or there was want of *bona fides*. Taking into account the facts and circumstances of a case, the party should not be seen to have "not acting diligently" or "remaining inactive." The "sufficient reason" must be supported by a credible explanation as to why the additional evidence was not led during the trial. The existence of "sufficient reason" is the key consideration which unlocks this court's discretion in an application under rule 31 (1) (b).

22. In addition, the evidence sought to be introduced should be materially relevant to the outcome of the case. Further, the application must meet the criteria laid down in decided cases. (See *R v Palmer* [1980] 1 SCR 759 (*supra*) and *Tana River Development Authority v County Government of Tana River & another* (*supra*). An applicant must provide cogent reasons why the evidence was not led during the trial. Ordinarily these facts are inter-related; they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion. These factors are not individually decisive but are interrelated and must be weighed against each other. Absence of one consideration can easily dislodge the other factors. For example, without a reasonable and acceptable explanation for the failure to adduce the evidence during the trial, the prospects of materially affecting the outcome of the case is immaterial. Without prospects of materially affecting the outcome, no matter how good the explanation for the failure to adduce is, the credibility of the evidence is immaterial.

23. Applying the law as laid down by the courts to the facts and circumstances of this case, we are satisfied that the applicant's explanation has surmounted the "sufficient reason" test. We are also satisfied that the applicant has met the criteria laid down in decided cases for allowing applications for adducing additional evidence by an appellate court. We are persuaded that no prejudice will be suffered by the respondent because allowing the application does not meet that the evidence remains unchallenged. On the contrary, and for the interests of fairness and justice, the respondent will be at liberty to reply

to the evidence. Accordingly, we allow the applicant's application dated November 5, 2014 and order that:

a. That the applicant be and is hereby allowed to adduce additional evidence by way of affidavit evidence.

b. That the affidavit of one Kipsang Sambai dated xxxx together with the evidence received from South African Authorities attached thereto is hereby deemed as duly filed and served upon all the parties to this appeal.

c. That the 2nd respondent be and is hereby granted leave to file a reply to the said affidavit within 15 days from the date of this order.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

HANNAH OKWENGU

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JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR