



REPUBLIC OF KENYA



**Maina v Benisa Limited (Appeal E163 of 2021)
[2024] KEELRC 1001 (KLR) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEELRC 1001 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E163 OF 2021**

**JK GAKERI, J
APRIL 15, 2024**

BETWEEN

JOHN NGOTHO MAINA APPELLANT

AND

BENISA LIMITED RESPONDENT

RULING

1. Before the court for determination is the Applicant/Respondent's Notice of Motion dated 23rd January, 2024 seeking orders that;
 1. The court be pleased to issue orders allowing the Respondent to adduce court proceedings in Milimani Criminal Case No. E641 of 2022 as additional evidence and also call new witnesses.
 2. Spent.
 3. Costs be provided for.
2. The Notice of Motion is expressed under Section 3A of the *Civil Procedure Act* and is based on the grounds set out on its face and the Supporting Affidavit sworn by Benjamin Kubai Macharia on 23rd January, 2023 who deposes that he had known the Appellant for over 20 years and the appellant relied on documents allegedly signed by the affiant which was not the case but the alleged forgery had not been reported to the police but the matter was investigated and the Claimant charged in Milimani Criminal Case No. E641 of 2022 on 6th July, 2022 and released on bail but was unable to raise the amount and requested a relative to seek forgiveness from the affiant on the ground that he was diabetic and had high blood pressure and as a consequence the affiant sought for the withdrawal of the charges against the appellant on humanitarian grounds.



3. That the prosecution confirmed that the appellant had high blood pressure and was diabetic and applied for withdrawal of the suit and as a sign of good faith withdrew the appeal against the appellant who decided to be the appellant.
4. The affiant states that the instant appeal is based on forged documents.

Respondent's Response

5. In his grounds of opposition, the Respondent/Appellant argues that the application herein does not meet the legal threshold as enunciated by the Supreme Court and the Court of Appeal and the Applicant/Respondent had sufficient time to report the alleged forgery to the police and has been indolent.
6. That no explanation has been provided for the inordinate delay in reporting the alleged offence and the application is intended to fill in gaps in its case and amounts to abuse of the court process.

Applicant's submissions

7. In its oral submissions, the applicant's counsel submitted the instant application relates to the introduction of new evidence not available during the trial, that the documents relied upon by the appellant are forged and the applicant seeks to adduce evidence to prove the same as a crime can be reported at any time and the grounds of opposition cannot rebut facts.
8. Counsel submitted that the withdrawal of the Criminal Case under Section 87 of the Criminal Procedure Code was not absolute as the matter can be reinstated and the withdrawal of the matter was on account of the appellant's suffering from high blood pressure and diabetes.
9. That the document in question was disputed during the trial and the applicant neither authored nor signed it.

Respondent's submissions

10. Counsel submitted on whether the court should allow the applicant to introduce additional evidence and witnesses and whether the application is merited.
11. On the 1st issue, counsel urged that the suit was decided on the basis of the evidence availed to the court and the applicant had not reported the alleged forgery to the police and further submitted that parties are bound by their pleadings as held in Independent Electoral and Boundaries Commission & another V Stephen Mutinda Mule and 3 others (2014) eKLR citing Adetoun Oladeji (NIG) V Nigeria Breweries PLC SC 91/2002.
12. It was submitted that a court of law determines the issues raised by the parties.
13. Counsel submitted that although the Respondent joined the applicant in 2016 and left in November 2018, the applicant did not report the alleged offence and no reason has been provided as awaiting the outcome of a case cannot be a tangible reason.
14. That the applicant intends to improve its case and fill in gaps it failed to substantiate at the trial.
15. As to whether the application is merited, counsel submitted that it was not as the applicant had no new evidence but wanted to adduce additional evidence as the witness and the evidence could have been obtained with reasonable diligence before and during the hearing before the trial court and the application did not meet the threshold in Mohamed Abdi Mohamed V Ahmed Abdullahi Mohamed & 3 others (2018) eKLR and Attorney General V Torino Enterprises Ltd (2019) eKLR.



16. Counsel cited the sentiments of the court in *Dorothy Nelima Wafula V Hellen Nekesa Nielsen & another* (2017) eKLR on the discretion of the court under Rule 29(1)(a) of the Court of Appeal Rules on additional evidence on appeal, to underscore the proposition that it must be shown that the evidence could not have been obtained by reasonable diligence before and during the hearing and the evidence would have had an important influence on the outcome.
17. Reliance was also made on the guidelines enunciated by the Supreme Court in *Mohamed Abdi Mohamed V Ahmed Mohamed & 3 others* (Supra) to urge that the documents produced at the trial are yet to be determined as forged.
18. Finally, counsel submitted that the instant application was an abuse of the court process, lacked merit, was incompetent, frivolous, vexatious and bad in law.

Determination

19. The singular issue for determination is whether the Applicant's Notice of Motion dated 23rd January, 2024 is merited.
20. Simply stated, the applicant is seeking leave of the court to adduce additional evidence and call new witnesses at the appellate stage of the case.
21. Section 78 of the *Civil Procedure Act* provides that;
 1. "Subject to such conditions and limitations as may be prescribed, an appellate court shall have power –
 - a. to determine a case finally.
 - b. to remand a case.
 - c. to frame issues and refer them for trial.
 - d. to take additional evidence or to require the evidence to be taken.
 - e. to order a new trial.
 2. Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."
22. The foregoing provision is similar to Rule 29(1)(b) of the Court of Appeal Rules.
23. Puzzlingly, counsel relied on Section 3A of the *Civil Procedure Act*.
24. It is trite that whether or not a court of law will permit new or additional evidence be adduced on appeal involves the exercise of judicial discretion as held in *Dorothy Nelima Wafula V Hellen Nekesa Nielsen & another* (Supra) and for a sufficient reason, guided by the parameters developed by courts, such as the evidence could not have been obtained by reasonable diligence before and during the hearing, 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 the evidence sought to be adduced is credible, though it need not be incontrovertible.



25. Needless to emphasize, in *Mohamed Abdi Mohamed V Ahmed Abdullahi Mohamed & 3 others (Supra)*, the Supreme Court of Kenya catalogued the most exhaustive list of the guidelines on admission of additional evidence before appellate courts in Kenya as follows;

“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 . . .

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.”

26. The court isolated 12 principles which ought to guide the court in exercising its discretion as to whether or not to allow adduction of additional or new evidence.

27. However, as held in *Mzee Wanje & 93 others V A.K. Saikwa (1982 – 88) 1 KAR 463*;

“This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal.”

28. The court is guided accordingly.

29. In the instant application, the Respondent/Applicant seeks leave to adduce court proceedings in *Milimani Criminal Case No. E641/2022* and call new witnesses.

30. While the proceedings are annexed to the Notice of Motion, the evidence to be adduced by the new witnesses is unclear as counsel has not provided draft witness statements. It is difficult to fathom how voluminous or otherwise the evidence is or its scope.

31. It is however decipherable that the applicant seeks to adduce evidence to establish inter alia that a document(s) relied by the Respondent in the trial court was forged.

32. If the document(s) was relied upon at the hearing and the applicant objected to it but the trial court relied on it or not based on the evidence adduced by both parties, would not allowing the applicant adduce evidence on the document(s) amount to patching up of the applicant’s case or filling the gap?

33. More significantly, however, could the evidence sought to be produced on appeal have been obtained by reasonable diligence before and during the hearing?

34. Was the applicant reasonably aware of and could have procured the evidence in the course of the trial?

35. Based on the materials before the court, the court is persuaded that although the criminal case arose after the applicant had filed its appeal which it subsequently withdrew in 2023 and thus the proceedings could not have been available before or at the hearing, the applicant could have reported the alleged forgeries to the police at any time since the Respondent was its employee from 2016 until November 2018 and the Respondent filed his case on 13th October, 2020.



36. Evidently, the testimony sought to be adduced by witnesses could have been obtained by the applicant with reasonable diligence and is not new, it is additional evidence the applicant desires to adduce it to revamp its case against the Respondent who is now the appellant in the appeal.
37. Juxtaposing the applicant's Notice of Motion against the guiding principles on adduction of additional or new evidence on appeal as formulated by courts and in particular the Supreme Court in Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others (Supra), it is the finding of the court that the Applicant's Notice of Motion does not meet the requisite threshold.
38. From the foregoing, it is discernible that the Applicant's Notice of Motion dated 23rd January, 2024 is for dismissal and it is accordingly dismissed save for leave to adduce court proceedings in Milimani Criminal Case No. E641/2022 Republic V John Ngotho Maina.
39. There shall be no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 15TH DAY OF APRIL 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

