



**Twaweza Apparel [EPZ] Limited v Kahindi & another (Appeal
80 of 2021) [2023] KEELRC 478 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELRC 478 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL 80 OF 2021
AK NZEI, J
FEBRUARY 23, 2023**

BETWEEN

TWAZEZA APPAREL [EPZ] LIMITED APPELLANT

AND

HANTEX GARMETS [EPZ] LIMITED 1ST RESPONDENT

REHEMA KAHINDI 2ND RESPONDENT

RULING

1. The application before me is the Appellant's Notice of Motion dated September 16, 2022. The Appellant seeks the following orders:-
 - a. That the Appellant be granted leave to adduce additional evidence namely:-
 - i. Payment advice from I & M Bank dated 15/7/2022 being payment for rent for USD 84,575.65 from the Appellant to the landlord.
 - ii. Internal transfer dated 3/12/2020 showing the ksh 19,000,000 paid by the Appellant as consideration for equipment and other properties acquired by the Appellant from the 2nd Respondent pursuant to the Deed dated November 23, 2020.
 - iii. Receipt dated 9/12/2020 from the 2nd Respondent to the Appellant, acknowledging payment of ksh 19,000,000 as consideration for property acquired by the Appellant pursuant to the Deed of Assignment dated November 23, 2020 between the Appellant and the 2nd Respondent.
 - iv. Single Administrative Documents showing imports of raw material by the Appellant for the manufacture of garments by the Appellant at the demised premises.



- v. Single Administrative documents showing exports made by the Appellant of garments manufactured at the demised remises, and exported overseas.
 - vi. Motor vehicle logbooks no 2020113003399,2020120102065, 2020113003560, 2020113001737, 2020113003306,2020120100254 and 2020121000201 for seven vehicles owned by the Appellant and parked at the demised premises.
- b. the Appellant be granted leave to file a supplementary affidavit consisting of the documents named in a(i-v) above.
 - c. costs.
2. The application sets out the grounds on which it is based, and is supported by an affidavit of Aye Aye Soe, the Appellant's General Manager, Sworn on September 16, 2022. It is deponed in the said affidavit:-
- a. that the appeal herein arises from the dismissal of the Appellant's objection application dated 4/5/2021 in the lower Court objecting to execution of the decree entered against the 2nd Respondent vide a judgment delivered on 25/2/2022.
 - b. that the additional evidence is directly relevant to the matter before the Court since it establishes who between the Objector/Appellant and the 2nd Respondent/Judgment Debtor owns the proclaimed goods at the demised premises, and who between the two is in lawful possession of the demised premises.
 - c. that evidence on possession of the demised premises, ownership of he proclaimed goods and evidence on actual business operation will impact upon the verdict in the appeal.
 - d. that the additional evidence sought to be adduced removes vagueness or doubt in the case and has direct bearing on the main issues in the appeal, of whether the execution should be levied upon the Appellant/Applicant.
 - e. that the evidence is not voluminous, and can easily be responded to by the Respondent in the appeal without any reasonable difficulty.
 - f. that the evidence was made available after the application in the lower Court and after the appeal had been filed, and could not be availed at the initial trial even upon exercise of due diligence.
 - g. that no party will suffer prejudice in the event that the documents are admitted.
3. The application is opposed by the 1st Respondent vide a Replying affidavit of Kitonga O Kiiva sworn on September 28, 2022 and filed herein on October 3, 2022. It is deponed in the said affidavit, *inter-alia*:-
- a. that the Appellant/Applicant filed a record of appeal on May 16, 2022, and that when the appeal came up for directions on May 17, 2022, the Appellant informed the Court that the record was complete, whereupon directions on disposal of the appeal were taken.
 - b. that the documentary evidence sought to be adduced were obtained after the fraudulent transfer of assets from the 2nd Respondent herein to the Appellant vide the Deed of Assignment dated November 23, 2020.
 - c. that the Appellant/Applicant failed to prove ownership of the proclaimed assets before the trial Court, and introducing documents for transactions that took place in the year 2022 for



purposes of proving ownership after dismissal of the objection application on 26/8/2021 in which the Appellant/Applicant failed to establish nexus with the proclaimed assets will be deeply prejudicial to the 1st Respondent.

- d. that the Appellant/Applicant's application is fatally defective as it seeks to introduce evidence which was in their possession and knowledge at the time it instituted Objector proceedings on 4/5/2021. That the said documents should have been brought to the attention of the trial Court during the hearing of the Objector Proceedings (application), but not at this stage.
 - e. that the Appellant/Applicant's decision to produce documents that were in its possession after a period of more than one year is an afterthought.
 - f. that the cardinal rule is that parties to an appeal should not be entitled to adduce additional evidence, whether oral or documentary, in the Court to which the appeal is preferred unless the Court from whose decree/order the appeal is preferred has refused to admit evidence which ought to have been admitted. That the evidence intended to be adduced herein was never rejected by the trial Court during the hearing of the application before it.
 - g. that the 1st Respondent mounted a challenge against the Deed of Assignment dated November 23, 2020, and the trial Court was convinced that property in the (proclaimed) goods had not passed from the 2nd Respondent to the Appellant as there was no credible evidence such as RTGS payment advice slip.
4. The Appellant/Applicant and the 1st Respondent filed written submissions for and against the application pursuant to the Court's directions in that regard, which I have considered. The 2nd Respondent indicated that it was supporting the application, but did not file any documents thereon. Indeed, the 2nd Respondent had all along indicated that it does not wish to participate in these proceedings.
 5. The application is expressed to be brought under Section 78(1)(d) of the Civil Procedure Act, Rule 38 of the Employment and Labour Relations Court (Procedure) Rules 2016, Article 50 of the Constitution and Sections 3A, 1A and 1B of the Civil Procedure Act. This Court's Rules, the Employment and Labour Relations Court (Procedure) Rules 2016, are silent on admission of additional evidence on appeal, and that could possibly explain why the Appellant invoked the provisions of Section 78 of the Civil Procedure Act. This Court has, over the years, invoked the provisions of the Civil Procedure Act and Rules made thereunder in situations where its Rules are silent on any particular matter of procedure, and has entertained applications brought under the said Act and Rules in such situations.
 6. Section 78(1) of the Civil Procedure Act provides as follows:-
 - “(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. Frame issues and refer them for trial
 - d. To take additional evidence or to require the evidence to be taken.”



7. The Supreme Court of Kenya in the case of *Mohamed Abdi Mahamud -vs- Ahmed Abdullahi Mohamed & 3 Others* [2018] eKLR set out the governing principles of allowing additional evidence as follows:-

“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 not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce 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. Where the additional evidence discloses a strong prima facie case of wilful deception of the Court
 - 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.
 - j. A party who has been successful 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.
 - 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.”
8. In the present case, the Appellant/Applicant filed Objector proceedings in the lower Court, objecting to attachment and sale of some movable properties in execution of the trial Court’s decree, passed by the trial Court against the 2nd Respondent herein and in favour of the 1st Respondent.
9. The Appellant did not, however, produce evidence that could have convinced the trial Court that the Appellant had, indeed, acquired ownership of the proclaimed chattels from the 2nd Respondent prior to the proclamation thereof. No proof of payment of the alleged ksh 20,000,000 consideration was



produced in the trial Court; and nothing was tabled in the trial Court to show that ownership of the proclaimed chattels had passed from the 2nd Respondent to the Appellant.

10. The Appellant/Applicant has not demonstrated that it could not have obtained the documentary evidence sought to be introduced with reasonable diligence for use at the hearing of the Objector proceedings that it had initiated, or that the documents were not within its knowledge. Indeed, the trial Court rendered itself as follows in its Ruling delivered on August 26, 2021, which is the ruling appealed against:-

“...further, there is no indication, as already noted that the transfer was complete and to this Court, the Objector, through the judgment debtor, intends to deprive the JD (sic) the chance to enjoy fruits of the judgment....”

11. The Appellant/Applicant has not told this Court where the documents sought to be introduced now were and why they were not exhibited and or produced in the trial Court during the hearing of the Objector proceedings. I have noted the following:-
- a. the payment advice from I& M Bank is dated 15/7/2022, almost a year from the date of the Ruling appealed against.
 - b. the internal transfer for ksh 19,000,000 and receipt in respect thereof are dated 3/12/2020 and 9/12/2020 respectively, about five months before institution of the Objector Proceedings in the trial Court. The Appellant/Applicant did not produce those documents in the trial Court, and for that reason failed to convince the trial Court that transfer of the proclaimed chattels had been completed.
12. The Appellant is now seeking to produce the documents as additional evidence on appeal without telling the Court why the documents were not produced in the trial Court in the first place, if at all they existed. The possibility of the said documents’ credibility being called to question is not far-fetched, and that could be the reason why the 1st Respondent submitted that the Appellant/Applicant “had possession of the said evidence since the filing of the Notice of Objection to Attachment on May 4, 2021, or alternatively were busy creating the evidence to suit their case.”
13. The present application was filed September 16, 2022, long after this Court had given directions on hearing of the appeal herein and called for written submissions thereon to be filed.
14. The Appellant/Applicant’s application herein does not meet the threshold set by the Supreme Court of Kenya (*Mohamed Ahmed* case (*supra*) for allowing the taking of additional evidence on appeal.
15. Failure by the Appellant/Applicant to prove that ownership of the proclaimed chattels had passed from the judgment debtor (the 2nd Respondent) to it and that it had paid consideration for them was fatal to its objection. It was held as follows in the case of *Capital Corporation Limited -vs- Ann Wamani & Another* [2018] eKLR:-

“in this case, the Objector did not provide any receipt to show that it was the person who purchased the attached items. Indeed, the Objector did not provide any document which would enable the Court to verify the Objector’s legal or equitable interest in the attached goods. All we have was a statement by Kinuthia Njoroge, saying that the attached movable property vest in Clean World Limited. In my considered view, the bare statement cannot be the basis for an objective determination by the Court, as to whether or not the attached goods belonged to the Objector.



Therefore, I find and hold that the Objector has failed to demonstrate that it has either a legal or an equitable interest in the attached property.”

16. In the case before the trial Court, the Appellant/Applicant exhibited a bare Deed of Assignment dated November 23, 2020, without any proof of payment of the ksh 20,000,000 consideration stated in the Deed of Assignment. The trial Court refused to find in favour of the Objector (the Appellant/Applicant).
17. Allowing the Appellant/Applicant to adduce the further evidence that it is seeking to adduce on appeal will be tantamount to allowing the Appellant/Applicant to fill in gaps in its evidence adduced in the trial Court, which will be highly prejudicial to the 1st Respondent.
18. Having said that, it is my finding that the Appellant/Applicant’s Notice of Motion dated September 16, 2022 is without merit. The same is hereby dismissed with costs.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23RD FEBRUARY 2023

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....for Appellant

..... for Respondent

