



**Manono v Sava Builders Limited (Appeal E005 of 2022)
[2023] KEELRC 1828 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELRC 1828 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E005 OF 2022**

**B ONGAYA, J
JULY 28, 2023**

BETWEEN

ALEX LUSOMA MANONO APPELLANT

AND

SAVA BUILDERS LIMITED RESPONDENT

RULING

1. The appellant filed the application by the notice of motion dated April 20, 2023 through C K Nyabuto Advocates. The application was brought under order 42 rule 27 & 28, order 51 rule 1 of the *civil procedure rules* & section 3A of the *Civil Procedure Act*.
2. The applicant prayed for orders as follows:
 - a. That the applicant be granted leave to adduce additional documentary evidence in this appeal as follows;
 - i. NHIF member data summary evidencing employment of the applicant by the respondent from the year 2014/2015 to the year 2019.
 - b. That the above additional documentary evidence be admitted by way of affidavit and the same be filed through a supplementary record of appeal.
 - c. That such further or other order be granted as this court deems fit and just in the circumstances of this appeal.
 - d. That costs of the application be in the cause.
3. The application was based on the affidavit of Alex Lusoma Manono and upon the following grounds:
 - a. Judgment in the matter herein was delivered on March 10, 2022 in favour of the respondent as against the applicant.



- b. On January 24, 2022 when the matter came up for hearing the applicant's advocate applied to supply the Honourable Court with the applicant's full NHIF data summary by attaching the same to the applicant's submissions.
 - c. The said application was disallowed.
 - d. In his judgment the Honourable magistrate found that there was no other document save for the NHIF summary for the month of August, 2019 and October 2019 that had been relied on by the applicant to prove that he worked for a longer period with the respondent and as a result dismissed the applicant's claim in its entirety.
 - e. It is worth noting that the NHIF data summary that had been produced was for the months of August, September and October a fact that the Honourable magistrate failed to note and consider while writing his judgment.
 - f. The additional evidence is therefore relevant as it proves that indeed the applicant worked for longer period with the respondent as it's for the period 2015 to 2019.
 - g. The applicant had challenge obtaining the whole NHIF data summary printout previously as NHIF insisted that they do not give a whole printout and it took the intervention of the advocates and producing the court's judgment for the same to be provided to the applicant.
 - h. Therefore, the whole NHIF data summary printout could not be available at the time of the decision by the trial court.
 - i. The additional evidence is of such weight that it will help the Court reach a fair and just decision in this appeal.
 - j. This is a Court of truth and any evidence that helps the court to arrive at the truth and admit justice should be entertained.
 - k. It is in the interest of justice that the additional evidence be admitted at this stage.
 - l. The respondent will not suffer any prejudice if the orders sought herein are granted.
 - m. The applicant on the other hand has suffered great prejudice and continues to suffer great prejudice for not receiving his entitled terminal benefits upon termination from employment.
 - n. Unless the prayed for orders are granted the applicant will continue to suffer prejudice.
 - o. It is therefore imperative that the said orders issue in favour of the applicant to safeguard its claim against the respondent.
4. The respondent responded to the application by filing the replying affidavit of Esther Kibore, counsel for the Respondent drawn by Lesinko Njoroge & Gathogo Advocates. The affidavit states that the gist of the application before court is that when the matter came up for hearing before the trial court on January 24, 2022, the appellant testified in chief and produced the list of documents dated 05.10.2020 to support his case. He was later cross examined, and on re-examination the appellant's advocate applied to file further documents so as to fill in the gaps in the appellant's case that arose from the cross-examination, an application which was disallowed by Hon Kasavuli (PM).
5. Counsel states that this application is no more than an appeal against the ruling of Hon Kasavuli (PM) given on January 24, 2022 disallowing the filing of additional documents, the appellant having failed to exercise its right of appeal within the stipulated time.



6. That the application is wholly unmerited and does not meet the threshold set in law to introduce new evidence on appeal bearing in mind that the alleged NHIF data summary for the period from 2015 to 2019 was never filed or produced in the lower court, as such, the lower court did not refuse to admit the alleged evidence to afford the appellant the right to invoke the remedies provided for under order 42 rule 27(a). That the additional documentary evidence are documents which could have been obtained with exercise of reasonable diligence, and that the appellant has not demonstrated by evidence the alleged challenges he faced, and due diligence he undertook, and the alleged interventions by his advocates to access and produce the documents that he now seeks to introduce, particularly because the NHIF data summary is in essence personal documents which can be availed on request.
7. That by proposing to attach the complete data summary to the submissions which proposal was declined by the lower court, the appellant confirms that the documents that he now intends to adduce on appeal were in his possession and had inexplicably not been filed and produced in the lower court. The additional documents marked ALM-3 is materially different from the data summary produced in the lower court and neither has it been certified thus fortifying the respondent's assertion that the document is a forgery.
8. It is the respondent's case that the appellant's aim is to fill in the evidential gaps that arose during cross-examination, and that there would be no end to litigation and it would be unfair and greatly prejudicial to the respondent if the appellate court's power to take additional evidence is improperly used to allow the appellant who has been unsuccessful at the trial to patch up the weak points in his case, fill up the omissions and improve his case by calling further evidence. The respondent insists that the appellant has not demonstrated sufficient cause why this court should exercise its limited discretion in the appellant's favour.
9. Parties filed final submissions on the application. The Court has considered all the material on record. The Court returns as follows.
10. The material before the Court shows that the applicant applied at the trial Court to produce the purported NHIF documents but the trial Court rejected that application. As urged and submitted for the respondent, the proper action was to appeal against the trial Court's refusal for the applicant to attach the documents on the submissions or to apply for review of that decision by the trial Court as may have been elected. The Court returns that the application is indeed an abuse of Court process as it is a cunning appeal against the trial Court's decision.
11. The Court further returns that as urged for the respondent, the purported new evidence is not fresh at all because with due diligence the same ought to have been produced appropriately before the trial Court in accordance with the rules of the Court. It was correctly declined by the trial Court because production of the documents attached on submissions as was urged before the trial Court was not the way to proceed in filing documents and invariably, the respondent would have been seriously prejudiced to see the documents in the submissions without an opportunity of challenging them at the trial. The Court follows holding of the Supreme Court in *Kanyuira-Versus-Kenya Airports Authority* (petition 7 of 2017) [2021]KESC 7 (KLR) (CIV) (8 October 2021) (Ruling) thus: In paragraph 79 of our Ruling in the Mohamed Abdi Mahamud case (*supra*), the court declared the circumstances under which additional evidence may be admitted, expanding three-part test in *Ladd v Marshall* [*supra*] 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 would 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 the additional evidence;
- d. where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a 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 made aware of and procured the further evidence in the course of the trial is an essential consideration to ensure fairness and due process;
- h. where 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 the lacunae and filling 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 in the 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.”

The court also stressed that, in exercise of its absolute discretion, it will only allow additional evidence sparingly and with abundant caution on a case-by-case basis.”

12. In the instant case, the applicant clearly seeks to bring evidence that is not fresh, one that with due diligence would have been produced before the trial Court, one that was sought to be introduced contrary to rules of procedure but the trial Court correctly rejected it, and obviously seeks to fill the gaps exposed after the close of trial before the trial Court. The Court returns that the application must be rejected as an abuse of Court process and unmerited.
- 13 In conclusion the application is hereby dismissed with costs and parties to take directions for expeditious hearing and determination of the appeal.

SIGNED, DATED AND DELIVERED IN COURT AT MACHAKOS THIS FRIDAY 28TH JULY, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

