Sinohydro Corporation Limited v Gufu & 34 others (Appeal E001, E002 & E035 of 2022 (Consolidated)) [2023] KEELRC 2002 (KLR) (1 August 2023) (Ruling)

Neutral citation: [2023] KEELRC 2002 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU

APPEAL E001, E002 & E035 OF 2022 (CONSOLIDATED)

ON MAKAU, J

AUGUST 1, 2023

BETWEEN

SINOHYDRO CORPORATION LIMITED ..... APPELLANT

AND

ROB SALIM GUFU & 34 OTHERS ..... RESPONDENT

RULING

1. Before the Court is the Appellant's Notice of Motion dated June 12, 2023 brought under Rule 23 of the *Employment and Labour Relations Court Rules*, Sections 12(3) (viii) and 20(1) of the *Employment and Labour Relations Court Act*. The Application basically seeks the following orders:

    a. The Supplementary Record of Appeal dated June 12, 2023 filed by the Appellant be admitted and be deemed to be properly on record.

    b. The cost of this Application be in the appeal.

2. The Application is supported by an affidavit sworn by Zhang Yang, the Applicant's Chief Executive Officer, dated June 12, 2023 together with a bundle of documents annexed to the affidavit. In essence the Application seeks for leave to introduce new evidence that was not placed before the Trial Court. The said evidence entails documents that the Applicant allegedly sent to its then Advocates Messrs. Saluny Advocates LLP for purposes of defending its case but the Advocates left them out.

3. The Applicant avers that the alleged failure by its then Advocates greatly prejudiced it as the omitted documents that answered the Respondent's claim on underpayment, non-payment of leave earned and the holidays worked, and as a result, the Respondents unjustly enriched themselves at its expense.

4. The Applicant's argument is that the said documents would have enabled the trial court to reach a different finding. The documents includes the payroll indicating what was paid to the Respondents

and the proof of bank transactions. They contained details of annual leave and holiday compensation, house allowance and Notice payment.

5. However, the Respondents opposed the Application vide a Replying Affidavit sworn June 13, 2023 by their counsel Mr Amule Yeka. In brief, the counsel deposed that he was in conduct of the matter since the filing of the suit at the Trial Court and all the parties were present at the various stages of the case. He further deposed that the Applicant was granted ample time to file its documents, which were in its custody at the time of trial but the Applicant opted to not file the same.

6. Mr Yeka also deposed that the Applicant's witness was the same at the trial and in this Application and that he never raised the issue of missing documents nor seek leave to file supplementary documents at trial. To support the forgoing averment, Mr Yeka attached the Appellant's list of witnesses in the lower court which shows that Mr Zhang was the main witness.

Submissions

7. The Applicant submitted that this Court has the jurisdiction to entertain the instant application under section 12 of the *Employment and Labour Relations Court* (ELRC) Act. The applicant further relied on Section 78 of the *Civil Procedure Act*, and Order 42 Rules 27, 28 & 29 of the *Civil Procedure Rules* to urge that the court has the jurisdiction to allow adduction of new evidence in an appeal.

8. For further emphasis and support of its arguments, the Applicant relied on the Court of Appeal decision in *Mzee Wanjie and 93 Others vs A K Saikwa, A C Kanyarati, S W Kibogo and William Gachiringa* (1982-88) 1 KAR 462, and the Supreme Court decision in *Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 others* (2018) eKLR, where the superior Courts held that additional evidence was not meant to fill gaps in evidence or help a Plaintiff to make a fresh case on appeal but only because the evidence is needful.

9. In further submission, the Applicant sought to clarify that the new evidence is not meant to grant it an opportunity to make a fresh case as the documents are only meant to support its allegation made in the trial Court that the Respondents were paid all their salaries and other benefits.

10. It also submitted that the omission by its previous Advocates should not be visited upon them as they had done their due diligence in ensuring that they submitted all the requisite documents to the Advocates. In support of the claim that the mistake was on the part of the Advocates, the Applicant in its further Affidavit dated 14 June 2023 produced an email captioned Termination of Retainer Agreement with Saluny Advocates LLP and a letter to Saluny Advocates LLP dated 5 April 2023.

11. It is the Applicant's contention that the Respondent shall not suffer any prejudice if the evidence is admitted as there shall be not much time taken. The Applicant goes further to indicate that the taking of evidence will take less than a day.

12. On the other hand, the Respondent submitted that the parties were granted ample time to put their house in order and during the Pre-trial Conference held on 23 March 2021, all the parties confirmed they had filed all their pleadings and documents. As a consequence of the foregoing, directions were given for the matter to go for hearing and determination. Reliance was placed on the provisions of the *Civil Procedure Rules* under Orders 3, Rule 7 and 11 to urge for the dismissal of the application.

13. It was further submitted that the Applicant prosecuted its case from the beginning to the end and that at no point was there an indication that it was intending to seek leave to have additional documents evidence adduced before judgment or even after. The Respondent also argues that the essence of the provision of Order 3 and 7 of the *Civil Procedure Rules* is to eliminate trial by ambush.

14. Finally, the Respondent contended that the Applicant ought to have first made an Application at the Lower Courts and only approach this Court in the event that the Application at the Lower Court was not successful.

Issues for Determination and Analysis

15. Having considered the application, affidavits and the submissions made by the two sides, the following issues comment themselves for determination:

    a. Whether this Court has the jurisdiction to admit additional evidence.

    b. Whether the supplementary Record of Appeal meets the threshold for admission as new evidence

Jurisdiction

16. Section 12(1) of the *ELRC Act* donates both exclusive original and appellate jurisdiction to hear and determine employment and labour relations disputes. The section provides that: -

> " The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including —
>
> ..."

17. However, the whole Act is silent about the power of the court to allow adduction of new evidence at the appeal level. The same position obtains in the *ELRC procedure Rules, 2016*. Therefore, I seek guidance from the *Civil Procedure Act* and the Rules.

18. Section 78 of the *Civil Procedure Act* provides for the Powers of appellate court in the following terms;

> " (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 for a new trial"
>
> (emphasis added)

19. Order 42 Rules 27 of the *Civil Procedure Rules* which provides that:

> " (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—
>
> (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

(b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission."

20. Rule 28 then provides for the mode of taking additional evidence in the following terms:

> " Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred."

21. However, Rule 29 provides that the appellate court is to specify the limits of the additional evidence to adduced, thus:

> " Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified."

22. The foregoing provisions confirm that a court can admit new evidence during an appeal. However the evidence must meet certain threshold before admission. The court must also specify the limit of the evidence to be taken and the mode of taking it.

Threshold for admission of new evidence

23. The introduction of new evidence in an appeal ought not to be for the purpose of giving the concerned party an upper hand or to fill gaps in the appeal. Order 42 Rule 27 (1) sets out the legal thresholds which are to be met before additional evidence can be admitted during appeal:

a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

24. Case law has however added more thresholds. In *Tarmohamed & another vs Lakhan &Co* [1958] EA 567 the Court of Appeal cited with approval the decision in English case of *Ladd v Marshal* (1954) 1WLR, 1489 that:

> " to justify reception of fresh evidence or a new evidence, three conditions must be fulfilled: firstly, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence 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; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

25. In *Wanjie & another v Sakwa & others* [1984] KLR 275 at page 280, the Court of Appeal disallowed a request for adduction of additional evidence under rule 29 of the *Court of Appeal Rules* and held that:

> " This rule is not intended to enable a party who has discovered new evidence to import, it nor is it intended to 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. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

26. In the instant case, the Appellant contends that the documents were omitted by its former Advocates during the trial and the said omission caused it to lose the case as it was not able to prove its averments, to the required standard of proof, that it had paid all the Respondent's dues. Consequently, the applicant contended that its former advocates gave the Respondents an unfair match against it.

27. I have perused the applicant's pleadings at the lower court, and noted that that it only amounted to mere denials. Further that, the list of Documents filed by it included termination letters, a bundle of documents for PAYE, NHIF and NSSF payments, and a bunch of documents presumably, in Chinese language. The applicant admits that the documents intended to be adduced as additional evidence were in its possession and that it even gave its former advocates to file in court to prove that it had paid the respondents all what they were claiming before the trial court.

28. The Applicant has not tendered any proof that it forwarded the said documentary evidence to its former advocates as alleged. Further, there is no concrete explanation as to why the applicant never ensured that its former advocates filed the said crucial evidence if at all it instructed them to file the same in court. Assuming that the lawyer had been given the said documents and failed to file the same, what prevented DW1, Mr Zhang Yang, from requesting to produce the same during the hearing? Why did he chose to ignore the alleged crucial evidence until the matter was on appeal? The answer is simple, he is trying to patch up the gaps in in the appellant's case in the appeal.

29. As demonstrated above, by the *civil procedure rules* and judicial precedents, additional evidence during appeal is only allowed where the following legal thresholds are met:

    a. The trial court has refused to admit evidence which ought to have been admitted;

    b. The evidence is needed by the appellate court to enable it pronounce judgment, or for any other substantial cause;

    c. The additional evidence could not have been obtained with reasonable diligence for use during the trial.

30. The court is not satisfied that the application herein meets the legal threshold for admission of the new evidence contained in the Supplementary Record dated June 12, 2023. It is clear that this Application by the Applicant is an afterthought intended to circumvent the cause of justice and steal a match against the Respondents. Consequently, the Appellant's Notice of Motion dated June 12, 2023 is dismissed with costs to the respondents.

31. The appellant is now given 21 days from today to comply with directions given by the court on March 1, 2023, to file and serve written submissions to dispose of the consolidated appeals. The Appeals will be mentioned during a virtual court session on September 27, 2023 to take a date for judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 1ST DAY OF AUGUST, 2023.

ONESMUS N MAKAU

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 April 2020, this ruling has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE