



**Wilson v Imarisha Mabati Limited (Appeal E023 of 2021)
[2022] KEELRC 1228 (KLR) (21 July 2022) (Ruling)**

Neutral citation: [2022] KEELRC 1228 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E023 OF 2021
CN BAARI, J
JULY 21, 2022**

BETWEEN

MARY KAVINDU WILSON APPELLANT

AND

IMARISHA MABATI LIMITED RESPONDENT

RULING

1. The ruling herein relates to a Notice of Motion application dated May 31, 2022, brought pursuant to Section 20 (1) & (4) of the *Employment and Labour Relations Court Act* No. 20 of 2011, Sections 1A, 1B, 3, 3A, 78 (1) (2) of the *Civil Procedure Act*, and Order 51 of the Civil Procedure Rules. The Applicant seeks orders that:
 - i. The Applicant be granted leave to file a bundle of documents in support of its case.
 - ii. The Honourble Court admits the new documents as duly filed.
2. The application is premised on grounds in the face of the application and a supporting affidavit sworn by Aldrin Ojiambo, Counsel on record for the Applicant on May 31, 2022.
3. The Applicant avers that she wishes to adduce new documents in support of her case which evidence will assist the court to make a fair and just determination of the appeal.
4. The Applicant further avers that she was unable to adduce the attached documents for reasons that it was not aware of, and did not participate in the trial at the Lower Court for reason that the court process and pleadings were never served on her, thereby barring its participation in the trial.
5. The Applicant avers that the new documents are strongly likely to impact upon the verdict of this Honourable Court, and would have altered the verdict of the Lower Court had they been produced.



6. It is the Applicant's assertion that the documents are directly relevant and useful to this appeal as they have a bearing on the major issues in the suit such as whether the employment existed on probationary terms, whether the probationary period was extended amongst others. It is the Applicant's further assertion that the documents will be utilized to solely to fill gaps in evidence.
7. The Applicant avers that the documents are only five (5), constituting eight (8) pages and thus, are not voluminous nor will they trouble the Court in effectively adjudicating the matter. The Applicant contend that the significance of the new documents outweighs the need for the swift conduct of this appeal.
8. The Respondent/Appellant opposed the application through an unsigned further affidavit by Mary Kavindu Wilson filed in court on June 10, 2022. The Appellant states the Applicant/Respondent was dully served through its representative by the court process server named Timothy Maxwell Oyombera, and who swore an affidavit of service to that effect.
9. The Appellant/Respondent states that the Process Server clearly indicated that he met a Mr. Collins who was well know to him, and that he knew the signature appended to the Summons to Enter Appearance belongs to one Lewis Kipyegon.
10. It is the Appellant/Respondent's case that the Applicant/Respondent was all along aware of the pendency of the matter before the trial court and he should not be allowed to feign ignorance.
11. The Appellant/Respondent contend that the matter proceeded ex parte at the Trial Court, and Judgment of the court was based on the evidence availed before it and that the appeal is also based solely on the evidence which was placed before the trial court.
12. The Appellant contend that her advocate will not have an opportunity to interrogate and/or cross examine the new evidence which the Respondent wishes to sneak in and which will be prejudicial to her case.
13. The Appellant states that the Respondent had a right to make an application before the trial court or before this court to seek stay of proceeding and to set aside the judgment of the court so that the matter could have been heard afresh, but chose instead to participate in the appeal.
14. The application was argued orally by the respective Parties' Advocates on June 13, 2022, with Mr. Nyboma holding brief for Mr. Ojiambo for the Applicant/Respondent, and Ms. Kisaka representing the Respondent/Appellant.
15. Mr. Nyboma adopted the grounds in support of the application and the Affidavit in Support, and further prayed that the court in arriving at its decision in the matter be guided by the principles set by the Court of Appeal in the cases of *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & 3 others* [2018] eKLR and *Raila Odinga & 5 others v IEBC & 3 others* [2013] eKLR which require that new evidence should be relevant to the suit.
16. Counsel argued that the Appellant was aware that her contract was probationary and her termination was not unfair. It is counsel's assertion that the documents they seek to introduce could influence the court's decision, and that for reason that the Respondent was not aware of the existence of the suit, they could not produce the documents at the trial court for rebuttal.
17. The Respondent argue that summons to enter appearance and the notification of entry of judgment were not served upon her, and that it is a requirement that it be served before judgment is entered.



18. The Respondent further argue that the evidence is credible and that she is not the unsuccessful party even after the Appellant proceeding ex parte.
19. The Counsel for the Appellant also adopted the affidavit filed by the Appellant and the affidavit of service by the process server. It is the Appellant's assertion that the trial court entered judgment against the Respondent and the matter proceeded for formal proof.
20. Counsel further submitted that the Respondent did not seek to stay proceedings in the matter, and neither did they seek to cross-examine the process server.
21. It is argued for the Appellant that it is prejudicial to her to allow the Respondent to file the documents at this point and that the purpose of Order 11 is to cure such mischief.

Determination

22. I have considered the application, grounds, Supporting Affidavit, the annexures and the Appellants affidavit and the Counsels oral submissions. The issue for determination is whether the Applicant/ Respondent has made out a case for leave to be granted to file evidence at the appeal stage.
23. Section 78 of the *Civil Procedure Act* Cap 21 states:
 - (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 charged conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.”
24. In *Mohamed Abdi Mohamed v Ahmed Abdullabi Mohamed & 3 others* [2018] eKLR, cited by the Applicant/Respondent, the Supreme Court laid out guidelines on admission of additional evidence before Appellate Courts, 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 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 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) Whether 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 lacunae and filling gaps in evidence; (j) The Court must find the further evidence needful;
- (k) A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.
- (l) 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.

[80] 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.”

25. The Applicant/Respondent’s reasons for not filing the documents now sought to be admitted at the appellate stage, is that she was not served with summons to enter appearance and the notification of entry of judgment by the Trial Court. The Appellant on her part states that the Applicant was served and has produced an affidavit sworn by the process server who effected service upon the Applicant.
26. The evidence the applicant seeks to be admitted is the Respondent/Applicant’s witness statement, an acknowledgment note of the Human Resource Manual, a copy of an email dated 6/3/2019 indicating that the Applicant extended the probationary period and an allowance Schedule dated April 25, 2018, showing that the Applicant paid statutory contributions on the Appellant’s behalf.
27. The question for this court is whether the evidence sought to be adduced meets the criteria for adduction of additional evidence as stipulated in the cited decision of the Supreme Court. In *Raila Odinga and 5 others v IEBC & 3 others* [2013] eKLR, the Supreme Court had these to say on reception of additional evidence:

“The other issue the Court must consider when exercising its discretion to allow a further affidavit, is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other Party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter.....In the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of addition evidence”



28. The question of whether this additional evidence will impact the result of the case, is a matter to be determined on merit upon the evaluation of the additional evidence against the other evidence on record.
29. The issue in contention is whether the Appellant/Respondent herein served the Applicant with the summons to enter appearance and the subsequent notification of entry of judgment. The Applicant/Respondent herein did not defend their case at all. The evidence they seek admitted is not new evidence, but their entire defence to the suit including a witness statement.
30. As correctly submitted by counsel, the evidence the Applicant seeks to be admitted is not voluminous, it is just about five (5) pages. Further, the evidence seeks to set clearly the nature of the employment relationship that existed between the parties herein and which evidence has a direct bearing on the main issue in the appeal pending before this court.
31. In considering an application to admit new evidence at an appellate stage, the court is to act cautiously so as not to occasion prejudice to either of the parties to the suit. In *IEBC v Robert K Nyengi* [2015] eKLR the Supreme Court held that it is essential for a Court in exercising its discretion to admit additional evidence to ensure no prejudice is occasioned to a party.
32. Consequently, I find and hold that the instant application substantially satisfies the criteria set by the various decisions of the superior courts, and Section 78 of the *Civil Procedure Act* for grant of leave to allow the Applicant to file new evidence in this matter. To this end, I grant orders as follows:
 - a. The Applicant be and is hereby granted leave to file a bundle of documents in support of her case.
 - b. That the new documents be and are hereby admitted as duly filed.
 - c. The Appellant is at liberty to cross-examine the Respondent on the additional evidence filed.
 - d. The costs of the application shall be costs in the appeal.
33. Orders accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 21ST DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Nyboma Present for the Respondent/Applicant

Ms. Kisaka Present for the Appellant

Ms. Christine Omollo-C/A

