



Discount Capital Limited v Nyambwano t/a Ganador Investments & another (Commercial Appeal E107 of 2022) [2024] KEHC 3308 (KLR) (Commercial and Tax) (18 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3308 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E107 OF 2022
JWW MONG'ARE, J
MARCH 18, 2024**

BETWEEN

DISCOUNT CAPITAL LIMITED APPELLANT

AND

**EVANS GICHANA NYAMBWARO T/A GANADOR INVESTMENTS 1ST
RESPONDENT**

AGRICULTURAL AND FOOD AUTHORITY 2ND RESPONDENT

(Being an Appeal against the entire Ruling and consequential Orders delivered by Resident Magistrate, Hon. C. A. Okumu on 15th July 2022 on the 2nd Respondent's Application dated 17th May 2022 in Nairobi Small Claims Court Commercial No. E1126 of 2021)

JUDGMENT

Brief Background

1. The Appellant herein was the Claimant in the Trial court in Nairobi Small Claims Court Commercial No E1126 of 2021, where it sued the Respondents by statement of Claim dated 13th September, 2021 seeking judgment against the Respondents jointly and severally for the contractual sum of Kshs 1,000,000/= plus costs and interest until payment in full.
2. The Claimant contended that the 1st Respondent approached it vide a credit line application form dated 27th February, 2016 seeking to enhance an existing invoice discounting facility of Kshs 800,000/= to the sum of Kshs 1,027,200/=. The Claimant agreed to enhance the 1st Respondent's credit limit by Kshs 1,000,000/= by a letter of offer dated 31st August, 2016, laying down the terms and conditions of the facility. As security the 1st Respondent offered a personal guarantee of Kshs 800,000 and letters



- of assignment over 3 outstanding invoices. The claimant contends the sum was advanced to the 1st Respondent on 2nd September, 2016 wherein it defaulted in payment and fell into arrears.
3. Denying the claim, the 2nd Respondent filed its response to the claim in which it alleged it was a stranger to the receipt of money alleged to have been received by the 1st Respondent under the invoice discounting loan. In the statement of defence, it denied the receipt of Kshs 292,320/= and Kshs 929,000/= done on 12th July, 2016 and 24th August 2016 respectively. It denied the acknowledgment receipts. The 2nd Respondent alleged fraud on the 1st Respondent and indicated that the matter of fraud was pending investigations.
 4. After due consideration of the evidence, the trial court on 31st March, 2022, delivered judgment in favour of the Claimant for the sum of Kshs 1,000,000 plus costs of the suit and interest. The Claimant proceeded to execute the decree through Haron Guantai T/a Hudlink Auctioneers when consequently, the Respondent filed the application dated 17th May, 2022 seeking to review the judgment of the trial court on discovery of new evidence and attached a copy of the forensic document examiner's report from the Director of Criminal Investigations.
 5. In its Ruling dated 15th July, 2022, the trial court ordered that the case be reopened to allow the production of the report. Aggrieved by the said decision the Appellant filed the instant appeal by the Memorandum of appeal dated 7th August 2022. citing the following 4 grounds:-
 - i. The learned Magistrate erred in fact and in law by allowing the 2nd Respondent's application for review of the trial Court's judgment delivered on 31st March 2022 despite the 2nd Respondent's failure to meet the legal threshold for the grant of such an order.
 - ii. The learned Magistrate erred in fact and law by affirming that the 2nd Respondent had met the legal threshold for review of the trial Court's judgment despite its failure to adduce the alleged new and importance evidence that it had discovered for examination by the trial Court.
 - iii. The learned Magistrate erred in fact and in law by considering the 2nd Respondent's application for review at all notwithstanding that the 2nd Respondent had filed its application outside the envisaged thirty (30) day statutory timeline under Section 41 of the Small Claims Act, 2016.
 - iv. The learned Magistrate erred in fact and law by wholly misdirecting the application of the law as pertains an order of review and therefore irregularly set aside the trial Court's judgment delivered on 31st March 2022 against the Respondents.
 6. By the directions of this court, the appeal was canvassed by way of written submissions.

Analysis And Determination

7. I have carefully considered the grounds of appeal, the trial court record as well as the submissions filed by the parties. The issue in dispute is whether the trial magistrate erred in her ruling in directing the re-opening of the case.
8. The Appellant contends the trial magistrate erred in re-opening the case on the bases of the new evidence contrary to the provisions of Section 41(1) and (2) of the *Small Claims Court Act* are couched in mandatory terms whereas the application for review was brought 48 days after the delivery of judgment. The claimant contends the application for review was dead on arrival and the trial court ought not to have entertained the same without addressing itself on the period of delay.
9. On the other hand, the 2nd Respondent avers the trial court properly evaluated the law in and evidence and judiciously exercised its discretion in considering the application.



10. The Provisions of Section 41 (1) and (2) of the [Small Claims Court Act](#) reads as follows: -
1. An Adjudicator may, on application by any aggrieved party or on his or her own motion, review any order of the Court on the ground that: -
 - a. The order was made *ex-parte* without notice to the Applicant;
 - b. The claim or order was outside the jurisdiction of the Court
 - c. The order was obtained fraudulently;
 - d. There was an error of law on the face of the record; or
 - e. New facts previously not before the Court have been discovered by either of the parties.
 2. The application referred to under subsection (1) Shall be made within thirty days of the order or award sought to be reviewed or such other period as the court may allow.
11. The provisions of Section 41(2) of the Small Claims Court empower the court to enlarge time within which to consider an application for review.
12. Further, Section 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 of the [Civil Procedure Rules](#) provides for review of an order by the court
- Section 80 provides that:
- Any person who considers himself aggrieved—
- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
 - b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.
- Under Order 45 rule 1 provides: -
- Any person considering himself aggrieved—
- (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
13. The application for review before the trial court was on the basis of discovery of new evidence.
14. In its application for review of the judgment the 2nd Respondent attached a Forensic Document Examiner's Report dated 31st January 2022 in which it alleged that some of the Appellant's documents adduced during the trial were a forgery by the 1st Respondent and as such liability could not attach to the 2nd Respondent. The 2nd Respondent attributes the delay in filing the application for review upon receiving the new evidence which could not be procured before delivery of judgment.



15. An applicant seeking review of a judgment is required to demonstrate that the evidence it seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case and lastly the evidence must be such that, if admitted, it would probably have an important influence on the result of the case.
16. The case of *Mzee Waujie & 93 others v A K Saikwa & 3 others* (1982-88) 1 KAR held that:-

“In order for the Court to consider admitting new evidence, it has to be shown that the evidence which the parties seek to be admitted was not or could not have been obtained by reasonable diligence at the time of the trial, or it has an influence on the outcome of the case, or that it must be presumed to be credible”
17. Similarly, in *Hasan Hashi Shirwa v Swalahudin Mohamed Ahmed* [2011] eKLR it was held that “Re-opening a case is not an impossibility, but there must be cogent reasons for re-opening, and not because a party has suddenly had a brain wave and spotted a loophole in its case, which it can now seal by re-opening the case.”
18. The decision whether or not to re-open a case is purely left to the realm of judicial discretion to be exercised judiciously and in the interest of justice. In the instant case the trial adjudicator evaluated the forensic report adduced and exercised her discretion in ordering a re-opening of the case. In doing so the judicial officer ought to be guided by Article 50 of the *Constitution* which protects the rights of parties to a fair hearing and ensure that no prejudice will be occasioned on either party. see the case of *Samuel Kiti Lewa v Housing Finance Company Limited & another* {2015} eKLR. “ In exercising that discretion, the Court is duty-bound to ensure that the proposed re-opening of a party’s case does not embarrass or prejudice the opposite party.”
19. The nature of the evidence sought to be adduced is new and was not within the custody of the Respondents. The 2nd Respondent demonstrated to the trial court that it had severally written to the DCI requesting for the report before trial was concluded but efforts to procure the report were futile. In the circumstances, the 2nd Respondent cannot be faulted for the failure to obtain the report before or during the trial.
20. The Supreme Court in the case *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others* (2018) eKLR set out the governing principals 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 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 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 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. 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 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.”

21. In considering an application for review it is apparent that the court determines if the new evidence is directly relevant to the matter before the court as well as be in the interest of justice. The court also ought to satisfy itself that the new evidence would influence or impact upon the result of the verdict. The Applicant also needs to demonstrate that the new evidence 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.
22. I have considered the impugned ruling and considering that the trial court addressed herself in all the pertinent issues that relates to a review of a judgment on discovery of new facts, I am not persuaded that the trial court erred in ordering for a retrial of the case.
23. I say so as I assess the balance of prejudice to be suffered by the parties. In doing so I consider right of the Appellant to enjoy the fruits of the judgment and the corresponding right of the 2nd Respondent to be accorded a fair hearing. In the trial court’s judgment delivered on 31st March, 2022 the court found in favour of the Appellant against the Respondents jointly and severally for the sum of Kshs 1,000,000/ = plus cost of the suit and interest.
24. The Appellant is in the process of executing the judgment and I find that if the Appellant is allowed to execute the judgment the 2nd Respondent will suffer prejudice and will be condemned unheard. it is apparent that the 2nd Respondent raised the defence of fraud and disputed signing some invoices.
25. Be as it may, I find that it is in the interest of justice that the 2nd Respondent be allowed to adduce the Forensic Report in order for the trial court to arrive at a just determination of the issues in dispute. This will only be achieved by re-opening the case to allow the introduction of the new evidence.



26. The upshot of the above finding therefore is that I am not persuaded that the Appellant trial Magistrate erred in re-opening the case. The resultant is that the appeal herein is bereft of merit and the same is dismissed with costs to the Respondents.

27. I direct that the trial file be remitted back to the trial court before a different adjudicator for re-trial on merit.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF MARCH, 2024

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

No appearance for the Appellant.

Mr. Pamba for the 2nd Respondent.

Amos - Court Assistant

