



**Mutichilo v Council of Legal Education (Civil Appeal E282 of 2022)
[2024] KEHC 16134 (KLR) (Civ) (20 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16134 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E282 OF 2022**

**CW MEOLI, J
DECEMBER 20, 2024**

BETWEEN

MIKE MUTICHILO APPELLANT

AND

COUNCIL OF LEGAL EDUCATION RESPONDENT

(Appeal from Legal Education Appeals Tribunal)

RULING

1. Before the court for determination is the Notice of Motion brought by Mike Mutichilo (hereafter the Applicant) and dated 19.06.2024. The prayers therein are as follows:
 1. Spent.
 2. This Honourable Court be pleased to grant leave to the Applicant to introduce additional evidence, namely Letters of Confirmation of the Appellant’s qualification dated 18.06.2024, which document is material to the determination of the issues raised in Civil Appeal Number 282 of 2022.
 3. Upon grant of prayer 2) hereinabove, this Honourable Court be pleased to order that the evidence annexed to the supporting affidavit sworn by Mike Mutichilo filed herewith, namely Letters of Confirmation of the Appellant’s qualification dated 18.06.2024, be deemed as part of the record.
 4. Costs of and incidental to the application abide the result of Civil Appeal Number 282 of 2024.



2. The application is expressed to be brought under Sections 1A, 1B, 3, 3A and 78(1) of the Civil Procedure Act (CPA); Order 51, Rule 1 of the Civil Procedure Rules (CPR); and Article 159 of the Constitution of Kenya. It is supported by the grounds laid out on its face and the affidavit of the Applicant, who stated that the present appeal lies against a decision rendered by the Legal Education Appeals Tribunal (the Tribunal) dismissing his appeal relating to denial of admission to the Kenya School of Law advocates training program. The Applicant stated that he is a holder of LL.B and LL.M degrees from Southern Federal University in Russia, which degrees were obtained pursuant to scholarships awarded to him by the Ministry of Education.
3. Further, that upon completion of his studies, he returned to Kenya and made an application to the Kenya School of Law for admission into the Advocates Training Programme, but that his said application was rejected by Council of Legal Education (hereafter the Respondent) on the grounds that he did not possess the requisite qualifications within the commonwealth jurisdiction to qualify for admission into the said program. He further stated that being dissatisfied with the above decision, challenged it by way of appeal before the Tribunal; that the Tribunal delivered its decision essentially finding that while there was no legal requirement that one must possess a law degree from a commonwealth jurisdiction in order to be admitted to the Kenya School of Law, the Applicant was nonetheless unqualified for admission into the program on the basis that he did not possess LL.B qualifications; and which determination he claims was against the evidence tendered before the Tribunal. Including the confirmation letters emanating from the Commission for University Education (CUE) and the Russian Embassy to Kenya, confirming the Applicant's academic qualifications above.
4. It is the Applicant's averment that despite the above correspondence, the Tribunal declined to allow his admission to the Kenya School of Law on grounds that it had no way of authenticating the letters relied on by the Applicant. Thus, he asserts that it is imperative for the additional evidence cited in the prayers in his Motion, to be produced, as it verifies and confirms his academic qualifications. That the evidence in question was obtained from CUE, being the body mandated to recognize and equate degrees and related academic qualifications awarded by foreign institutions.
5. The Applicant further averred that the issues arising on appeal arise from an anomaly on his certificates, which has since been rectified by the CUE, hence the Motion. The Applicant in closing stated that the Respondent will not suffer any prejudice if the orders sought in the Motion are granted.
6. The Motion was opposed by the Respondent who relied on the replying affidavit sworn by its Acting Chief Executive Officer (CEO) Jennifer Gitiri. Therein, she deposed that the Motion is an afterthought, is misconceived and is bad in law. That in the exercise of its legal mandate, the Respondent deemed the Applicant's degree unrecognizable as a degree in law and therefore rendered him unqualified to enroll for the Advocates Training Program (ATP) offered at the Kenya School of Law, which decision was upheld by the Tribunal. She further deposed that the additional evidence sought to be introduced at this stage does not constitute any new evidence since the Applicant had every opportunity to obtain it previously and the same could have been tendered during the Tribunal hearings. She asserts that the additional evidence sought to be introduced purports to convert the terms "Bachelor's in Legal Studies and Master's in Legal Studies" to "Bachelor's Degree in Law and Master's Degree in Law", a matter constituting the main contention before the Tribunal.
7. She adds that contrary to the averments in the Motion, it is the Respondent (and not CUE) that has the mandate to recognize and approve legal academic qualifications obtained outside the Kenyan jurisdiction and in the circumstances, the additional evidence sought to be adduced would raise new weighty issues which ought to have been canvassed before the Tribunal. Moreover, the evidence in



question was supplied and obtained after delivery of judgment by the Tribunal and would therefore constitute the introduction of entirely new evidence. Besides, it has not been demonstrated that the Applicant exercised any diligence in obtaining the said evidence during the pendency of the matter before the Tribunal; or to show that the same was unavailable at all material times previously. That the orders sought would, if granted, occasion grave prejudice to the Respondent and the deponent therefore urged that the Motion be dismissed with costs.

8. The court directed the parties file written submissions on the Motion. Counsel for the Applicant anchored his submissions on Section 78 of the CPA; Order 42, Rules 27, 28 and 29 of the CPR and the decisions in *Kyenze v Kithini & 3 others* [2022] KEHC 10175 (KLR) and *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad, Ahmed Muhumed Abdi, Gichohi Gatuma Patrick & Independent Electoral Boundaries Commission* [2018] KESC 62 (KLR). Regarding the principles governing the admission of additional evidence. Counsel submitted that the power to grant leave to adduce additional evidence on appeal is discretionary and that such discretion ought to be exercised judicially and sparingly, as held in the case of *Patriotic Guards Ltd v James Kipchirchir Sambu* [2018] KECA 799 (KLR). That in the present instance, the Applicant has a constitutional right to be permitted to tender the subject additional evidence.
9. Counsel further submitted that, it would serve the interest of justice for the court to allow the Applicant to adduce the relevant additional evidence which will greatly assist the court in making a conclusive and just determination in the appeal. Adding that the said evidence would have been admissible in the Tribunal proceedings for purposes of bringing clarity on the crux of the dispute revolving around the Applicant's academic qualifications.
10. It is equally the submission by counsel that the said evidence also constitutes a clarification on the error made by CUE in its previous correspondence regarding the Applicant's academic qualifications, and that the inadvertence on the part of CUE ought not to be visited upon the Applicant. Ultimately, counsel argues that the evidence to be adduced is relevant to the appeal proceedings and further constitutes a key ground in the memorandum of appeal herein. Hence, it is only fair for the court to exercise its discretion in the Applicant's favour by granting the orders sought in the Motion.
11. On her part, the Respondent's counsel also based her submissions on the authority of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad, Ahmed Muhumed Abdi, Gichohi Gatuma Patrick & Independent Electoral Boundaries Commission* [2018] KESC 62 (KLR) as well as the case of *Safe Cargo Limited v Embakasi Properties Limited, Commissioner for Lands & Attorney General* [2019] KECA 982 (KLR) on the governing principles regarding the admission of additional evidence on appeal. She contended that it would not be in the interest of justice at this stage to allow the additional evidence, since the Applicant had every opportunity to adduce the same before the Tribunal but did not. Counsel further contended that by seeking to adduce the evidence in question, at this late stage, the Applicant is essentially seeking to introduce new issues in a bid to fill in the gaps of his case before the Tribunal.
12. Counsel equally contended that if adduced, the evidence in question will likely introduce confusion, raising as it does, a challenge concerning the respective rightful mandates of the Respondent and CUE. In conclusion therefore, it was submitted that the Motion should not be allowed.
13. The parties' respective counsels further highlighted their submissions. Counsel for the Applicant, submitted on his part that the additional evidence sought to be adduced forms the crux of the appeal as it clarifies the issue of the Applicant's academic qualifications. He relied on Vol. 11 of the Halsbury's Laws of England as cited in his submissions and contended that the matter before the Tribunal was determined primarily on the basis of two (2) letters issued by CUE which erroneously bore similar



- dates, a matter now clarified by way of the additional evidence sought to be tendered. He asserted that the Tribunal had the power to call for the said clarification pursuant to Section 31 of the Legal Education Act, Cap. 16B Laws of Kenya, but did not. That the evidence sought to be adduced would have been admissible before the Tribunal, in any event, and will assist in dispelling any ambiguities in the matter. That no prejudice will be visited upon the Respondent if the orders sought are granted.
14. Counsel for the Respondent relying on the averments made in the replying affidavit of Jennifer Gitiri, argued that the additional evidence sought to be adduced will create raise confusion as regards the respective mandates of the Respondent and CUE, yet the question of the respective institutions' mandates was fully canvassed before the Tribunal, with reference being made to Section 6(p) of the Universities Act, and Section 8 of the Legal Education Act. That in the circumstances, the court ought to reject the Motion.
 15. In rejoinder, the Applicant's counsel dismissed the submissions made on behalf of the Respondent as having no bearing in law. Stating that the respective mandates of the Respondent and CUE are clearly set out in the relevant statutes and confirming that the question was canvassed before the Tribunal. And has further been addressed in the case of Nyagah & another v Egerton University & 3 others [2024] KEHC 10024 (KLR).
 16. The Court has considered the material canvassed in respect of the Motion, as well as the rival written and oral submissions. The Applicant is essentially seeking by his second prayer in the motion to produce additional evidence in the appeal, namely, the letter of confirmation of the Applicant's qualifications and dated 18.06.2024. This same prayer was included in the Applicant's motion dated 19.02.2024 primarily seeking to reinstate his appeal earlier dismissed for want of prosecution following a notice to show cause heard on 1.02.2024 before Majanja J (as he then was). The order allowing the motion for reinstatement of the appeal made on 13.04.2024 did not address the prayer seeking the introduction of additional evidence, and as no objection has been raised to the second prayer in the present motion, the court will proceed to address it.
 17. I must however state that prayer (3) of the present motion as crafted is problematic as it appears to envisage the "deeming" of the additional evidence as "part of the record" upon leave being granted. From my reading of Section 78 of the CPA and concomitant Rules of the CPR, where a court allows production of new or additional evidence on appeal, such evidence would ordinarily be adduced through a proper formal hearing by the relevant witness, in conformity with the Evidence Act and the Civil Procedure Rules.
 18. That said, Section 78 of the CPA which provides that:
 - "(1) Subject to such condition 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 conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

19. The procedural Rules that relate to Section 78 (supra) provide under Order 42, Rule 27 of the CPR 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 reasons for its admission.”

20. The Supreme Court in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others* (2018) eKLR spelt out the principles for consideration in an application seeking admission of 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 wilful 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. As a matter of general principle, appellate courts are reluctant to allow parties to adduce additional evidence on appeal except where exceptional circumstances are demonstrated. Thus, in *Tarmohamed & Another v Lakhani & Co* (1958) EA 567 the Court of Appeal pronounced itself as follows on the matter:

“ [E]xcept in cases where the application for additional evidence is based on fraud or surprise... to justify reception of fresh evidence or a new trial, three conditions must be fulfilled: first, 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.”

22. Further, in *National Cereals and Produce Board v Erad Supplies & General Contracts Ltd* (CA 9 OF 2012) and the *Administrator, H H The Agha Khan Platinum Jubilee Hospital v Munyambu* (1985) KLR 127 the Court of Appeal emphasized that the admission of additional evidence at the appeal stage must be anchored on exceptional circumstances which would constitute sufficient reason.

23. Additionally, the Court of Appeal in *Wanjie & others v Sakwa & others* (1984) KLR 275 considered at length the rationale for the obvious restriction of reception of additional evidence in the following terms:

“ [T] his rule is not intended to enable a party who has discovered fresh evidence to import it, nor is it intended 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.”



24. Hancox JA (as he then was) stated in the above case above that the requirement for reasonable diligence is aimed at discouraging litigants from waiting until the appeal stage to seek to tender additional material which should have been considered by the trial court.
25. As earlier mentioned, the additional evidence which the Applicant seeks to tender at this stage consists of letter of confirmation of the Applicant's qualifications and dated 18.06.2024, which letter is supposedly aimed at offering clarification and authentication of the Applicant's academic qualifications obtained from Southern Federal University in Russia.
26. Looking at the record but without delving into the merits of the appeal at this stage, the court noted that the appeal before the Tribunal was triggered by a decision arrived at by the Respondent, declining to issue the Applicant with the requisite clearance certificate to enable him enroll for the ATP offered by the Kenya School of Law. Upon hearing the appeal, the Tribunal by way of its judgment delivered on 28.07.2021 affirmed the above decision by the Respondent on the basis of its finding that the Applicant holds a Bachelor's degree in Legal Studies and not an LL.B which constitutes one of the minimum requirements for admission into the ATP.
27. Subsequently, the Applicant filed an application dated 18.01.2022 seeking review and/or varying of the judgment by the Tribunal. The grounds upon which the review motion was anchored were cited as 'error apparent on the face of the record' and 'discovery of new and important evidence' which evidence the Applicant sought to admit at that stage. By its ruling delivered on 8.04.2022, the Tribunal upon finding that the Applicant had not met the threshold for review, dismissed the aforesaid application with no order as to costs.
28. Regarding the document sought to be adduced as additional evidence, it is the court's considered view that the Applicant has firstly failed to demonstrate that the subject document could not have been obtained previously even with the exercise of all due diligence. More so as the proposed evidence concerns the Applicant's academic qualifications which form the crux of the dispute herein. Furthermore, and as earlier observed, the proposed documentary evidence is purportedly aimed at rectifying other documentation previously produced as exhibits before the Tribunal; namely the letters issued by CUE and dated 30.09.2020.
29. The proposed material was or ought to have been within the Applicant's knowledge at all material times and if any rectification or clarification was required, the same ought to have been sought at the earliest opportunity during pendency of the appeal before the Tribunal. The delay of over four (4) years in seeking and/or obtaining the proposed evidence since issuance of the documentation sought to be clarified, and post the Tribunal's judgment appears unjustified and inexcusable. In any event, the record shows that the Applicant had equally sought a review of the impugned judgment before the Tribunal and further sought leave to introduce some additional evidence under the guise of 'new and important evidence' but the Tribunal declined to grant the order for review.
30. In addition, it is clear from the record of the Tribunal proceedings and rival arguments of the parties before this court that the additional evidence proposed to be introduced on appeal goes to the heart of the dispute herein from inception and will likely therefore prejudice the Respondent, if allowed. Looking at the gist of the proposed documentary evidence in light of the decision of the Tribunal, it appears that rather than clarifying or removing any vagueness, surrounding the key issue relating to the Applicant's academic qualifications, the proposed evidence is really intended for the ulterior purpose of removing lacunae and filling in gaps in the Applicant's evidence, at best, or at worst, to enable the Applicant to make out a fresh case at the appeal stage. Such an outcome cannot be said to be in the interest of justice, and as stated in *Wanjie & Others vs Sakwa* (supra) litigation would never end if



courts were to liberally grant leave to adduce new evidence on appeal, which effectively enabled parties improve on their cases in the court appealed from.

31. In the court's considered view, no exceptional circumstances have been demonstrated here to justify the granting of the leave sought by the Applicant and resultantly, the Notice of Motion dated 19.06.2024 is without merit.
32. Having settled the matter of the motion, it would be remiss of the court to fail to highlight several anomalies detected in the course of perusing the record herein while preparing this ruling. Some of these anomalies are grave and must be addressed before this appeal can proceed further.
33. First, the memorandum of appeal dated 4.05.22 and filed on 6.05.2022 challenges both the Tribunal judgment of 28.07.2021 and the subsequent Tribunal ruling on the Applicant's review motion, delivered on 8.04.2022. In the case of Chairman Board of Governors Highway Secondary School v William Mmosi Moi [2007] eKLR, the Court of Appeal stated that the two remedies of appeal and review cannot be pursued either concurrently or sequentially in respect of the same decision. Besides, in so far as some of the grounds and prayers in the memorandum of appeal dated 4.05.2022 purport to challenge the judgment of 28.07.2021, the appeal is incompetent for being filed out of time and without leave. In addition, the Applicant has included in his record of appeal what is purported to be an "affidavit in support of the appeal" supposedly sworn prior to the appeal, on 20.05.2021. There is no provision in the CPR that entitles an appellant to file such affidavit with his appeal.
34. Thus, the court will make the following orders in conclusion: -
 - a. The Notice of Motion dated 19.06.2024 is hereby dismissed with costs to the Respondent.
 - b. The grounds of appeal and prayers in the memorandum of appeal dated 4.05.2022 touching on the Tribunal judgment of 28.07.2021 are incompetent and the Appellant is hereby directed to file an amended memorandum of appeal directed only at the Tribunal ruling on review as delivered on 8.04.2022. The said amended memorandum of appeal shall be filed and served within 14 days of this ruling, failing which the entire memorandum of appeal dated 4.05.2022 will stand automatically struck out with costs to the Respondent.
 - c. The so-called affidavit in support of the appeal supposedly sworn on 20.05.2021 together with the entire record of appeal dated 26.06.2023 are hereby struck out, and the Applicant directed to file and serve a fresh record of appeal that is both appropriate and in compliance with the Civil Procedure Rules within 14 days of this ruling.
 - d. In the event there is compliance with (b) and (c) above by the Applicant, the court while noting the age of this appeal which had earlier been dismissed for want of prosecution, directs the Applicant to take all steps necessary to fully prosecute his appeal by 31.05.2025, failing which the appeal will stand automatically dismissed, for want of prosecution and with costs to the Respondent.
 - e. To facilitate expedition, the Deputy Registrar of the court is directed to urgently call for the original record of the Legal Education Appeals Tribunal.
35. In light of the foregoing, this appeal shall be listed for directions before this court on a date to be fixed immediately hereafter.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 20TH DAY OF DECEMBER 2024.

C. MEOLI



JUDGE

In the presence of

For the Applicant: N/A

For the Respondent: Ms. Wahu

C/A: Erick

