



REPUBLIC OF KENYA



KENYA LAW
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**Mwende v Kasyule (Civil Appeal E714 of 2021)
[2023] KEHC 21754 (KLR) (10 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21754 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E714 OF 2021
CW MEOLI, J
AUGUST 10, 2023**

BETWEEN

JUSTUS KIOKO MWENDE APPELLANT

AND

BRIAN MUEMA KASYULE RESPONDENT

RULING

1. Before the court for determination is the Notice of Motion brought by Justus Kioko Mwende (hereafter the applicant) and dated March 8, 2022. The prayers therein are as follows:
 - i. That this honourable court do grant leave to the appellant at the hearing of the appeal to take additional evidence in the form of;
 - a. The supporting affidavit of Justus Kioko Mwende supporting the application;
 - b. A letter dated November 3, 2021 by Dr. Evans Amukoye Ag. Director for Kenya Medical Research Institute confirming that the Covid-19 results produced by the Respondent were not done in the EID laboratory.
 - c. Letter dated November 5, 2021 from Mama Lucy Hospital confirming the dates and genuity of the Medical case summary report produced by the Respondent.And or the same be filed as a Supplementary Record of Appeal.
 - ii. THAT costs of the application be provided for.
2. The application is expressed to be brought inter alia under section 78(1) (d) of the *Civil Procedure Act* (CPA) and Order 51 of the *Civil Procedure Rules* (CPR). It is supported by the grounds laid out on its face and the affidavit of the applicant, who asserted that being aggrieved by the judgment delivered



by the trial court in Milimani SCCOM No. 638 of 2021 on September 29, 2021 he lodged the present appeal.

3. The applicant also stated that he then instructed his advocate to verify the authenticity of the documents tendered by Brian Muema Kasyule (hereafter the Respondent) at the trial, claiming that he had contracted the Covid-19 virus and which verification evidence he wishes to tender as additional evidence before the court. It was deposed that the new evidence was not available before the trial court or in the Applicant's possession previously but will assist the court in making a fair and informed determination on the appeal.
4. The Motion was opposed by the respondent who swore a replying affidavit on May 11, 2022. Therein, he averred that the Motion is an afterthought without merit, the applicant having waited until the delivery of judgment by the trial court to seek to verify the authenticity of the abovesaid documents. The respondent further swore that the applicant has neither satisfied the threshold for a grant of the orders sought nor demonstrated inability upon exercising due diligence to obtain the proposed new evidence before or during the trial. That in any event, the documents in question have no relevance in the appeal and would not assist the court in reaching its verdict. Moreover, for the court to grant leave for production of the documents would be akin to subjecting the Respondent to a retrial which would not be in the interest of justice.
5. The court directed that parties file written submissions. Counsel for the applicant anchored his submissions on section 78(1) (d) of the *CPA* and *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others* (2018) eKLR; *K. Tarmohamed v Lakhani* [1958] EA 367; and *Wanjie & others v Sakwa & others* (1984) KLR on the principles governing the taking of additional evidence on appeal. Counsel submitted that the grant of leave to a party to adduce additional evidence on appeal is discretionary and that such discretion ought to be exercised judicially and sparingly. That in the present instance, the Applicant has demonstrated that the evidence sought to be tendered was not in his possession at all material times and hence it is only fair that the court exercise its discretion in his favour by granting the orders sought.
6. In reply, the respondent's counsel who also anchored his submissions on the well-known cases *Tarmohamed v Lakhani* [1958] EA 367 and *Wanjie & others v Sakwa & others* (1984) KLR contended that the applicant's assertions concerning inability to obtain that the additional evidence earlier do not hold water. Because, he was served with the necessary documentation in the course of the trial through his advocate and had ample time to adduce the additional evidence before the lower court but failed to do so. Counsel further contended that the Applicant has not demonstrated the relevance of the proposed additional evidence to the outcome of the appeal. Pointing out that the subject matter in the suit was a contract upon which the trial court concluded that the principal debt owing to the Applicant had been settled in full by the Respondent. In conclusion the court was urged to dismiss the motion.
7. The court has considered the material canvassed in respect of the motion. The admission of additional evidence by an appellate court is provided for by section 78 of the *CPA* which states 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.”
8. Additionally, in augmenting the foregoing provision, 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.”
9. The Supreme Court in the case of [Mobamed Abdi Mahamud v Ahmed Abdullahi Mobamed & 3 others](#) (2018) eKLR spelt out the governing principles for consideration in 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 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.”

10. As a matter of general principle, appellate courts have been reluctant to allow parties to adduce additional evidence on appeal except where there exist exceptional circumstances. In addition to the principles set out hereinabove, the Court of Appeal in *Tarmohamed & another v Lakhani & Co* (1958) EA 567 expressed itself thus on the subject:

“Except 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.”

11. Further, in *National Cereals and Produce Board v Erad Supplies & General Contracts Ltd* (CA 9 of 2012) and the *Administrator, H H The Agba 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.

12. 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 on appeal, stating that:

“This 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.”



13. Hancox JA (as he then was) stated in the just cited case 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.
14. Here, the proposed additional evidence which the Applicant seeks to tender at this stage consists of letters issued by separate institutions pertaining to the Respondent's documented medical test results and their authenticity or lack thereof.
15. Without delving into the merits of the appeal which will be heard at a later date, the court observed that the suit which was filed by the Applicant against the Respondent was founded on breach of a deed of settlement, wherein the Applicant sought inter alia, for general damages and the sum of Kshs. 500,000/-. The record reveals that at the trial and during the defence hearing, the Respondent tendered various documents including medical documents as exhibits to support the averment that he had contracted Covid-19 which impeded his ability to repay the sums owing to the Applicant. The record shows that the Applicant's counsel attended court proceedings at all material times and cross-examined the Respondent.
16. In its judgment, the trial court found that it was not in dispute that the debt owing to the Applicant had been settled in full prior to commencement of the trial and therefore declined to make any award on costs.
17. Reviewing the proposed additional evidence, the court is of the view that the Applicant has not demonstrated that the same could not have been obtained previously, with the exercise of due diligence. The additional evidence is in respect to documentation which constituted part of the Respondent's bundle of documents at the trial and regarding which the Applicant had advance notice at pre-trial stage before they were tendered as exhibits.
18. Secondly, upon consideration of the rival arguments herein, the court is not persuaded that the proposed additional evidence has any direct bearing on or relevance to the appeal; it does not seem to touch on the substantive issues in dispute and which are the subject of the appeal. Thirdly, the Applicant has not demonstrated how the proposed additional evidence would impact on or influence the outcome of the appeal.
19. In the result, the court declines to exercise its discretion in the applicant's favour. Consequently, the motion dated March 8, 2022 is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 10TH DAY OF AUGUST 2023.

C.MEOLI

JUDGE

In the presence of

For the Applicant: Mr. Kioko h/b for Musyoki

For the Respondent: Ms. Bosibori

C/A: Emily

