



**Nation Media Group Limited v Nanjira (Civil Appeal 30 of 2021)
[2023] KEHC 27374 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEHC 27374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL 30 OF 2021
PJO OTIENO, J
DECEMBER 21, 2023**

BETWEEN

NATION MEDIA GROUP LIMITED APPELLANT

AND

RASHID MAKOKHA NANJIRA RESPONDENT

RULING

1. By an application dated 13/2/2023 and expensed to be premised upon to provisions of Rule 29 of the Court of Appeal Rules and Section 78(1) of the [Civil Procedure Act](#), the Respondent seeks an order from the court for leave to adduce additional evidence by way of an affidavit.
2. The reason put forth to support the application and its prayers is that at trial it was averred that the appellant had attempted to offer an apology yet it kept the offensive publication live on its google account to date hence the defamation persists. A document said to have been downloaded from the account was exhibited to prove the allegation of continued tort.
3. The application was resisted by the affidavit of one Sekon Owino, the head of legal of the Appellant, who contends that the application doesn't meet the requirements of the law under Section 78 of [the Act](#) in that there was never a demonstration that the new evidence sought to be relied upon was not available and could not be availed before and during the trial at the lower court upon application of due diligence. The deponent then contends that the application merely attempts to fill in the gaps by patching up the weaknesses of his case at trial and to open a new case, tender new evidence and to prejudice the Appellant who successful defended the claims for aggravated damages.
4. When a court of law would allow adduction of additional evidence is now a well-trodden path with no new learning to be sought. The law is trite and clear that for one to succeed in such an application, he bears the onus to demonstrate, among other matters, that the same could not have been obtained with reasonable due diligence for use at the trial, was not within the knowledge of the applicant or could not



have been produced at the hearing of the suit by him. See *Mohammed Abdi Mahamud -vs- Ahmed Adbullahi Mohamed & 3 others* [2018] eKLR.

5. From the matters deponed in the Affidavit of the Applicant, the offending material appears to have been posted on the page on the 26.5.2019 and has remained so posted hence the defamation and injury to his reputation persists. The publication persists and was indeed live and accessible at the time the case was heard.
6. That position alone disqualifies the document sought to be produced as additional evidence from the genre of evidence qualifying for admission as additional evidence on an appeal. It is disqualified because the search that yielded the discovery could have yielded the same result before and during the trial had reasonable diligent been employed.
7. It is thus the finding of the court that the application dated 13.2.2023 lacks merit and the same is dismissed. The costs of the application are awarded to the Respondent in any event.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 21ST DAY OF DECEMBER, 2023.

PATRICK J O OTIENO

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Ms. Wanyonyi for Asuna for Appellant

No appearance for Namatsi for Respondent

Court Assistant: Polycap

