



Mash & 3 others v Westwick College of Health Sciences Nairobi Limited (Commercial Appeal E128 of 2024) [2025] KEHC 438 (KLR) (Commercial and Tax) (23 January 2025) (Ruling)

Neutral citation: [2025] KEHC 438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E128 OF 2024**

**PM MULWA, J
JANUARY 23, 2025**

BETWEEN

**LAVENDAH MASH 1ST APPELLANT
JACQUELINE WANJIKU KAMAU 2ND APPELLANT
HAPPINESS NYAKENANDA 3RD APPELLANT
ELIZABETH SHIHAFU 4TH APPELLANT**

AND

**WESTWICK COLLEGE OF HEALTH SCIENCES NAIROBI
LIMITED RESPONDENT**

RULING

1. The Appellants filed the Notice of Motion dated 12th July 2024 under Section 78 (1)(d) of the *Civil Procedure Act*, seeking leave to file additional evidence in support of their case. The application is supported by the grounds on its face and the supporting affidavit sworn by the Appellants on 12th July 2024. The Appellants deposed that after the trial court issued the judgment on 12th April 2024, they learnt that the Respondent was not accredited, licensed and registered by the TVETA to offer training. They exhibited search results from the Technical and Vocational Education and Training Authority (TVET) portal and online articles from the Star and Standard Newspapers regarding a criminal case in which the Respondent's director is charged.
2. The Respondent opposed the application through a Replying Affidavit sworn by its director, Christine Nyambura Muturi on 13th October 2024. She asserted that the Respondent is fully certified and accredited to offer the educational services that it provides. She also contended that the application failed to meet the legal threshold to adduce additional evidence at an appellate stage. This is because



the search results on the TVET portal were readily available during the trial. In addition, the online articles are irrelevant to this matter which is a contractual dispute while the articles concern an ongoing criminal case involving the Respondent's director.

Analysis and determination

3. I have considered the application, the response and the parties' respective submissions and authorities cited. Section 78 (1) of the [Civil Procedure Act](#) provides that:

“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.”

4. The Supreme Court set out the principles for consideration for allowing additional evidence in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* (Petition 7 & 9 of 2018 (Consolidated) [2018] eKLR as follows:-

“(79) 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.

[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.”

5. I have considered the additional evidence. I have also considered the above principles. I am not persuaded that the Appellants have made a case for leave to introduce additional evidence on appeal. I am inclined to agree with the Respondent’s arguments.

6. In the upshot, the Appellants’ application dated 12th July 2024 is dismissed with costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 23RD DAY OF JANUARY* 2025.

P.M. MULWA

JUDGE

In the presence of:

Mr. Haggai for Appellants

Mr. Kagai for Respondent

Court Assistant: Carlos

