



**JCB (Suing Through Mother And Next Friend LMN) v Kaaga Boys High School  
(Civil Appeal E140 of 2024) [2025] KEHC 2124 (KLR) (6 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2124 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU  
CIVIL APPEAL E140 OF 2024  
EM MURIITHI, J  
FEBRUARY 6, 2025**

**BETWEEN**

**JCB (SUING THROUGH MOTHER AND NEXT FRIEND LMN) ... APPELLANT**

**AND**

**KAAGA BOYS HIGH SCHOOL ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 20/9/2024 pursuant to Section 78 of the [Civil Procedure Act](#) and Order 42 Rules 27, 28 and 29 of the [Civil Procedure Rules](#), the Applicant seeks that:
  1. The Honorable Court be pleased to allow the respondent/applicant leave to produce additional evidence.
  2. Upon grant of prayer 1 above, the Honorable Court be pleased to order the applicant herein to file a supplementary record of appeal within 7 days and the supplementary record of appeal to contain only annextures marked “LMN-01 to “LMN-06” as appears in the affidavit in support of the motion dated 20/9/2024.
  3. Costs of this application does abide the outcome of the appeal.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of LMN, the Applicant’s mother sworn on even date. She avers that the cause of action subject of this appeal was an assault on the minor while in the Appellant’s school that occurred on 5/06/2024. She sued the Appellant for neglecting its duty of care of the minor while in school and the trial court found the school liable and awarded the minor damages in compensation. She tried with little success to secure the minor’s form 4 placement in different schools, yet he was due to sit for K.C.S.E in November 2024. Due to challenges in having the minor enroll in another school as a form 4 student, she was forced to enlist him at a school in Nairobi to sit for mock KCSE and paid Ksh.4,000 on 15/7/2024. She came to terms with fate that her son would not be able to sit for his KCSE in 2024,



and in his best interests, enrolled him at [Particulars Withheld] Boys High School on 12/9/2024 in form 3. She incurred expenses and paid extra school fees for the minor at the new school for form 3 term 3, because he had already cleared form 4 term 3 at the Appellant's school. She seeks leave to adduce the additional evidence contained in annexures LLM-01 to LMN-06, which was unavailable during trial. She is advised by her advocates that this application meets the principles for allowing additional evidence on appeal as set out by the Supreme Court in *Mohamed Abdi v Ahmed Abdulahi Mohamad & 3 others* (2018) eKLR. The additional evidence sought to be adduced is not voluminous and is vital in the hearing and determination of the appeal, since one of the grounds raised in the memorandum of appeal faults the trial court for awarding excessive damages.

3. The Applicant swore a supplementary affidavit on 11/10/2024 in support of her application. She avers that the minor was enrolled in another school way after the trial process had concluded.
4. The Respondent/Appellant has opposed the application by his replying affidavit sworn on 3/10/2024. It contends that the issues of the minor moving to another school, repeating form 3 and incurring unforeseen expenditures were not pleaded during trial, and therefore the evidence sought to be adduced has no bearing on the issues that were determined by the trial court. It avers that the said documents predate the date of the trial court's judgment and were thus in the knowledge and possession of the Applicant. Since the Applicant has not filed a cross appeal, it remains unclear what value the evidence sought to be introduced would have if not to patch up and fill gaps in the evidence adduced at trial.

### Submissions

5. The Applicant urges that the documents sought to be adduced are directly relevant to the appeal and more specifically on the quantum of damages awarded by the trial court, which could impact the outcome of the appeal. She urges that the documents, which are not voluminous, were not available during trial as the minor was only enrolled in another school in September, 2024, and cites *Mohamed Abdi v Ahmed Abdullahi Mohamad & 3 others* (Supra). She urges that the said documents are not intended to fill gaps in evidence as she has not filed any cross appeal, and relies on *Kenya Agricultural and Livestock Research Organisation v Leah Okoko & another* (2022) eKLR.
6. The Respondent faults the Applicant for failing to establish the basis for admission of documents which were in her possession as they predate the date of judgment. It urges that the Applicant is only seeking to patch up and fill gaps in the evidence before the trial court which this court must reject. It urges that the Applicant seeks to introduce fresh evidence over matters that were decisively dealt with by the trial court, and prays for the dismissal of the application with costs. It urges that the intended additional evidence has no probative value, and cites *Mohamed Abdi Mahamad* (Supra), *Saluja v Gill t/a P Gill Estate Agents Property Services & another* (2002) EWHC 1435, *Raila Odinga & 5 Others v IEBC & 3 Others* (2013) eKLR, *Balozi Kenga v Kenya Power & Lighting Co Ltd* (2020) eKLR and *Safe Cargo Limited v Embakasi Properties Limited & 2 others* (2019) eKLR.

### Determination

7. The singular issue for determination is whether the court should exercise its discretion in favour of the Applicant and grant the leave sought.
8. Section 78 of the *Civil Procedure Act* provides for the powers of the Appellate Court as follows;:
  - (1) 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. (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.”

9. The principles governing production of additional evidence on appeal were considered by the Supreme Court in *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 Others* (2018) eKLR, 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.

[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.”

10. The justification for the belated production of the additional evidence is their unavailability, despite with due diligence, at the time of the trial. It is urged that the said documents were obtained in September, 2024 after the minor had settled in another school, hence their non-production at the trial court. Admittedly, the Applicant has not cross appealed against the Appellant’s appeal, and therefore they would have no bearing and/or relevance on the outcome of the appeal. Needless to state, the Applicant already obtained a favourable judgment before the trial court, the absence of the additional



documents, notwithstanding. What prejudice and injustice would she suffer now if the same are not produced at this appellate stage? It is sought to buttress the judgment of the court in a reverse argument that evidence which the court did not consider, would in any case have justified the award of damages had the court been aware of the evidence sought to be availed.

11. This court considers that the risks of the production of the additional evidence in unnecessarily delaying the expedite conclusion the appellate process, far outweigh any benefit in the justice of the case.
12. In the exercise of its inherent jurisdiction and the overriding objectives under Section 1A and 1B of the *Civil Procedure Act*, this court finds that justice will nevertheless be served to the parties if the leave to produce of the additional evidence is declined, because the same is not crucial to the determination of the issues in dispute.
13. It must be emphasized that an appeal to this court is by way of a retrial and an appellate court can only re-analyze and re-evaluate the evidence as taken before the trial court, and only in exceptional circumstances, which have not been demonstrated here, receive additional evidence on appeal. If the evidence sought to be adduced relates, as the supplementary affidavit suggests, to events after the trial had concluded, its reception would leave the respondent/defendant with no opportunity to respond to the claim, a new cause of action really, at the trial level. That would be an unfair hearing.
14. Moreover, the issue of the damages resulting from repeating form four class are in the nature of special damages which were not pleaded in the suit before the trial court and there is no basis for receiving evidence on an unpleaded special damage. The Court must agree with the respondents that the evidence sought to be adduced at the appellate level has no probative value as it addresses an issue which was not placed before the trial court by pleadings before that Court, and if it relates to events happening after the conclusion of the trial cannot have been the subject of the deliberations of the court leading to the judgment now appealed from and pending determination by this court by way of retrial.

#### **Orders**

15. Accordingly, for the reasons set out above, the Applicant's application dated 20/9/2024 is without merit and it is dismissed.
16. The applicant shall pay the cost of the application to the Respondent.  
Order accordingly.

**DATED AND DELIVERED THIS 6<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**EDWARD M. MURIITHI**

**JUDGE**

Appearances:

Mr. Gikuri Advocate for the Applicant

Mr. Mwenda Advocate for Respondent

