



REPUBLIC OF KENYA



FKM v IWM (Civil Appeal E041 of 2023) [2025] KEHC 2396 (KLR) (6 March 2025) (Ruling)

Neutral citation: [2025] KEHC 2396 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS**

CIVIL APPEAL E041 OF 2023

EN MAINA, J

MARCH 6, 2025

BETWEEN

FKM APPELLANT

AND

IWM RESPONDENT

RULING

1. By the Notice of Motion dated 25th November, 2024 the Appellant/Applicant seeks orders firstly, to be allowed to adduce additional evidence and secondly, to file a Supplementary Record of Appeal so as to produce that evidence. He also prays that the costs of this application be provided for.

The Applicants case

2. In his Supporting Affidavit sworn on 25th November 2024, the Applicant deposes that his appeal is anchored on, inter alia the fact that the trial court erred both in fact and in law by directing that the minor continues to attend the [Particulars Withheld] School despite that he was not involved in the choice of the school and further that the school's fees are uncharacteristically exorbitant; that recent occurrences have brought to light that the Respondent had undue influence over some of the members of the School administration and has over time been conniving with the school Accountant/Bursar to illegally demand, levy and obtain exorbitant fees from him; that on 16th of October, 2024 through her Advocate on record, the Respondent sent him a letter dated 14th October, 2024 signed by the head teacher of the school, one Ms. Elizabeth Gati, demanding Kshs.131,000 purportedly being the minor's school balance fee for 2024 terms 2 and 3. That being alarmed by the tenor of the demand and the threats issued by the Respondent, his Advocate advised him to visit the school and request for a full breakdown of the minors' fees.
3. The Applicant contends that on 23rd October 2024, he visited the school and met the Head teacher and School Bursar and requested for a detailed comprehensive statement of account of the minor's fees; that the comprehensive fee statement issued to him confirmed that the balance due was in fact



Kshs.32,270/- and not the Kshs.131,000/- demanded in the letter dated 14th October, 2024. He contends that the fee demanded by the school was inaccurate, grossly exaggerated and was meant to illicitly procure monies from him; that the Head Teacher who signed the demand letter indeed claimed that she had no idea how the huge discrepancy arose and purported that the demand letter was placed on her desk for her signature but she was not the originator of the same.

4. He stated that the Head Teacher summoned the Accountant who generated the demand letter to give them an explanation but he disappeared from the school premises. He stated that the Head Teacher apologized for the “obvious extortion attempt” and promised to follow up on the matter.
5. The Applicant averred that evidence of the Respondent’s illicit actions came into his possession on 23rd October 2024 when he visited the school and that the same could not have been obtained earlier. He prayed to be allowed to introduce the demand letter dated 14th October 2024, the comprehensive statement of account issued on 23rd October 2024 and the Respondent’s Advocate’s letter dated 31st October 2024 by way of a supplementary record of appeal.

The Respondent’s case

6. The Respondent opposed the application through a Replying Affidavit dated 11th December 2024 wherein she deposes, inter alia, that the additional evidence sought to be introduced is solely intended to fill up the gaps in the Applicant’s case so as to build an arguable appeal; that it also intended to aid the Applicant to avoid paying the child’s school fees balance and also to prevent the reconciliation of accounts in the trial court. The Respondent contends that it is also intended to aid him to avoid the refund of her fees paid when he refused to do so despite the court order. She denies exerting undue influence on the school administration or conniving with the school to defraud the Applicant and urges this court to dismiss the application.
7. Learned counsel for the parties consented to canvass the application by way of written submissions.

Submissions

8. In his submissions dated 4th February 2025, Learned Counsel for the Applicant placed reliance on Section 78 of the *Civil Procedure Act* and Order 42 Rules 27, 28 & 29 of the Civil Procedure Rules. Counsel relied on the case of Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad and 3 others [2018] eKLR wherein the Supreme Court set out the guiding principles for the admission of additional evidence by appellate courts. Counsel submitted that in children cases, the best interest of the child takes precedence and it was therefore wrong for the education of the child to be used to defraud the father. Counsel argued that Sections 1A, 1B and 3A of the *Civil Procedure Act* were intended to ensure that courts determine cases expeditiously and in a manner that is proportionate. Counsel urged this court to allow the application arguing that the Applicant had demonstrated that it is merited.
9. For the Respondent, reliance was placed on Section 78 (1) (d) of the *Civil Procedure Act*, Order 42 Rule 27 of Civil Procedure Rules and on the case of Mohammed Abdi Mohamud v Ahmed Abdulahi Mohamad & 3 others [2018] eKLR.
10. Counsel for the Respondent submitted that the additional evidence has no relevance to the grounds of appeal in that in the grounds the Appellant only raises the issue of the minor’s school fees in relation to the amounts payable, the lack of apportionment of the school fees between them and his autonomy on the choice of school. Counsel also argued that the alleged evidence is based on lies and half-truths. Further, that the purported additional evidence is intended to hoodwink this court in order for the Applicant to avoid the application made by the Respondent in the trial court for reimbursement of



a sum of Kshs.217,650/-. Counsel also contended that the evidence is deceptive as it conceals the fact that the Appellant did not pay the child's fees for the 2nd and 3rd term of 2024.

11. Counsel for the Respondent submitted that should the new evidence be admitted, the Respondent will be greatly prejudiced; that the Appellant has not in any way or form demonstrated that the additional evidence has any important or direct effect on the outcome of the appeal and hence the application should be dismissed with costs.

Analysis and determination

12. This court has considered the application, the response thereto the rival submissions and the cases cited. The principles that should guide an appellate court in an application for additional evidence on appeal were laid by the Supreme Court in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad and 3 others* [2018] eKLR, where the court stated:-

“(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. 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 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.....”

13. Therefore, whereas whether or not to grant leave to adduce additional evidence is in the discretion of the court, the court must bear in mind and must be guided by the above principles albeit noting that each application must be decided on its own merits. The discretion is not to be exercised at a whim or arbitrarily.

14. I have considered the additional evidence sought to be introduced by the Appellant. The same is in the form of a demand letter dated 14th October 2024, a statement of account issued on 23rd October 2024 and a demand letter from the Respondent’s Advocate dated 31st October, 2024. These documents indeed bring out the discrepancies complained about by the Applicant in this appeal and which the Respondent seeks to discount. The evidence is in my view relevant to the issue in dispute between the parties in this appeal and the Appellant/Applicant has given a plausible explanation as to why the evidence was not available to him during the trial in the magistrate’s court. The statements are from the school which the child attends hence are believable and credible. I am also not satisfied that admitting the evidence will compromise or prejudice the Respondent’s application in the trial court on her claim for compensation for any amounts she paid but which should have been paid by the Respondent.

Disposition.

15. Accordingly, I find merit in the Appellants’ Notice of Motion dated 25th November 2024 and grant orders as follows: -

- i. That leave be and is hereby granted to adduce and file additional evidence limited to the following documents:-
 - a. The demand letter dated 14th October 2024.
 - b. The comprehensive statement of account issued on 23rd October 2024.
 - c. The Respondent’s Advocate’s demand letter dated 31st October, 2024.
- ii. The additional evidence shall be adduced by means of a Supplementary Record of Appeal to be filed and served within seven (7) days of the date of this Ruling.
- iii. The costs of this application shall be in the cause.

Orders accordingly.

RULING SIGNED, DATED AND DELIVERED VIRTUALLY ON THIS 6TH DAY OF MARCH, 2025.

E. N. MAINA

JUDGE

6/03/2025



In the presence of:

Mr. Kinyua for Nakhone for the Appellant

Ms Nekoye for the Respondent

C/A: Geoffrey

