



**Haji v Mohamed (Civil Appeal E057 of 2024)
[2025] KEHC 4016 (KLR) (21 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E057 OF 2024**

**G MUTAI, J
MARCH 21, 2025**

BETWEEN

ALI ABUBAKAR HAJI APPELLANT

AND

FERUZ SUFYAN MOHAMED RESPONDENT

RULING

1. The notice of motion dated 6th November 2024 was filed by the respondent. The application seeks to have this court expunge from its records items No 7,11, and 12 of the record of appeal on the grounds that they were not part of the documents that were produced in the proceedings before the court below.
2. The grounds upon which the application is based are that the appellant introduced new evidence at the appellate stage, in the record of the appeal, that was not adduced in the lower court, which action was highly prejudicial to the respondent. It was urged that the introduction of the new evidence would be unfair as the respondent never got a chance to interrogate and counter the same in the lower court. It was thus urged that it would be in the interest of justice and fairness for the application to be allowed.
3. The appellant filed grounds of opposition dated 13th November 2024 in which, in the main, it urged that this court was not in a position to tell which documents were or were not produced in the court below without first hearing the appeal and examining the certified copies of the proceedings and comparing them with the record of appeal. It was urged that the application was premature and would only duplicate the work of the parties and the court.
4. Parties filed written submissions. The submissions of the applicant are dated 27th January 2025. Mnyazi Tsuma and Co Advocates urged that the impugned documents were not produce during trial and their introduction at the appellate stage would prejudice the respondent/applicant. In support of her contention, counsel relied on the case of Salma Yusuf Kassim vs African Safaris Destination Ltd



[2021] eKLR, where Nzioki wa Makau, J expunged documents for being inconsistent and for lack of certificate of manner and means of production as electronic evidence.

5. It was urged that I allow the application and expunge the impugned documents.
6. The appellant's submissions are dated 30th January 2025. Counsel for the appellant, Mr Mwinyi, submitted that the only issue coming up for determination was whether the application ought to be allowed.
7. He submitted that the impugned documents have a nexus with the subject matter of appeal and would help the court determine whether the trial court's finding that there should be equal distribution division of the matrimonial property was right.
8. Regarding the loan documents, it was urged that it was not the first time the respondent had heard about the loan as it had been mentioned during the trial.
9. It was admitted that the Mpesa statement was generated after the trial. Counsel stated that the appellant could not have produced what was not in his possession during the trial.
10. Regarding the photograph that was introduced in the record of appeal, it was urged that the same was a picture of the matrimonial property.
11. Based on the foregoing, it was urged that the application be dismissed with costs.
12. I have considered the application, the response thereto and the parties' submissions. It is clear that the impugned documents were not produced in the court below. Could the same be produced during the appeal stage? The answer to the said question is clearly in the negative. Order 42 Rule 27 (4) of the Civil Procedure Rules, 2010 is clear as day. It states expressly that 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, unless with the leave of the court.
13. The word "shall" indicates the imperative nature of the said provision. Although there are exceptions, these are only available if the leave of the court is sought. It is self-evident that no leave of the court was sought by the appellant before the compilation of the record of appeal.
14. In the circumstance, this court agrees with the counsel for the respondent/applicant that what the appellant is trying to do is to steal a match on the respondent by amending his appeal and providing more evidence that was not produced in the court below. Such action would be injurious to the respondent. This court would be shirking its duty to be fair to both parties if such an action is permitted.
15. In the circumstance, I allow the application dated 6th November 2024 as prayed. Given the conduct of the appellant I award the respondent the costs of the application.
16. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 21ST DAY OF MARCH 2025. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

Gregory Mutai

JUDGE

In the presence of: -

No appearance for the Appellant;



Ms Kibunja, holding brief for Ms Mnyazi, for the Respondent; and
Arthur – Court Assistant.

