



**Njoroge v Mwaura t/a Kenline Consultants & another (Civil Appeal E204 of 2023)
[2025] KEHC 4969 (KLR) (Commercial and Tax) (24 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E204 OF 2023**

PM MULWA, J

APRIL 24, 2025

BETWEEN

JAMES KARIUKI NJOROGE APPELLANT

AND

KENNETH MWAURA T/A KENLINE CONSULTANTS 1ST RESPONDENT

MBUSERA AUCTIONEERS 2ND RESPONDENT

(An application for leave to introduce additional evidence in Civil Appeal E203 of 2023, being an appeal from the judgment and decree of the Chief Magistrate's Court in Milimani Commercial Civil Suit No. 3946 of 2020 delivered on 4th August 2023)

RULING

Background

1. Vide a Complaint dated 6th August 2020, Kenneth Mwaura T/A Kenline Consultants (hereinafter referred to as “the Respondent”) instituted a suit against James Kariuki Njoroge (hereinafter referred to as “the Applicant” or “Appellant”) seeking special damages in the sum of Kshs. 699,270/=, interest at court rates from September 2017, and costs of the suit.
2. Upon trial, the learned magistrate delivered a judgment on 4th August 2023 in favour of the Respondent, having found that the Appellant failed to adequately challenge the Respondent’s evidence. Judgment was accordingly entered in the sum of Kshs. 699,270/=.
3. Dissatisfied with the outcome, the Appellant lodged a Memorandum of Appeal dated 30th August 2023. Thereafter, the Appellant filed the instant application dated 1st March 2024 brought under, inter alia, Section 78(1)(d) of the *Civil Procedure Act*, seeking leave to adduce additional evidence on appeal



specifically a Bill of Quantities (BOQ) dated 19th February 2024, allegedly prepared by a practicing surveyor.

4. The application is opposed by the Respondent, who contends that it is frivolous and amounts to a misuse of the appellate process.
5. The parties duly filed written submissions in support of and in opposition to the application.
6. The sole issue for determination is whether the Appellant has made out a sufficient case for leave to adduce additional evidence on appeal.
7. Section 78(1)(d) of the *Civil Procedure Act* empowers an appellate court to take additional evidence or to direct that such evidence be taken. Further, Order 42 Rules 27 - 29 of the Civil Procedure Rules set out the circumstances under which such evidence may be admitted.
8. The applicable guiding principles for admission of additional evidence were well articulated by the Supreme Court in *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR laid down a three-fold threshold for admission of additional evidence:
 - a. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
 - b. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
 - c. The evidence must be apparently credible, though it need not be incontrovertible.
9. The Appellant seeks to introduce a Bill of Quantities dated 19th February 2024, which he avers relates to the subject premises that formed the basis of the original claim. It is submitted that by the time of the hearing, the premises had allegedly been sold, rendering it impossible to procure the said document at the time of trial.
10. The Respondent, while citing the Supreme Court decision in *Mohamed Abdi Muhamud* (Supra) submits that the Appellant has failed to meet the legal threshold for admission of additional evidence. In particular, it is contended that the Appellant has not demonstrated that the evidence was unavailable despite the exercise of reasonable diligence before the conclusion of the trial.
11. I have carefully considered the Appellant's assertions. Notably, no evidence has been tendered to corroborate the claim that the premises in question had been sold prior to the hearing of the matter. Even assuming the sale had occurred, the Appellant remained under a duty to act diligently in preserving material evidence or seeking expert opinion in anticipation of trial. There is no affidavit from the surveyor detailing the circumstances under which the inspection was carried out or the challenges faced. Further, no documentation has been presented to show that any attempts were made either to access the property, preserve relevant information, or to seek leave of the trial court for purposes of adducing such evidence. In my view, the requirement of reasonable diligence has not been met.
12. While it is true that a BOQ may, in certain circumstances, assist in establishing the quantum of a construction-related claim, I am persuaded that in this instance, the purpose of the proposed evidence is to impeach or diminish the amount already awarded. To admit such evidence at this stage would in effect amount to reopening the evidentiary record and allowing the Appellant to reconstruct a defence that he had ample opportunity to advance at the trial.
13. I am mindful that reopening a case at the appellate level is a drastic measure, which must be exercised sparingly. I align with the Respondent's position that the Appellant's attempt to introduce new



evidence at this stage is nothing more than an endeavour to patch up weaknesses in his case. Such an approach undermines the integrity and finality of the trial process and introduces undue delay.

14. I am cognizant of the holding in *Mzee Wanje and 93 Others v A.K. Saikwa* (1982 – 88) 1 KAR 463, where the Court of Appeal stated:

“This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal.”

15. The Respondent, having diligently prosecuted his case since 2020, is entitled to the finality of litigation. The reintroduction of evidence at this stage would not only delay the final resolution of the matter but would also prejudice the Respondent through added costs and uncertainty. The Appellant has not demonstrated any compelling reason why the additional evidence could not have been obtained and tendered during the trial.

16. In the result, I am not persuaded that the Applicant has satisfied the threshold for the grant of leave to adduce additional evidence on appeal. Accordingly, I find the Notice of Motion dated 1st March 2024 is bereft of merit and is hereby dismissed with costs to the Respondent.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF APRIL 2025.

PETER M. MULWA

JUDGE

In the presence of:

Mr. Kinyua for Appellant/Applicant

Mr. Mbatha h/b for Mr. Burugu for Respondent

Court Assistant: Carlos

