



**Ochieng v Jujahon Limited & 3 others (Civil Appeal E089 of 2022)
[2025] KEHC 7224 (KLR) (Commercial and Tax) (22 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 7224 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E089 OF 2022**

PM MULWA, J

MAY 22, 2025

BETWEEN

STEPHEN OCHIENG APPELLANT

AND

JUJAHON LIMITED 1ST RESPONDENT

EMMANUEL OTIENO ANYIRI 2ND RESPONDENT

MILICENT AKOTH ADERO 3RD RESPONDENT

JAMES HAYA ANYIRI 4TH RESPONDENT

RULING

1. The applicant seeks leave of court to file additional documentary evidence and such evidence be deemed to have been part of the evidence in the High Court so that the said evidence is taken into account in the determination of this appeal. The application is by way of a Notice of Motion dated 22nd March, 2024 filed pursuant to Section 78 1(d) of the *Civil Procedure Act*, Rules 27, 28 & 29 of the *Civil Procedure Rules*, Section 1A, 1B, & 3A of the *Civil Procedure Act*. It is supported by an affidavit sworn on the same day by Stephen Ochieng, the applicant.
2. The grounds in support of the application are that the existence of a contract between the parties was admitted in the pleadings and was not an issue for determination at trial. However, the court raised the issue of the contract's existence and payments in its judgment, without the Applicant having had the opportunity to adduce evidence. The additional evidence, comprising correspondence between the parties, contains material admissions and clarifications relevant to the project, which were not captured at trial. And that it is in the interest of justice that the court allows the production of this evidence.



3. The application is opposed. The 2nd Respondent, Emmanuel Otieno Anyiri, a director of the 1st Respondent, swore a replying affidavit dated 2nd May 2024. He deposed that the instant application is res judicata, the court having previously dismissed a similar application dated 17th October 2022 by a ruling delivered on 23rd February 2023. The Respondents further assert that the Applicant is merely seeking to fill gaps exposed in the judgment of the trial court and to introduce evidence that was at all times within the Applicant's knowledge and possession but which, for reasons unexplained, was not tendered at trial.
4. The application was canvassed by way of written submissions. The Applicant filed submissions dated 26th June 2024 and further submissions dated 13th August 2024. The Respondents filed their submissions on 19th July 2024. I have considered the application, the affidavits in support and in opposition, the written submissions of both parties, and the applicable legal framework.

Determination

5. The principles governing the admission of additional evidence on appeal are well settled. In *Wutob v Dagnia* [2001] EA 187 and *Republic v Ali Babitu Kololo* [2017] eKLR, the following guiding principles were enunciated:
 - i. The evidence must be such that it could not have been obtained with reasonable diligence for use at the trial;
 - ii. The evidence must be such that, if admitted, it would probably have an important influence on the result of the case, though it need not be decisive; and
 - iii. The evidence must be apparently credible, although not necessarily incontrovertible.
6. Section 78(1)(d) of the *Civil Procedure Act* empowers the appellate court to take additional evidence. Further, Order 42 Rule 27(1) of the *Civil Procedure Rules* provides that additional evidence may only be admitted where:
 - a. the trial court refused to admit evidence which ought to have been admitted; or
 - b. the appellate court requires the evidence to pronounce judgment or for any other substantial cause.
7. Rules 28 and 29 provide for the procedure of taking such evidence and the scope thereof.
8. While the Court is clothed with jurisdiction to admit additional evidence on appeal, this jurisdiction must be exercised sparingly and only in exceptional circumstances. As the courts have consistently stated, this discretion is not available to parties who seek to mend the weak points in their case or to introduce evidence that was deliberately or negligently omitted at trial.
9. Applying the above principles to the facts of this case, I find no explanation as to why the correspondence now sought to be introduced, which is admitted to have been within the Applicant's possession, was not presented before the trial court. The Applicant's argument that the trial court addressed issues not pleaded is not a sufficient ground to reopen the evidentiary record. A litigant is under a duty to present their full case at trial. The onus of proving one's case is not displaced merely because the pleadings are framed a certain way.
10. Further, I agree with the Respondents that this Court previously dismissed a similar application on 23rd February 2023. That decision has not been reviewed or appealed. The doctrine of res judicata under Section 7 of the *Civil Procedure Act* bars the re-litigation of matters that have been conclusively



determined by a court of competent jurisdiction. This doctrine is essential in upholding the finality and sanctity of judicial decisions.

11. The upshot is that the present application falls afoul of both the principles governing admission of additional evidence on appeal and the doctrine of res judicata. The instant application, in my view, is an attempt to reopen litigation that has been closed and to cure evidentiary deficiencies that the Applicant had the opportunity to address at trial.
12. Accordingly, the Notice of Motion dated 22nd March 2024 is hereby dismissed with costs to the Respondents.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 22ND DAY OF MAY 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Ondieki h/b for Mr. Abidha for Appellant/applicant

Mr. Wakwaya for Respondents

Court Assistant: Carlos

