



REPUBLIC OF KENYA



**Mwangi (Suing as the Guardian Ad Litem of Samuel Warui Mwangi - Deceased) v Waichere & 2 others (Civil Appeal 92 of 2023) [2025] KEHC 10632 (KLR) (17 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 10632 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 92 OF 2023  
FN MUCHEMI, J  
JULY 17, 2025**

**BETWEEN**

**CECELIA WANGUI MWANGI (SUING AS THE GUARDIAN AD LITEM OF SAMUEL WARUI MWANGI - DECEASED) ..... APPLICANT**

**AND**

**JOSPHAT GITHII WAICHERE ..... 1<sup>ST</sup> RESPONDENT**

**SAMUEL MBUGUA GITHII ..... 2<sup>ND</sup> RESPONDENT**

**HARVEST LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application dated 7<sup>th</sup> March 2025 seeks for orders of leave to file additional evidence and/or in the alternative the applicant's annexed additional draft list of witnesses, witness statement, list of documents and attached documents be adopted and deemed as properly filed.
2. The application is opposed.

**Applicant's Case.**

3. The applicant states the deceased is her son who was involved in an accident on 12<sup>th</sup> April 2020 at Juja areal along Kenyatta Road Service land and obtained fatal injuries. Consequently, she lodged Thika CMCC No. 561 of 2020 which was dismissed by the court on 24<sup>th</sup> March 2022, which judgment is the subject of this appeal herein.
4. The applicant states that the subject accident involved one more victim Nicholas Joseph Ngahu who she was unable to include as a witness in the trial suit or adduce his evidence as he was undergoing treatment for a very long time in hospital and at home where he could not be located or accessed in order to obtain the said documents and produce them as exhibits. Thus, the evidence sought to be



introduced could not have been obtained by reasonable diligence before and during the initial hearing. Further, his evidence is extremely crucial to the full and exhaustive determination of the present case as he was a direct eye witness and also a victim.

5. The applicant states that the additional evidence sought to be introduced in support of her case will assist the court to make a fair and just determination of the case. Further, the evidence sought to be introduced will have an important influence or sway on the result of the case if it was available at the time of the trial.
6. The applicant supported her application by filing an Affidavit sworn by Nicholas Ngahu and he states that he was involved in a road traffic accident on 12<sup>th</sup> April 2020 at Juja along Kenyatta Road service lane sustaining serious bodily injuries.
7. The deponent states that he underwent treatment for a long time in hospital and at home in Meru. After he recovered he filed a suit in Thika Small Claims Court Suit No. E293 of 2023 which was settled by way of a consent judgment between himself and the respondents herein who admitted liability in the matter.
8. The deponent further states that the deceased was involved in the same accident and the applicant filed a suit in Thika Chief Magistrate's Court Civil Suit No. 561 of 2020 which was dismissed by the court on 24<sup>th</sup> March 2022 for lack of sufficient evidence, the subject of the appeal herein. The deponent states that given the outcome of his said suit his testimony and evidence in Thika CMCC No. 561 of 2020 would probably have had an important influence or sway on the result of the trial suit if it was available at the time of the trial and the evidence and testimony is still credible and relevant and likely to influence or impact upon the result of the verdict of the appeal herein.
9. The respondent did not file a response to the application despite being granted time to do so on 24<sup>th</sup> February 2025. However, both parties filed submissions in regard to the application.

### **The Applicant's Submissions.**

10. The applicant relies on Section 78 of the *Civil Procedure Act* and the cases of Dorothy Nelima Wafula vs Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] eKLR; EO vs COO [2020] eKLR and Mohammed Abdi Mohammed vs Ahmed Abdullahi Mohammed & 3 Others [2018] eKLR and Sharon Mwendu Ndolo vs Rahab Nyangima John & Another [2022] eKLR and submits that she was not aware of the existence and involvement of Nicholas Ngahu in the subject road accident to procure his evidence during the deceased's trial. Furthermore, she could not get the said Nicholas Ngahu as a witness as he had suffered extensive injuries from the said accident and was recovering from hospital and in his home. Thus if Nicholas Ngahu would be in a position to testify he would have produced exhibits such as his witness statement, his treatment notes and the relevant police abstract which indicated that both he and the deceased were involved in the same road traffic accident.
11. The applicant further submits that the testimony of the surviving witness holds crucial insight and information pertaining the accident itself and the surrounding circumstances. Further, the relevance of the said new evidence is grounded on the fact that the respondents settled his claim and admitted liability in Thika Small Claims Suit No. E293 of 2023.
12. Relying on the cases of Kenya Agriculture & Livestock Research Organization & Another [2022] eKLR and Paul Waratho & Another vs Bata Shoe Co. Ltd & 2 Others [2016] eKLR, the applicant submits that the additional evidence sought to be adduced is directly relevant to the matter before the court and it is in the interest of justice to have the same adduced. Further, the respondents will have an opportunity to rebut or respond to the same hence no prejudice shall be suffered by them.



### **The Respondents' Submissions.**

13. The respondents submit that the appellant has failed to demonstrate that the new witness or additional documents could not have been obtained with reasonable diligence during trial. No affidavit from the hospital or credible medical records have been provided to substantiate the claim that the witness was incapacitated throughout the pendency of the lower court proceedings.
14. The respondents further submit that the judgment or consent in Thika SCCC No. E293 of 2023, which the appellant seeks to rely on is a decision of a subordinate court which is not binding on the present court.
15. The respondents argue that the appellant has not shown how the proposed new evidence is material to the outcome of the appeal or that it would have any bearing on the core issues. Mere convenience or dissatisfaction with the trial record does not warrant re-opening the evidentiary record at the appellate stage.
16. The respondents assert that admitting new evidence at this late stage would prejudice them as they conducted the trial and prepared the appeal based on the original evidentiary record. Further, they would be unfairly disadvantaged and the appellate process would be unduly delayed.
17. The respondents argue that the application is an afterthought aimed at filing gaps in the appellant's case. Furthermore, the courts must guard against the misuse of its discretion to allow fresh evidence as a tool for litigants to relitigate their cases under the guise of an appeal

### **The Law.**

Whether the application has merit.

18. Section 78 of the *Civil Procedure Act* provides:-  
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.
19. Order 42 Rules, 27, 28 and 29 of the Civil Procedure Rules provide:-  
The 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; but if  
The court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or  
The court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.  
Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred, the court shall record the reason for its admission.



Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence

and to send it when taken to the court to which the appeal is preferred.

Where additional evidence is directed or allowed to be taken, the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.

20. The Supreme Court in the case of *Mohammed Abdi Mohamud vs Ahmed Abdullahi Mohammed & 3 Others* (2018) eKLR laid down the following principles:-

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 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.

21. The Court of Appeal in *Wanja vs Saikwa* (1984) 275 restated the principles to be considered before granting leave to adduce additional evidence inter alia as follows:-

The principles upon which an appellate court in civil cases, will exercise its discretion in deciding whether or not to receive further evidence are:-



- a. It must be shown that the evidence could not be 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.
- c. The evidence is on the face of it credible.

The rule governing the admission of additional evidence does not entitle a party applying to bring in contradictory, as opposed to additional evidence, for to do so would mean the case would in effect be re-heard and retried as to the existing facts which cannot have been the intention of the rule.

22. Applying the above principles to the instant case, I have perused the record and noted that the police abstract the applicant wishes to be introduced as additional evidence was produced during the hearing before the lower court. The said police abstract listed the deceased and one Nicholas Ngahu as the parties who were injured during the said accident. Both police abstracts emanated from Juja Police Station and conclude that the matter is pending under investigation. The appellant argued that she tried to trace the said witness, Nicholas Ngahu but he was not available for he was still recovering from injuries sustained in the accident. He was admitted in hospital and his home is in Meru. The applicant says the said witness' whereabouts were not known.
23. The evidence of a witness who was travelling with the appellant in the same vehicle during the occurrence of the accident and who has already successfully filed a case for compensation, is indeed relevant in the appellant's case. The police abstract produced in the lower court confirms that the proposed witness was in the accident vehicle at the material time. The additional evidence could not have been obtained with reasonable diligence during the trial due to factors which the applicant has explained. This application complies with the principles of additional evidence as set out by the Court of Appeal in the case of *Wanja vs Saikwa* (1984) KLR 275.
24. The respondent argue that the decision the applicant seeks to introduce is one of the lower court and is not binding on this court. This is a misapprehension of this application in that it is the evidence of an additional witness on the occurrence of the accident that the applicant seeks to introduce. The High Court will not rely on the lower court decision or finding in determining this appeal.
25. It is well explained by the applicant that she applied due diligence to try and trace the witness but she was not successful and thus she could not have produced the evidence in issue in the lower case. The applicant has established that the said evidence will have an influence on her case.
26. It is my considered view that allowing the additional evidence will have an impact on the outcome of the verdict and that it is on the face of it credible.
27. The application dated 7<sup>th</sup> March 2025 has merit and is hereby allowed in terms of prayer 1 and 2 of the application.
28. There shall be no order as to costs.
29. It is hereby so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 17<sup>TH</sup> DAY OF JULY 2025.**

**F. MUCHEMI**  
**JUDGE**

