



REPUBLIC OF KENYA



**Mycredit Limited v Njue (Civil Suit E040 of 2023)
[2024] KEHC 2441 (KLR) (Commercial and Tax) (8 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2441 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E040 OF 2023
FG MUGAMBI, J
MARCH 8, 2024**

BETWEEN

MYCREDIT LIMITED APPELLANT

AND

HARRISON MUNYI NJUE RESPONDENT

RULING

Background

1. Before this Court is a Notice of Motion application dated 2nd March 2023, brought under Article 159(2) of the *Constitution*, sections 1A, 1B, 3A, and 78(1)(d) of the *Civil Procedure Act* and Order 42 rules 6, 27, 28, and 29 of the *Civil Procedure Rules*. The applicant seeks an order for leave to adduce additional evidence and for the costs of the application.
2. The application is premised on the grounds stated on the face of it and is buttressed by an affidavit sworn by Sarah Wabwile, the Legal Officer of the applicant company on 2nd March 2023. The application is opposed by a replying affidavit sworn on 24th March 2023 by Harrison Munyi Njue, the respondent.
3. According to the records, the origin of the dispute between the parties is a loan of Ksh.300,000/= extended to the respondent by the applicant, which was to be repaid with interest at 5% per month as well as late payment of 3% per month. The loan as per the agreement was to be secured by a chattel mortgage over motor vehicle registration number KAV 004V.
4. The respondent filed the claim seeking return of the lorry worth Ksh.750,000/= as well as compensation of the loss of monthly earning of Ksh.140,000/= .It was his case that the lorry was



- taken by the applicant after he had repaid a total of Ksh.91,500/=. The respondent was served with proclamation notice by auctioneers which was annexed.
5. The applicant availed a statement of account showing that the amount outstanding was Ksh.548,216.78/= inclusive of interest and penalties. It was the applicant's alleged evidence that the vehicle had been sold at Ksh. 550,000/= and there was a shortfall still due.
 6. The applicant takes issue with the Small Claims Court for adjudicating on matters which the applicant states were already conceded by the parties without soliciting further evidence or granting the parties an opportunity to address the same. Specifically, the applicant criticized the Court for assuming that the suit motor vehicle had not been sold as urged by the appellant's witness yet the evidence on the same was not called for. Supporting the application, the appellant annexed a Certificate of Sale for the suit motor vehicle and advertisements related to its sale.
 7. Conversely, the respondent challenges the assertions made by the applicant, particularly in paragraph 5 of its supporting affidavit. The respondent argues that during the trial, upon cross-examination of the applicant's witness, it was admitted that the suit motor vehicle had been sold, albeit without presenting evidence of the sale at that juncture. The respondent maintains that it was incumbent upon the applicant to furnish all pertinent evidence during the trial, without expecting the Court to solicit additional documents on its behalf.
 8. The application was canvassed by way of oral submissions. The appellant's counsel contended that the issue of the motor vehicle's sale emerged during cross-examination, a stage at which introducing new evidence was not feasible. Furthermore, this issue was highlighted in the Small Claims Court judgment, despite not being formally pleaded by either party. Invoking Section 78 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, the appellant's counsel argued that evidence of the vehicle's sale is crucial as it bears the potential to alter the Small Claims Court's decision.
 9. The respondent's submissions referenced Order 42 Rule 27(1) of the *Civil Procedure Rules* 2010, emphasizing that the introduction of additional evidence at the appellate stage is generally prohibited unless the documents in question were previously unavailable despite reasonable diligence. The respondent's counsel labeled the application as an afterthought, aimed at compensating for deficiencies in the appellant's case.

Analysis

10. Upon reviewing the application, other pleadings, evidence as well as considering the submissions from counsel for both parties, this Court is tasked with determining whether the appellant has satisfied the prerequisites for the introduction of additional evidence at this appellate stage.
11. By dint of section 78(1) of the *Civil Procedure Act*, I am cognizant that an appellate court possesses the discretion to allow the introduction of further evidence during the appeal stage. However, this discretion must be considered in conjunction with Order 42 rule 27 which restricts the parties' ability to introduce new evidence at the appellate level, barring exceptions such as the trial court's refusal to admit necessary evidence or the appellate court's need for further evidence to pronounce judgment or for other significant reasons.
12. The Supreme Court, in *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamed & 3 Others*, [2018] eKLR, established the following criteria for allowing additional evidence in appellate courts.
 - i. The additional evidence must be directly relevant to the matter before the court and be in the interest of justice;



- ii. It must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;
 - iii. 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;
 - iv. 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;
 - v. The evidence must be credible in the sense that it is capable of belief;
 - vi. The additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;
 - vii. 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;
 - viii. Where the additional evidence discloses a strong prima facie case of willful deception of the Court;
 - ix. 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;
 - x. 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; and
 - xi. 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. In *Mzee Wanje & 93 Others V A.K. Saikwa*, (1982-88) 1 KAR 463 the Court of Appeal, referring to Rule 29 of the *Court of Appeal Rules* Similar to Section 78 of *Civil Procedure Act* stated:
- “This Rule is not intended to enable as 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.”
14. Applying the facts of the present appeal against these comprehensive guidelines, it is a fact that the applicant seeks to introduce a Certificate of Sale for the suit motor vehicle and related advertisements. The applicant has neither claimed nor demonstrated that these documents were unobtainable with reasonable diligence or were unknown at the time of the suit. Rather, it was suggested that these documents were not presented initially due to an understanding that the vehicle’s sale was acknowledged by both parties.
15. The Court has considered the record of proceedings at the small claims court. It is not true that the issue of sale of the vehicle was uncontroverted. The respondent during examination in chief stated that he kept enquiring whether the motor vehicle had been sold but had never received an answer or seen an advertisement for its sale. He states that he sought the assistance of the Court to help him get the vehicle back or if the vehicle had been sold, a refund of the balance.



16. In my view, given the testimony by the respondent and in the absence of any other records from the small claims court indicating otherwise, it is obvious that there was a controversy regarding whether or not the vehicle had been sold.
17. It is no wonder that the Learned Adjudicator reached the finding as she did, in the absence of any evidence on the value of the vehicle or the advertisement or sale of the vehicle. Considering the appellant's failure to adequately justify the omission of the Certificate of Sale and sale advertisements from the trial proceedings, this Court concurs with the stringent standards set forth by the Supreme Court in *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamed & 3 Others* [supra].
18. Accordingly, this Court concludes that the additional evidence sought to be adduced by the applicant is meant to fill gaps in the applicant's evidence before the trial Court and patch up the weak points in its case.

Determination

19. The application for leave to introduce additional or further evidence does not meet the established criteria and is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 8TH DAY OF MARCH 2024.

F. MUGAMBI

JUDGE

