



**Kanyanga v Jomo (Civil Appeal E111 of 2023) [2024] KEHC 9464 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9464 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
CIVIL APPEAL E111 OF 2023**

**TA ODERA, J**

**JULY 23, 2024**

**BETWEEN**

**ALBERT KAZENGA KANYANGA ..... APPELLANT**

**AND**

**AMISI JOMO ..... RESPONDENT**

**RULING**

1. The appellant filed notice of motion dated 7.3.24 seeking that;
  1. Spent
  2. The Pending hearing and determination of this application, the Honourable Court be pleased to arrest the judgment scheduled for 11.3.24.
  3. The Honourable Court be pleased to allow the applicant/ appellant to produce additional evidence.
  4. That upon prayer 3 being granted this court be pleased to order the appellant to file a supplementary record of appeal within 3 days from the date of the prayer being granted.
2. The application is based on the grounds that the respondent filed the suit in the lower court seeking damages for injuries allegedly sustained in a road traffic accident on 31.8.20. Also that he relied on treatment notes from Kisii County referral hospital dated 31.8.20 which formed basis of the P3 form and medical report by Dr. Daniel Omaiyo Nyameino. That the matter was fast tracked and by the time the insurer of the appellant was done with their investigations judgment had already been delivered against him. Further that the orders sought will assist the court to arrive at a just determination of this appeal. That the applicant will have an opportunity to challenge that which he did not challenge during trial and the he will be prejudiced unless the said orders are granted.
3. The application is supported by the annexed affidavit of Odek Wilson a legal officer of Britam Insurance company Limited which was the Insurer of the applicant at the material time. He deponed that the



respondent produced treatment notes allegedly from Kisii county and referral Hospital and dated 31.8.20 which formed the basis of the P3 and medical report. Also that they investigated the accident and got new evidence to the effect that the respondent was never treated at the said facility on 31.8.20 as per the letter dated 6.11.23 issued by Kisii County referral hospital. He produced the investigation report by Parity Assessors & Consultants Limited which contains the plaint and bundle of documents produced by the respondent and the letter from Kisii County referral hospital and medical report by Dr. Obondi. Exhibit “OW”

4. The application was served upon the respondent but he neither filed a reply nor appeared during interpartes hearing. The application is thus unopposed.

5. Section 78(1) of the Civil Procedure Act Provides:

“(1) 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;” (underlining mine)

6. The Supreme Court in the case Mohamed Abdi Mahamud Vs. Ahmed Abdullahi Mohamed & 3 Others (2018) eKLR set out the governing principals of allowing additional evidence as follows:-

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 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;
- (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 wilful 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.”
7. I have carefully considered the application herein the supporting affidavit and the annexures and I note that the intended additional evidence is relevant to this case as it relates to whether the respondent sustained the injuries as alleged and whether he was involved in the accident herein and it would greatly affect the outcome of the appeal herein. The letter from the hospital was obtained after judgment of the trial court as investigations were still on going. I agree with counsel for the applicant that the additional evidence will assist this court to determine the issues in the appeal herein in a just and fair manner.
8. In the upshot I find that the application is merited and I proceed to make the following orders:
- a. The Applicant is allowed to produce the additional evidence in the form of the accident investigation report.
  - b. The applicant to file a supplementary record of appeal and further submissions if need be within 7 days from today.
  - c. The respondent to file and serve a replying affidavit to the record of appeal and further submissions if need be within 14 days of service of the supplementary record of appeal.
  - d. Mention on 19.11.24 to confirm compliance with the above orders and a judgment date.
  - e. Costs in the cause.

**T.A ODERA**

**JUDGE**

**23.7.24**

**DELIVERED VIRTUALLY IN THE PRESENCE:**

Court Assistant: Oigo

Parties -Absent

