



**Acceler Global Logistics & 4 others v Rahil International Limited & 13 others (Commercial Case 99 of 2016 & Civil Case 28 of 2017 (Consolidated)) [2024] KEHC 13196 (KLR) (Commercial and Tax) (14 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13196 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE 99 OF 2016 & CIVIL CASE 28 OF 2017 (CONSOLIDATED)  
MN MWANGI, J  
OCTOBER 14, 2024**

**BETWEEN**

**ACCELER GLOBAL LOGISTICS ..... 1<sup>ST</sup> PLAINTIFF  
ERICK KOCH ..... 2<sup>ND</sup> PLAINTIFF  
MARCOS BRANDLISE ..... 3<sup>RD</sup> PLAINTIFF  
DHANJI MANJI RAVJI ..... 4<sup>TH</sup> PLAINTIFF  
TORSTEIN FREDRICK KOCH ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**RAHIL INTERNATIONAL LIMITED ..... 1<sup>ST</sup> DEFENDANT  
COULSON HARNEY LLP ..... 2<sup>ND</sup> DEFENDANT  
BENJAMIN TARUS KIPKORIR ..... 3<sup>RD</sup> DEFENDANT  
DAVID MUIRURI RITHO ..... 4<sup>TH</sup> DEFENDANT  
JAMES MBUGA NJOROGE ..... 5<sup>TH</sup> DEFENDANT  
DUNCAN DEEVER ACHAR ..... 6<sup>TH</sup> DEFENDANT  
JACKLINE CHELANGAT ..... 7<sup>TH</sup> DEFENDANT  
ERNEST KIPNGENO SIGEI ..... 8<sup>TH</sup> DEFENDANT  
JOSEPH OKOTH ..... 9<sup>TH</sup> DEFENDANT  
BENSON NGUGI ..... 10<sup>TH</sup> DEFENDANT  
POLYCARP A ODHIAMBO ..... 11<sup>TH</sup> DEFENDANT**



**THE REGISTRAR OF COMPANIES ..... 12<sup>TH</sup> DEFENDANT**  
**THE CHIEF LANDS REGISTRAR ..... 13<sup>TH</sup> DEFENDANT**  
**THE ATTORNEY GENERAL ..... 14<sup>TH</sup> DEFENDANT**

## **RULING**

1. The plaintiffs filed a Notice of Motion application dated 2<sup>nd</sup> November 2023 pursuant to the provisions of Sections 1A, 3 & 3A of the *Civil Procedure Act*, Section 146(4) of the *Evidence Act*, Articles 48, 50 & 159(2)(d) of the *Constitution* of Kenya, 2010, and all other enabling provisions of the law. The plaintiffs seek orders for leave to re-open their case to adduce additional evidence comprising inter alia, the shareholding status of Stepping Stone Limited, leave to recall their witness, Dhanji Manji Ravji for purposes of adducing additional evidence clarifying the shareholding status of Stepping Stone Limited, and for leave to call an additional witness for the purposes of adducing evidence on the payment of the purchase price for the property known as LR No. 20751 (IR 68428).
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Mr. Dhanji Manji Ravji, the 4<sup>th</sup> plaintiff herein, and one of the 1<sup>st</sup> defendant's Directors. He averred that there is need to adduce additional evidence in support of purchase of the property known as LR No. 20751 (IR 68428) to rebut various allegations that were made by the defendants in their statements of defence which involve a Joint Venture Agreement signed on 20<sup>th</sup> June 2006 between the 2<sup>nd</sup> to 5<sup>th</sup> plaintiffs and Energy & General Limited, which acquired a property through Stepping Stone Limited. He averred that the 2<sup>nd</sup> to 5<sup>th</sup> plaintiffs were to provide financing, and that they also signed a Deed of Trust to hold shares as Trustees of Energy & General Limited, but they failed to provide the agreed finances, leading to their resignation as Directors of the 1<sup>st</sup> defendant, which is a Special Purpose Vehicle created for property development, and they were replaced by the 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> & 11<sup>th</sup> defendants who claim to be the duly registered Directors of the 1<sup>st</sup> defendant.
3. Mr. Ravji stated that in rebuttal of the aforesaid allegations, the plaintiffs wish to produce Stepping Stones Limited's CR12 form, its Memorandum & Articles of incorporation, its annual returns for the years 2010, 2009, 2008, 2007, 2002, 2001, 2000, 1999, 1998, 1997, 1996 & 1995, and filings from the Companies' Registry on the changes of its Directorship. He further stated that the plaintiffs wish to call an additional witness from the firm of D.V. Kapila & Company Advocates to produce copies of the letters dated 21<sup>st</sup> January 2007, 19<sup>th</sup> February 2007 & 21<sup>st</sup> February 2007 from Timamy & Company Advocates, and copies of the letters dated 30<sup>th</sup> January 2007 & 13<sup>th</sup> February 2007 from D.V. Kapila & Company Advocates. He asserted that the aforesaid additional evidence is crucial in assisting this Court to come to a fair and just determination of the consolidated suit.
4. In response to the application, the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> & 11<sup>th</sup> defendants filed a replying affidavit sworn on 26<sup>th</sup> March 2024 by Benjamin Tarus Kipkorir, the 3<sup>rd</sup> defendant herein, and a Director of the 1<sup>st</sup> defendant. He stated that the additional evidence that the plaintiffs intend to adduce has been within the plaintiffs' reach all along and could have been obtained with reasonable diligence, thus failure to adduce the said evidence was a deliberate decision. He deposed that the CR-12 the plaintiffs intend to produce shows the Directors of Stepping Stone Limited as at 4<sup>th</sup> April 2022, whereas the plaintiffs closed their case on 24<sup>th</sup> March 2022. Additionally, he deposed that the plaintiffs have not offered any explanation as to why the said additional evidence was not introduced before the close of the plaintiffs' case. He contended that the CR-12 for Stepping Stone Ltd contains handwritten alterations bringing its entire legitimacy into question, making it inadmissible.



5. Mr. Kipkorir stated that the said additional evidence is in reply to the defendants' statement of defence dated 22<sup>nd</sup> July 2020 which was in the possession of the plaintiffs for two (2) years before they closed their case. Further, he claimed that the said evidence has no probative value in answering the question of the 1<sup>st</sup> defendant's directorship which is the substratum of this suit. He contended that the question of directorship of Stepping Stone Limited and the payment of the purchase price are merely auxiliary, and that the plaintiffs had all the opportunity to submit and/or plead on the same. He averred that the instant application is an afterthought and an attempt to fill in evidentiary gaps in the plaintiffs' case.
6. In a rejoinder, the plaintiffs filed a further affidavit sworn on 24<sup>th</sup> May 2024 by Mr. Dhanji Manji Ravji, the 4<sup>th</sup> plaintiff herein, and one of the 1<sup>st</sup> defendant's Directors. He averred that the additional evidence seeking to be adduced by the plaintiffs was procured after the close of their case. He stated that the evidence on the completion of the sale transaction, being the completion documents was not adduced as they had been mixed up with various documents at Mr. D.V. Kapila's firm since the said transaction occurred in the year 2007. He explained that the said firm shifted offices after the close of the plaintiffs' case on 24<sup>th</sup> March 2022, at which point the said documents were discovered. He stated that the defendants' cases have not been heard hence they have an opportunity to address the Court on the evidence sought to be adduced, and they would also have an opportunity to cross-examine the intended witnesses on the said evidence.
7. The instant application was canvassed by way of written submissions. The plaintiffs' submissions were filed on 26<sup>th</sup> March 2024 & 24<sup>th</sup> May 2024 by the law firm of Oraro & Company Advocates, whereas the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> & 11<sup>th</sup> defendants' submissions were filed on 9<sup>th</sup> April 2024 by the law firm of Prof. Tom Ojienda & Associates.
8. Ms. Lubano, learned Counsel for the plaintiffs relied on the case of *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR, and submitted that the evidence sought to be adduced was neither in the plaintiffs' possession during the pre-trial conference nor at the time when their case was being heard. Counsel relied on the Supreme Court case of *Raila Odinga & Others v IEBC & 3 others* [2013] eKLR, and urged this Court to grant the orders sought. She cited Section 146(4) of the *Evidence Act* and Order 18 Rule 10 of the *Civil Procedure Rules*, 2010. She referred to the Court of Appeal case of *Fernandes v Noronha* [1969] EA, and stated that the additional evidence sought to be adduced is material to the determination of this matter, thus the instant application should be allowed. She asserted that no prejudice would be suffered by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> & 11<sup>th</sup> defendants in the event that the orders sought are granted since no new issue will be raised by the evidence which will be adduced by the new witness and the defendants' case is yet to be heard.
9. Mr. Okore, learned Counsel for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> & 11<sup>th</sup> defendants relied on the case of *Susan Wavinya Mutavi v Isaac Njoroge & another* [2020] eKLR, and submitted that the instant application is an attempt by the plaintiffs to fill in perceived evidentiary gaps that they have since discovered after they closed their case. He cited the case of *John Karuga Wabinya v Attorney General & 4 others* [2020] eKLR, and contended that the plaintiffs have not offered any explanation as to why the additional evidence sought to be adduced was not produced during the hearing of their case and/or demonstrated any justification as to why the pieces of evidence being within their reach, were not produced before the close of the plaintiffs' case. He further relied on the Supreme Court case of *Patrick Thoithi Kanyuria v Kenya Airports Authority* Petition (Application) No. 7 of 2017 and stated that the evidence sought to be adduced by the plaintiffs comprises statutory documents and correspondence which would have been produced with even the slightest exercise of due diligence.



10. In a rejoinder, Ms. Lubano relied on the case of *Tecbiz Limited v Royal Media Services Limited* [2021] eKLR, and submitted that the plaintiffs have made out a case to warrant being granted of the orders sought. She referred to the case of *Raindrops Ltd v County Government of Kilifi* [2020] eKLR, and stated that the probative value of the additional evidence and its impact on the outcome of the matter holds more weight as compared to the aspect of reasonable diligence, so as to ensure that substantive justice is achieved.

### Analysis And Determination

11. I have considered the application filed herein, the grounds on the face of the Motion and the affidavits filed in support thereof. I have also considered the replying affidavit filed by the respondents and the written submissions by Counsel for the parties. The issue that arises for determination is whether the plaintiffs' case should be re-opened for additional evidence to be adduced.
12. This Court has the discretion to grant orders for reopening of the plaintiffs' case and for calling additional evidence, but the said discretion must be exercised judiciously. In determining an application such as the one before me, Courts need to find out the reason as to why the additional evidence is sought to be adduced and why the witnesses sought to be called were not availed before the close of a party's case. It must also be demonstrated that the failure to avail the said evidence was not deliberate. The Uganda High Court Commercial Division in the case of *Simba Telecom v Karubanga & another* [2014] UGHC 98, when determining an application to re-open the said case for purposes of submitting fresh evidence referred to the Australian case of *Smith v New South Wales* [1992] HCA 36; (1992) 176 CLR 256, where it was held as follows -

If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.

13. From the record, it is evident that the instant application was filed after the close of the plaintiffs' case, but before the hearing of the defendants' case. The plaintiffs now seek to re-open their case and adduce additional evidence comprising inter-alia, the shareholding status of Stepping Stone Limited. They also seek leave to recall their witness, Mr. Dhanji Manji Ravji for purposes of adducing the said additional evidence and to call an additional witness for the purposes of adducing evidence on the payment of the purchase price for the property known as LR No. 20751 (IR 68428). The application is premised on the fact that the evidence sought to be adduced was not within the plaintiffs' reach before the close of their case, neither could they have laid their hands on the said evidence even with the exercise of due diligence.
14. The Court in the case of *Susan Wavinya Mutavi v Isaac Njoroge & another* (*supra*) when disallowing an application similar to the instant one held as follows-

Over the years, Kenya's superior courts and courts in the Commonwealth have developed principles which guide the exercise of jurisdiction to re-open a case and receive additional evidence in a civil trial court. First, the jurisdiction is a discretionary one and is to be exercised judiciously. In exercising that discretion, the court is duty-bound to ensure that



the proposed re-opening of a part's case does not embarrass or prejudice the opposite party. Second, where the proposed re-opening is intended to fill gaps in the evidence of the applicant, the court will not grant the plea. Third, the plea for re-opening of a case will be rejected if there is inordinate and unexplained delay on part of the applicant. Fourth, the applicant is required to demonstrate that the evidence he seeks to introduce could not have been obtained with reasonable diligence at the time of hearing of his case. Fifth, 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. Lastly, the evidence must be apparently credible, though it need not be incontrovertible. (Emphasis added).

15. The evidence intended to be adduced by the plaintiffs is allegedly in rebuttal of the averments contained in the defendants' statement of defence. The plaintiffs contended that the documentation on the shareholding and directorship of Stepping Stone Limited was not available to them even after conducting a search at the Companies' Registry and that the said documents were only available to them after the close of their case. Secondly, their contention is that completion documents for the sale of the suit property were not available as they had been mixed up with various documents at Mr. D.V. Kapila's firm, and the said documents only became available on 24<sup>th</sup> March 2022 after the said firm shifted offices, which was after the close of the plaintiffs' case.
16. This Court however notes that the plaintiffs have all along been in possession of the defendants' defence. It is not disputed that the plaintiffs were aware of the existence of the documents which form part of the additional evidence they intend to adduce. For this reason, in order for this Court to exercise its discretion in favour of the plaintiffs, they have to demonstrate that they could not produce and/or that they could not have laid their hands on the said documents even after the exercise of reasonable and due diligence, before the close of their case. It is however worthy of note that in as much as the plaintiffs allege to have had challenges in acquiring the documentation on the shareholding and directorship of Stepping Stone Limited, no evidence of the said challenges and/or evidence that the plaintiffs reached out to the Companies' Registry for assistance but failed to obtain the said documents has been adduced. Further, the plaintiffs have not explained why they did not reach out to the Companies' Registry before the close of their case for assistance in acquiring the said documents.
17. The plaintiffs' assertion that the completion documents on the sale of the suit property were not available as they had been mixed up with various documents at Mr. D.V. Kapila's law firm, and they only became available on 24<sup>th</sup> March 2022 after the said firm shifted offices and also after close of the plaintiffs' case is not persuasive enough. The plaintiffs did not deny that they were all along aware of the fact that the law firm of D.V. Kapila & Company Advocates was involved in the transaction that led to the sale of the suit property, thus an Advocate from the said law firm could have been called as a witness by the plaintiffs to testify as to the legality of the said transaction and whether or not the purchase price of the suit property was fully paid. In addition, in as much as the plaintiffs averred that the completion documents were mixed up with various documents at Mr. D.V. Kapila's firm, no evidence has been adduced in support of this averment from the said law firm.
18. Annexed to the plaintiffs' further affidavit is a letter dated 12<sup>th</sup> July 2022 from Oraro & Company Advocates, addressed to the 1<sup>st</sup> defendant. In the said letter, the 1<sup>st</sup> defendant was informed that the Court had granted the plaintiffs fourteen (14) days to file an application for leave to file additional documents and to recall their witness to produce the said documents. This Court however notes that no application was filed by the plaintiffs within the given time lines. They attribute the said delay to workload pressure, the need to thoroughly review the documents received, and the fact that they were simultaneously handling an application by the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> & 11<sup>th</sup> defendants. This Court however notes that the plaintiffs did not make an effort to inform this Court of the aforesaid challenges and seek



more time to file the said application. The reluctant and disinterested manner in which the plaintiffs addressed the situation leaves a lot to be desired. This is because if the evidence sought to be adduced was crucial to the determination of the dispute between the parties herein, the plaintiffs would have moved with alacrity in seeking leave of this Court to adduce the said evidence.

19. In light of the analysis made in this ruling, it is my finding that if the plaintiffs and their Advocates on record had exercised reasonable and due diligence, they would have in good time acquired the documents which they seek leave to adduce, and they would have produced them at the hearing of their case. In the circumstances, I am persuaded that the instant application is not only an afterthought, but is also an attempt by the plaintiffs to fill in evidentiary gaps in their case.
20. In the end, this Court is not persuaded that the plaintiffs have made out a case to warrant being granted the orders sought herein.
21. The upshot is that the application dated 2<sup>nd</sup> November, 2023 is devoid of merits. It is hereby dismissed with costs to the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup>, 9<sup>th</sup> & 11<sup>th</sup> defendants/respondents.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF OCTOBER, 2024.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:

Ms Ogonyo h/b for Mr Angwenyi for the 1<sup>st</sup> plaintiff/applicant

Ms Msando h/b for Mr Okoro for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 6<sup>th</sup> and 9<sup>th</sup> defendants

Ms Mangich h/b for Ms Lubano for the 2<sup>nd</sup> to 5<sup>th</sup> plaintiffs/applicants

Ms Muthoni Matu h/b James Ocheing Oduol for the 2<sup>nd</sup> defendant

Ms B. Wokabi – Court Assistant.

