



REPUBLIC OF KENYA



**Garissa Maize Millers Limited v Attorney General & 2 others (Civil Suit  
12 of 2013) [2024] KEHC 17015 (KLR) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 17015 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL SUIT 12 OF 2013  
JN ONYIEGO, J  
OCTOBER 11, 2024**

**BETWEEN**

**GARISSA MAIZE MILLERS LIMITED ..... PLAINTIFF**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**MINISTER OF STATE FOR DEFENCE ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF OF DEFENCE FORCES ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. Before me for determination is a notice of motion dated 17.05.2024 filed pursuant to Articles 23(3) and 159 of *the constitution* 2010, order 2 rule 15 and order 51 rule 1 of the *civil procedure rules*, Section 1A, 3A and 63(e) of the *Civil Procedure Act* seeking the following prayers:
  - i. Spent.
  - ii. That this Honourable Court be pleased to find the plaintiff/respondent is seeking to introduce new and additional evidence vide his supplementary list of documents dated 14.05.2024 without seeking leave of the court.
  - iii. That the Honourable court be pleased to expunge the supplementary list of documents dated 14.05.2024 from the court record in its entirety.
  - iv. That the Honourable court be pleased to issue any other prayer that it may deem fit and just to grant.
  - v. That costs of the application be provided for.
2. The application was supported by an affidavit of Henry Muriithi Mugira sworn on even date with the application. It was deposed that the plaintiff/respondent had made a similar application to the one



herein seeking to introduce new evidence which was declined by the Court of Appeal in Civil Appeal No. 160 of 2016. That the plaintiff/respondent did not seek this court's leave before introducing the new evidence as the initial special damages was pleaded as Kes. 407,172.00 which has since been changed to read Kes. 1,377,840.000.00.

3. It was averred that the additional documents by the plaintiff/respondent seek to have as part of the record the annual company's report for the year 2010-2014, replacement value report for the year 2012-2023, cash flow projections for the year, bill of quantities dated 25.02.2015 and loss of income statements from the year 2012-2023.
4. That the supplementary evidence be expunged from the record as the plaintiff/respondent cannot plead new evidence that the Court of Appeal had already pronounced itself on. It was contended that the plaintiff/respondent cannot be allowed to introduce new evidence 10 years after the commencement of the case herein. It was urged that there should be an end to litigation and therefore, the court should not allow fresh evidence. It was argued that after all, the case herein was only resubmitted to this court for litigation on the issue of quantum only.
5. The plaintiff/respondent filed grounds of objection dated 12.06.2024 urging that the said documents in the supplementary list of documents dated 14.05.2024 are necessary for the court to render a just decision in respect of quantum of damages to be awarded to the plaintiff. That the trial court issued directions regarding filing of a supplementary valuation report and granted the applicant leave to file a rejoinder if need be. That the same was not challenged by the applicant nor was the said direction set aside. It was urged that the respondent shall suffer great prejudice if the documents submitted are expunged from the court.
6. The plaintiff/respondent also filed a replying affidavit sworn by Hassan Ibrahim Ahmed on 12.06.2024 deposing that he is the director of the plaintiff. That the Court of Appeal at paragraph 34 of its judgment delivered on 08.12.2023 referred this matter to this Honourable court for purposes of fresh hearing and consideration regarding quantum of global award to be awarded to the plaintiff.
7. That as a result of the destruction of the respondent's property, documents necessary to provide an accurate valuation of the respondent's company at the time of filing the suit were lost. That the documents submitted vide the supplementary list of documents would thus be helpful to the court in rendering a just decision in respect of quantum. It was urged that should the said documents be expunged, the same would result into great prejudice visited upon the plaintiff/respondent. This court was thus urged to allow the said evidence as the applicant would suffer no prejudice if the same is allowed.
8. The suit was canvassed by way of written submissions wherein the defendants/applicants in their submissions dated 26.07.2024 argued that the main issue for determination is whether the plaintiff/respondent introduced new evidence via his supplementary list of documents dated 14.05.2024. The applicant while relying on the case of *Mohamed Abdi Muhamad vs Abamed Abdullabi Mohamad & 3 others* (2018) eKLR urged that to introduce any intended additional evidence at this time is an attempt to make a fresh case, fill up omissions and patch up the weak points in the case which of course were not initially pleaded.
9. It was contended that the evidence the plaintiff is seeking to adduce at this time was in its possession at the time of hearing of this case and that no exceptional circumstances or reasons have been tendered to warrant this court admit the supplementary list of documents which include valuations at the current market rate which in essence would prejudice the applicant.



10. That should this court allow the said list of documents, then the applicant will suffer substantial loss. It was contended that special damages must be pleaded and proved specifically and that parties are bound by their pleadings. To that end, support was drawn from the case of Adeton Oladeji (N.I.G.) vs Nigeria Breweries Plc. S.C. 91/2002 where the court was emphatic that parties are bound by their pleadings. It was therefore urged that the said supplementary list of documents having been filed in violation of the right to fair hearing, the same ought to be expunged from the record herein.
11. The plaintiff/respondent in their submissions dated 15.07.2024 submitted that the main issue for determination is whether this court should admit the documents produced by the plaintiff in its supplementary list of documents dated 14.05.2024.
12. It was urged that this Honourable Court directed that parties do file their respective valuation reports and thus all parties were given time to file and then conduct the hearing thereof. That in order for the applicant to help the court, they ought to have filed their valuation report showing the disparities with the respondent's valuation report. The same notwithstanding, the applicants will have an opportunity to cross examine the maker of the said valuation report they seek struck out.
13. Reliance was placed on the case of *Mohamed Abdi Mohamud vs ahmed Abdullahi Mohamad & 3 others* [2018] eKLR where it was held that before a court admits additional evidence, it must assess the proportionality and prejudice of allowing such evidence.
14. That in reaching a 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 must be considered. It was urged that it was not controverted that there was a fire caused by the Kenya Defence Forces which consequently destroyed the respondent's company property. That the necessary documents that could provide an accurate valuation were destroyed in the said fire.
15. It was argued that this court has discretion to admit the documents in question. To that end, reliance was drawn from the case of Mbogo vs Mbogo (1969) wherein it was held that discretion is intended to be exercised to avoid injustice or hardship resulting from an error or excusable mistake. In the end, this court was urged that in the interest of justice, the supplementary list of documents dated 14.05.2024 be allowed.
16. I have considered the application before me and the response thereof. I have also considered rival submissions by both parties. The only issue for determination is whether at this stage of the trial the plaintiff can be allowed to file a supplementary list of documents.
17. Civil Procedure Rules make provision and guidelines on the requirement for parties to file documents within certain parameters. If documents are not available as at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. That is one of the purposes for the directions that a court gives under the provisions of Order 11 of the Civil Procedure Rules. Any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff's case which is not the case here.
18. In the case of *P.H. Ogola Onyango t/a Pitts Consult Consulting Engineers vs Daniel Githegi g/a Quantalysis* [2002] eKLR Waweru J. when faced with a similar situation stated as follows: -

“Indeed discovery, along with interrogatories and inspection, is a pre-trial procedure. They are all meant to facilitate a quick and expeditious trial of the action. Though the court no doubt has jurisdiction to allow a party to introduce a document or documents once the



opposing party has closed its case, ... To allow him to introduce documents after the plaintiff has closed his case will occasion the plaintiff serious prejudice that cannot be cured by cross-examination. In Civil litigation there must be a level playing field. That field cannot be level were one party permitted to introduce documents in the trial after the opposite party has closed his case, and many years after pleadings closed.

19. In this case, the hearing of the plaintiff's case commenced on 17.05.2013 and upon this suit being dismissed by this court, the plaintiff preferred an appeal to the Court of Appeal where a judgment was delivered on 08.12.2023 overturning the decision of this court.
20. Having read the said judgment, it is my understanding that the Court of Appeal at paragraph 34 remitted this suit back to this court ordering a fresh hearing and consideration regarding quantum of a global award to be awarded to the plaintiff/respondent herein based on the evidence on record.
21. Having perused the said supplementary list of documents alluded to, I find that the same consists of valuation of the said property as at 06.06.2012 till the end of December, 2023. Therein, it was stated that the basis of valuation was the replacement value as at the date of valuation which in other words was 31.12.2023 when the valuation was concluded. The plaintiff in defending its position urged that in allowing the supplementary list of documents, the same shall guide this court in reaching a proper determination in regards to quantum. Further, that the applicant will not be prejudiced as they will have an opportunity to cross examine the maker of the document. In the same breadth, that the documents could not be produced at the opportune time noting that the same were destroyed by the fire and the same was confirmed by the Court of Appeal.
22. A further perusal of the said supplementary list of documents shows that some of the documents included therein are annual reports and financial statements of the plaintiff, images of post fire incident damage, assets of the company amongst others.
23. It is clear that the contents of the said supplementary list of documents have financial implications on the quantum sought by the plaintiff. The question that I ask myself at this point is whether the said documents running all the way from 06.06.2012 till the end of December, 2023 ought to be considered as new evidence or the same is covered by the plaintiff's argument that its documents were destroyed in the said fire and therefore the same could not be recovered at the time the suit was filed.
24. It is public knowledge that ordinarily, the memorandum and articles of association like that of the plaintiff, have been in the custody of the company's registry since its incorporation and further, financial statements are generated on an annual basis and annual returns of a company are required to be filed at the company's registry on a yearly basis. In my view, these documents do not form new and compelling evidence that would persuade this court to exercise its discretion to allow the same to be relied upon by the defendant at this stage of the trial.
25. Noting that the fire happened sometime in the year 2012, it would thus be unfair to introduce evidence touching up to the year 2023 in the name of guiding the court reach a fair determination. As such, admitting the supplementary list of documents dated 14.05.2024 would be akin to this court perpetrating injustice as the same would prejudice the defendant/applicant's case if the court was to allow the plaintiff rely on the documents at this point in time.
26. The above notwithstanding, my interpretation of 'hearing afresh' revolves around the fact that the Court of Appeal has thus reached a determination where liability was imputed on the defendants/applicants. It therefore follows that the only issue pending is the amount of money in terms of reparations that ought to be paid to the plaintiff. In my considered view, the same did not mean that parties file fresh supporting documents to determine the aspect of quantum.



27. Having held as above, I am inclined to expunge the said documents from the court record and direct that each party to bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 11<sup>TH</sup> DAY OF OCTOBER 2024**

**J. N. ONYIEGO**

**JUDGE**

