



Annihi Creations Enterprises Ltd v Nyaga (Sued for and on behalf of the Late Kelvin Murimi Njeri - Deceased) (Civil Appeal E008 of 2022) [2023] KEHC 2274 (KLR) (22 March 2023) (Revision)

Neutral citation: [2023] KEHC 2274 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E008 OF 2022
RM MWONGO, J
MARCH 22, 2023**

BETWEEN

ANNIHI CREATIONS ENTERPRISES LTD APPLICANT

AND

FAITH NJERI NYAGA (SUED FOR AND ON BEHALF OF THE LATE KELVIN MURIMI NJERI - DECEASED) RESPONDENT

REVISION

1. This is an application for leave to file additional evidence made under Section 78 (1) (d) of the [Civil Procedure Act](#), Order 51 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#).
2. The applicant seeks orders that:
 1. The Applicant be granted leave to file additional evidence in support of its case as espoused in the annexed Supporting Affidavit.
 2. The new evidence be produced by way of affidavit and the same be filed as a supplementary record of appeal.
 3. That costs be in the cause.
3. The application is grounded on the following:
 - i. That judgement in the trial court was entered on January 26,2022 and being aggrieved, the Appellant lodged this appeal.
 - ii. That the appellant wishes to adduce additional evidence in support of its case, which evidence will assist the court to make fair and just determination of the matter.



10. The Respondent also filed grounds of Opposition to oppose the appellant's notice of motion dated September 9, 2022 and reiterated the averments in the Replying Affidavit dated September 23, 2022.
11. On direction of the court the parties canvassed the application dated September 23, 2022 by oral submissions.

Applicant's submissions

12. The applicant relied on the Supreme Court decision in *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR which stated the principles governing the production of 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 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.
13. The applicant urged for the additional evidence to be allowed, pointing out that the respondent will not suffer any prejudice and will be able to cross-examine the witnesses.



Respondent's submissions

14. The respondent counsel opposed the application and relied on his grounds of opposition and the Replying Affidavit. He submitted that the threshold for granting orders for new evidence have not been met, and that allowing this application will set a bad precedent as parties will be bringing new evidence after conclusion of trial.
15. He closed by stating that this was an attempt by the applicant to patch up gaps in their case as indicated in the lower court judgement, and they availed their sole witness in the lower court. Counsel pointed out that in the matter of *Attorney General v Torino Enterprises Limited* [2019] eKLR where an application for new evidence was allowed, the evidence consisted only of official documents.

Issue for determination

16. The only issue for determination is whether the Applicant should be granted leave to file additional evidence after judgement has been delivered.

Analysis and Determination

17. Section 78 of the *Civil Procedure Act* states the powers of the appellate court in an appeal which includes the discretion to take additional evidence. The powers are set out in the following terms:

- “(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; (e) to order a new trial.”

18. The power to take additional evidence on an appeal is not generalized, but is controlled by the provisions of Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules, 2010* which set out the following parameters:

“27.

- (1) 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
 - a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - b) 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.

(2) 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.

28. 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.

29. 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.”

19. The applicant’s claim is that at the of hearing and determination of the suit before the lower court, the police file containing eye witness statements, reports and sketch maps was yet to be availed before the court as it had been called for by the office of the directorate of public prosecutions and thus the matter proceeded without the statements of the defence witnesses being filed save for the driver’s statement.
20. In particular, the main evidence that the applicant seeks to produce is the police file. They say that the police file contained a letter from the DCI which confirmed that from the eye witness reports, the accident happened as the deceased was attempting to overtake a fleet of vehicles on the road and stated that the deceased was blamed for the accident.
21. Further, the applicants claim that this additional evidence is weighty and credible and sheds light on this matter and the Lower Court is likely to have arrived at a different conclusion if it had a chance to examine the same. They claim they were not sensitized on the importance of the documents.
22. The respondent averred in their replying affidavit that the said Application is an afterthought where the Applicant seeks to bridge gaps that became apparent during the hearing of the suit in the lower court by adducing fresh evidence to make a new case.
23. Further, the suit is as a result of a road traffic accident where investigations are conducted by the police. The Applicant should have taken all the necessary steps to get copies of any document they wished to rely on during trial which they never did and have not demonstrated that they tried to get them.



24. The applicant relies on this decision where the Supreme Court set the governing principles on allowing additional evidence in appellate courts in Kenya. Mobamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR. The principles include that:

- “(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;...” (Emphasis added).

25. In Sharon Mwende Ndolo v Rabab Nyangima John & another [2022] eKLR the appellant was also aggrieved by the judgment of the trial court of July 2, 2021 and in particular the refusal to award special damages of Kshs 596,706. The court there allowed the production of additional evidence as the same did not amount to making a fresh case at the appeal court. Kasango J held that:

“I find that the additional evidence is indeed directly relevant to the appeal before court and would influence the impact of this appeal. The demand letter of the hospital was sent to the appellant a month after the trial court’s judgment. It therefore could not be produced at trial. That additional evidence relates to the trial court’s declination to award the special damages stated above. The appellant had adduced the Coptic Hospital discharge report at the trial and the appellant in adducing the additional evidence in this appeal, she would not be making a fresh case nor would she be filing omissions.” (Emphasis added).

26. It is clear that in Sharon Mwende, the court noted that the evidence sought to be adduced was unavailable at the time of trial and could not have been adduced at the trial. On that basis the court found the evidence to be admissible.

27. I have perused that record of the lower court where the point concerning the evidence is raised by the appellant, and which was pointed out during the hearing of this application. The issue arose during cross examination of PW3 Sgt Timothy Kingora (pages 53-54 ROA) and before the close of the prosecution’s case. The witness stated in cross examination on November 17, 2021 that:

“... the case s still PUI (pending under investigation). ODPP have the file and they need to give us the way forward”

28. I have also seen the Police Abstract dated March 8, 2021, which was exhibited in the lower court. It is indicated in the Abstract at various paragraphs:

“Has the investigation been completed? ...(answer) No

If so has anyone been charged? (Answer) No

.....

7. Result of investigations or prosecution (if known): Pending Under Investigation”



29. It is clear that the appellant knew all along from the time of seeing the abstract – which was part of the plaintiff’s evidence – that the matter had been pending under investigation since the accident occurred on February 14, 2021, to the time when the plaintiff’s witness Sgt Timothy Kingora was testifying.
30. In the applicant’s application for the additional evidence in grounds 3 and 5 the applicant states:
- “
- “ 3. That at the time of the hearing and determination of the suit, the before the lower court the police file containing eye witness statements, reports and sketch maps was yet to be availed before the court...
-
5. The applicant further reiterates that it was unable to adduce the attached documents for reasons that it did not receive that it did not receive any legal advice on the importance of the documents and the production thereof as exhibits”
31. The presentation of oral evidence in the trial court commenced on November 17, 2021. prior to that evidence had been exchanged between the parties as is the normal practice, including the Police abstract. Each party knew the case that they were to make out or to meet. At the hearing, the appellant was the defendant. It may be that they left the defence to their insurance provider, but they were a party and were represented by a counsel.
32. Indeed, the statements which the applicant now wishes to introduce, had in fact been recorded way back on February 15, 2021, and the sketch plans had been produced on February 17, 2021. The letter by the DCI forwarding their duplicate of the police file is dated October 12, 2021, almost a month before the trial begun.
33. In the event, nothing would have been easier than for the defendant or insurance company, irrespective of who was defence counsel to call for the police file at the time the police officer was giving evidence on 17.11. 2021. There is no indication that the defence applied for or even sought an adjournment to seek to obtain the evidence they now have in their possession. That evidence was available almost a month prior to the hearing.
34. In the Mohamed Abdi Mahamud case the Supreme Court was categorical that the evidence sought to be introduced is not intended to fill a gap in the applicant’s case. The Court stated:
- “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.”
35. The respondent submits that allowing this application will set a bad precedent as parties will be bringing new evidence after conclusion of trial. It is an attempt to patch up the gaps in their case as indicated in the lower court’s judgment.
36. In the case of *Safe Cargo Limited v Embakasi Properties Limited & 2 Others* (2019) eKLR it was stated as follows:
- “This Court in discussing its power to admit additional evidence under Rule 29 (1) stated as follows in Republic –v- Ali Babitu Kololo (2017) eKLR



It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal.”

37. In *Kenya Medical Research Foundation v Eric K Omanje t/a Manje Auto Garage* [2020] eKLR Mrima J, declining an application for introduction of fresh evidence stated as follows:

“I further find that the endeavor to introduce additional evidence on appeal is an attempt by an unsuccessful litigant out to make a fresh case on appeal, fill up omissions and patch up weak points in the case. The totality of the foregoing will result into delay in determination of the matter”

Conclusion

38. I stand in the same position as Mrima, J. I find that the appellant had ample opportunity during trial to call for and demand the production of the evidence now sought to be produced on appeal. The evidence was available from as early as February 152021 to the time when they were to make their defence. They made no attempt to apply for that evidence which was clearly already in the hands of the police.

39. In the result, I reject the applicant’s application and dismiss the same with costs.

40. Orders accordingly.

Dated and delivered at Kerugoya this 22nd day of March, 2023

.....

R. MWONGO

JUDGE

In the presence of:

Wanja for the Applicant

Maringa for the Respondent

Mr. Murage, Court Assistant

