



**Seedtran Transporters Ltd v Said (Civil Appeal 221 of 2022)  
[2023] KEHC 2845 (KLR) (24 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2845 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL 221 OF 2022  
DKN MAGARE, J  
MARCH 24, 2023**

**BETWEEN**

**SEEDTRAN TRANSPORTERS LTD ..... APPELLANT**

**AND**

**SHABAN HASSAN SAID ..... RESPONDENT**

**RULING**

1. This is an appeal from a decision of the trial court to admit a document written without prejudice. The Applicant argues and rightly so that he has a right to challenge the decision of the Court. I think so. Given that he has leave to Appeal, I will not begrudge him for seeking a second opinion. The question is whether he has satisfied the 2<sup>nd</sup> requirement that there will be irreparable harm.
2. The question of improper admission of evidence is succinctly covered that Section 175 of the [evidence act](#). The same provides “effect of improper admission or rejection.”

Effect of improper admission or rejection The improper admission or rejection of evidence shall not of itself be ground for a new trial or for reversal of any decision in a case if it shall appear to the court before which the objection is taken that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that if the rejected evidence had been received it ought not to have varied the decision.

3. In other words, when evidence has either been improperly accepted or rejected, that alone is not the *raison d’etre* to overturn a decision. Consequently, the Applicant need to show the court, that over and above the improper rejection the trial will be prejudiced.



4. In *Charles Juma Mulwa v Peter Makau Ndeti and Esther Mbula Makau (Suing on their own behalf and as administrators of the Estate of late Alex Nzomo Muendo)* [2020] eKLR, the Court had this to say: -

A holistic consideration of section 175 of the *Evidence Act* section 79A of the *Civil Procedure Act*, reveals that this court can set aside the ruling of the trial court where it is demonstrated that the improper admission or rejection of evidence or error, defect or irregularity in the proceedings in the suit, affected the merits of the case or the jurisdiction of the court or occasioned a miscarriage of justice. In my view, the above scenario occasioned a miscarriage of justice. A miscarriage of justice was discussed in the case of *Zabira Habibullah Sheikh & Another vs State of Gujarat & Others* AIR 2006 SC 1367 where the Supreme Court of India stated:-

“It has to be unmistakably understood that a trial which is primarily aimed at ascertaining the truth has to be fair to all concerned. There can be no analytical all comprehensive or exhaustive definition of the concept of a fair trial, and it may have to be determined in seemingly infinite variety of actual situations with the ultimate object in mind viz whether something that was done or said either before or at the trial deprived the quality of fairness to a degree where a miscarriage of justice has resulted...Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, the condemnation should be rendered only after the trial in which the hearing is a real one, not a sham or mere farce and pretence....The fair trial for a criminal offence consists not only in technical observance of the frame, and forms of law, but also in recognition and just application of its principles in substance, to find out the truth and prevent miscarriage of justice”

5. It follows that the appeal is not an idle one. However, there is no loss demonstrated in proceeding with the suit in the court below. These are reversible orders. There is no evidence that not staying the proceedings will prejudice the Applicant in any way. This could be different if the evidence of decisive character is excluded and could affect the trial irreparably.

6. Section 79A of the *Civil Procedure Act*, provides that: -

“79A. No decree to be altered for error not affecting merits or jurisdiction

No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the court.”

7. Consequently, it is fair that proceedings be undertaken, that if the document affects the outcome of the case, it shall be dealt with as such in the appeal level on merit.

8. In the circumstances there is no irreparable loss likely to be suffered. This is for good reasons: -

- a. Any improper admission will be remedied when the totality of the evidence is on record.
- b. The order of admission of evidence is reversible on appeal if it affects the outcome without as of necessity requiring a retrial. In other words, if the document was of decisive character, then the same may be excluded and the court proceeds as if the document as never admitted or rejected as the case may be.



9. I therefore dismiss the application dated 2/2/2023. The costs of the said application shall be in the appeal. The Appellant should take steps and file the Record of Appeal within 60 days.
10. The matter in the court below shall proceed unhindered from where it had reached.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24<sup>TH</sup> DAY OF MARCH, 2023.  
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**HON. MR. JUSTICE DENNIS KIZITO MAGARE**

**JUDGE OF THE HIGH COURT, MOMBASA**

**In the presence of:**

Ms Gatimu the Appellant

Jengo for the Respondent

**Court Assistant – Oliver Musundi**

