



Al Husnain Motors Ltd v Okwoba (Suing as the Legal Representative of the Estate of Phaustine Nengo Opemi - Deceased) & another (Civil Appeal E56 of 2021) [2023] KEHC 22445 (KLR) (22 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22445 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
CIVIL APPEAL E56 OF 2021
JRA WANANDA, J
SEPTEMBER 22, 2023**

BETWEEN

AL HUSNAIN MOTORS LTD APPELLANT

AND

EDMOND OPEMI OKWOBA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF PHAUSTINE NENGO OPEMI - DECEASED) 1ST RESPONDENT

PETER NJUGUNA KAMAU 2ND RESPONDENT

RULING

1. The Application before the Court is the Appellant’s Notice of Motion dated 9/06/2022 and filed in this Appeal on 2/08/2022. The same seeks the following orders:
 - i. The Court be pleased to allow the Applicant to adduce additional evidence at the hearing of the appeal which shall include the following:

The sale agreement between the Appellant and James Jomo MAChengo in respect of the suit motor vehicle KCA XXXX
 - ii. Costs of the application be provided for.
2. The background of this matter is that by the Plaint filed on 21/06/2019 in Mumias PMCC No. 72 of 2019 through Messrs Abok Odhiambo & Co. Advocates, the 1st Respondent, suing as the legal representative of the estate of the late Phaustine Nengo Opemi (deceased) pleaded that the Appellant and the 2nd Respondent were the owners of the motor vehicle registration number KCA XXXX Toyota Hiace Van, on 5/07/2016 the deceased was a pedestrian when the driver of the said motor vehicle



- negligently managed the same that he caused it to knock down the deceased at Munami area along Busia-Mayoni road occasioning the deceased fatal injuries. The 1st Respondent thus sought damages.
3. Among the items included in the 1st Respondent's bundle of documents and produced in evidence was a copy of Records from the National Transport & Safety Authority (NTSA) indicating that the motor vehicle was registered on 28/08/2014, that as at 17/04/2019, the 2nd Respondent was the registered owner thereof and that the only other previous registered owner was the Appellant.
 4. The 2nd Respondent did not enter appearance and as a result, default Judgment was entered against him.
 5. On its part, the Appellant, through Messrs Otieno, Yogo, Ojuro & Co. Advocates filed a Statement of Defence on 1/08/2019 denying the said allegations. On 18/02/2020, the Appellant was granted a period of 14 days to file its Witness Statements and bundle of documents. The matter then proceeded to trial on 29/09/2020 when the Plaintiff's 1st and 2nd witnesses testified. Although the Appellant participated in the trial, it had not yet filed the Witness Statement nor the bundle of documents.
 6. After close of the 1st Respondent's case but before commencement of the defence case, the Appellant finally filed its Witness Statement and bundle of documents on 27/10/2020. In the Statement and also in the defence witness' testimony given on 8/07/2021, the Appellant took the position that it had sold the motor vehicle to one James Jomo Machengo way back in the year 2014 and that therefore the Appellant was not in control, management or possession of the vehicle as at the time of the accident.
 7. While testifying, the Appellant's witness sought to produce the said bundle documents filed out of time but the attempt was objected to by the 1st Respondent's Counsel. The objection was upheld by the trial Court and the bundle of documents duly expunged from the record.
 8. After close of the case, the trial Court delivered its Judgment on 5/10/2021 whereof it found, inter alia, that the Appellant's allegation that it had sold the vehicle before the accident was not supported by any documentary evidence. Accordingly, it entered Judgment and awarded damages against the Appellant and the 2nd Respondent, jointly and severally.
 9. Being dissatisfied with the said decision, the Appellant instituted the present Appeal vide the Memorandum of Appeal filed on 2/11/2021. The decision was challenged on both limbs of liability and quantum.
 10. However, before hearing of the Appeal, the Appellant filed the present Application. The same is premised on the grounds stated on the face of the Application and is supported by the Affidavit sworn by one Kashif Riaz who described himself as the Appellant's Manager.

Appellant's Supporting Affidavit

11. The Appellant deponed that it had sold the motor vehicle to one James Jomo Machengo (purchaser) vide the Sale Agreement dated 24/8/2014, the purchaser was therefore the one in possession and control of the vehicle at the time when the accident occurred, the purchaser took immediate possession of the vehicle upon signing the Agreement, upon payment of the purchase price the Appellant transferred the vehicle to the purchaser's names and that the Appellant's list of documents was expunged from the record on 8/07/2021 by the trial Court therefore the same was never produced despite being in the possession of the 1st Respondent. Counsel added that the Sale Agreement dated 24/8/2014 needs to be produced as additional evidence as it will show that the Appellant is not the owner of the vehicle, no prejudice will befall the Respondents as the said document is already in their possession and the document is directly relevant to the issues for determination in this appeal.



Respondent's Replying Affidavit

12. The Application is opposed by the 1st Respondent vide his Replying Affidavit filed in Court on 13/10/2022. He deponed that the Applicant's attempt to introduce new evidence at this appeal stage is not only facetious, vexatious and an abuse of Court process for reasons that a similar attempt was made by the Applicant at the trial Court without obtaining leave of Court and the documents were expunged from the record, the trial Court rendered its Ruling on the point of law expunging the said documents and further, granted the Applicant a 30 day right of appeal which appeal was never lodged, that the Appellant's defence did not plead the fact that the vehicle had been sold to anybody and that even after commencement of the trial, the Applicant never joined the alleged purchaser as a third party to the proceedings, the Applicant is attempting to create a fresh case by introducing new evidence that was never determined by the trial Court contrary to the trite principles governing appeals and that the Appellant is trying to use the Court to rectify its mistake of failing to obtain leave of Court prior to introducing new evidence.
13. The 1st Respondent deponed further that a cursory look at the Appellant's defence will show that no alleged purchaser of the vehicle was ever joined as a party to the proceedings and as such, no such party can be included in the present appeal, the Applicant is merely wasting the Court's time by engaging in multiple delaying tactics to forestall the just determination of the appeal, the additional evidence sought to be procured on appeal could have reasonably been presented before the trial Court but which opportunity the Appellant overlooked, the Appellant was granted a 30 days right of Appeal against the trial Court's Ruling expunging its new evidence which appeal step was not taken by the Applicant and as such, the Appellant should not be allowed to have a second bite at the cherry, the 1st Respondent stands to suffer irreparable loss if the Application is allowed.
14. It was then directed and agreed that the Application would be determined by way of written Submissions. Pursuant thereto, the Appellant filed its Submissions on 27/10/2023 while the 1st Respondent filed earlier on 18/10/2023.

Appellant's Submissions

15. To support the prayer for leave to adduce additional evidence, Counsel for the Appellant cited Section 78 of the *Civil Procedure Act*, Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules*, the Supreme Court case of *Mohammed Abdi Mohamud v. Ahmed Abdulabi Mohamad & 3 Others* [2018] eKLR, the Court of Appeal case of *Safe Cargo Limited v Embakasi Properties Limited & 2 Others* [2019] eKLR and also the case of *Republic v Ali Babitu Kololo* [2017] eKLR.
16. Counsel submitted that the Appellant has met the legal threshold in that in the Supporting Affidavit it is demonstrated why the evidence was not adduced earlier, the evidence sought to be adduced meets the criteria and guidelines laid out by the Supreme Court, the same is relevant to the matter before Court and it is in the interest of justice to have it adduced. Counsel reiterated that at the time of the accident the Appellant had sold the vehicle to one James Jomo Machengo, the trial Court expunged the Applicant's List of Documents from the record, the Sale Agreement needs to be produced as additional evidence as it will show that the Appellant is not the owner of the vehicle, the Respondent will not be aggrieved in any way as the Agreement in question is already in their possession, the evidence to be adduced comprises of only two pages, it is not voluminous hence making it easy to peruse, the Respondents have had enough time to examine what the Appellant seeks to produce as additional evidence.



Respondent's Submissions

17. Counsel for the Respondent submitted that the issue of introducing additional evidence on an Appeal is one that should be decided on a case to case basis and there are laid out principles set by judicial precedents as to the threshold to be met, an Appellate Court has to consider and be guided by the laid out principles applicable. He cited the Supreme Court case of *Mohammed Abdi Mohamud v Ahmed Abdulabi Mohamad & 3 Others* [2018] eKLR and Order 42 Rule 27 of the *Civil Procedure Rules*.
18. Counsel submitted that a cursory look at the proceedings of the trial Court of 8/7/2021 will reveal that the Appellant's witness was set to testify and wished to adopt his statement as well as the List of Documents, the 1st Respondent's Advocate however raised an objection that the said documents had been filed without leave of the Court, that the Applicant was given 14 days within which to file their documents, that the Appellant had been given the opportunity to file all its documents but failed to do so and that the 1st Respondent had already testified and closed his case. He added that it was not until 5/11/2020 that the alleged documents were filed, the 1st Respondent did not have the opportunity to look at the documents and the Appellant ought not to be allowed to build its case while the same was proceeding.
19. Counsel contended further that the alleged individual that the Appellant sought to introduce was not a party to the proceedings, Order 7 Rule 5 of the *Civil Procedure Rules* is couched in mandatory terms regarding leave for extension of time to file additional documents, the trial Magistrate rendered her Ruling on this point of law and expunged the Appellant's documents, the Appellant was then granted 30 days right of Appeal but never appealed, the guiding principles are to be considered conjunctively and not disjunctively such that if an Applicant fails to satisfy all or a majority of them then the Application must fail, the trial Magistrate properly refused to admit the Appellant's evidence and that the additional evidence sought to be produced could have been procured with reasonable diligence as the same was within the knowledge and possession of the Appellant. Counsel cited the case of *EO v COO* [2020] eKLR and *Dorothy Nelima Wafula v. Hellen Nekesa Nielsen and Paul Fredrick Nelson* [2017] eKLR.
20. Counsel submitted further that the Appellant has not demonstrated any sufficient reason or grounds since the Sale Agreement was well within its possession and the Appellant's folly was to file the same out of time and without leave, the Appellant cannot now wish to persuade this appellate Court to allow extraneous evidence which essentially seeks to create a new case, in considering the introduction of new evidence on appeal an appellate Court ought to be cautious not to allow a fresh case or the patching up of weak points not addressed at the Court of first instance, there would be no end to litigation if the principles espoused in the case of *Mohamed Abdi Mohamed* (*supra*) were used for the purpose of allowing parties to make out a fresh case or improve their case by calling further evidence, this Court's power to either allow or dismiss an Application of this nature ought to be exercised sparingly and with great caution.
21. Counsel reiterated that the Appellant never bothered to take out third party proceedings in the primary case against any alleged buyer and as such, no such intended third party can be joined at the appeal stage. He cited the case of *Dharmagha Patel & Another v TA (Minor suing through the mother and next friend HH)*. Counsel further argued that the Application has been brought too late in the day as the trial Court has already rendered its judgment on the matter and it is only at this appeal stage that the Appellant has brought the Application which counts as inordinate delay.
22. According to Counsel, the main reason why the Appellant seeks to introduce the alleged new evidence is only to remove the lacuna and fill evidential gaps left open during trial at the Magistrate's Court



and making out a fresh case at the appeal which is forbidden. He added that there must be exceptional circumstances to constitute sufficient reasons for receiving evidence at the appeal stage. He then cited the case of *Nayan Mansukhlal Salva v Hanikssa Nayan Salva*.

Analysis and Determination

23. Upon carefully considering the record including the Affidavits and Submissions presented, in my view, the broad issue that arises for determination is the following:

“Whether the Appellant has made out a case warranting it to be granted leave to adduce additional evidence at this appellate stage.”

24. The power of an appellate Court to admit additional evidence is one of the powers granted to an appellate Court under Section 78 of the *Civil Procedure Act* which provides that:

“(1) Subject to such condition 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.

25. Order 42 Rule 27 of the Civil Procedure Rules then provides as follows;

“(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.”

26. The Supreme Court in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR, laid down guidelines for admission of additional evidence by appellate Courts as follows:

“(79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before



us. 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.

[80] We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”

27. Earlier, in the case of *Raila Odinga and 5 others v Independent Electoral and Boundaries Commission & 3 others* [2013] eKLR, the Supreme Court guided that it will be reluctant to admit additional evidence if the same will make it difficult or impossible for the opposing party to respond effectively. Therefore, the Court must act with abundant caution and care in the exercise of its discretion under this rule.
28. Further, in Civil Appeal (Application) 84/2012 *Attorney General v Torino Enterprises Limited* [2019] eKLR, the Court of Appeal stated as follows:

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- “13. In *Dorothy Nelima Wafula v Hellen Nekesa Nielsen and Paul Fredrick Nelson* [2017] eKLR, it was expressed that under that Under Rule 29(1) (a),



additional evidence will be introduced on appeal in the discretion of the Court, “for sufficient reason.” The Court further stated that:

“Though what constitutes “Sufficient reason” is not explained in the rule, through Judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a Party seeking to present additional evidence on appeal. Before this Court can permit additional evidence Under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible.”

29. Although in the above case, the Court of Appeal was dealing with an Application brought under Rule 29 of the Court of Appeal Rules, similar principles apply to the provisions under which the present Application has been brought.
30. Applying the above principles to the present case, I note that the Appellant has approached this Court seeking leave to adduce the same additional evidence that was expunged by the trial Court when the matter was being heard. The Applicant maintains that the said evidence is crucial and vital in dispensing of the dispute herein.
31. From the proceedings at the trial Court of 18/2/2020, it evident that that the Appellant was granted 14 within which it to file its defence documents. Further, when the matter came up for defence hearing on 8/7/2021, one Alfred Kaiya, testifying as DW1, sought to produce the Appellant’s documents in evidence. Mr. Abok, Counsel appearing for the 1st Respondent objected to the production of the documents on the ground that they had been filed out of time and without leave of the Court. Counsel further argued that the 1st Respondent being the Plaintiff therein had already testified on 29/9/2020 and closed his case on 15/10/2020 only for the said documents to be filed on 5/11/2020 and served upon the 1st Respondent on 14/6/2021.
32. In his said objection, Counsel Mr. Abok’s further contended that the 1st Respondent did not have the opportunity to look at the documents and further that the documents sought to introduce a party who was not a party to the proceedings. Consequently, the trial Magistrate, on the same day, rendered a Ruling on the issue, upheld the objection and expunged the documents from the Court record. The Appellant never appealed against the said Ruling and fully participated in the subsequent proceedings up to close of the trial, filing of Submissions and delivery of Judgment.
33. From the chronology of events outlined above, it is evident that from the onset, the Appellant had ample opportunity to file its documents within the stipulated timelines. When the normal timeline lapsed, the trial Court granted the Appellant an additional 14 days within which to file the documents. The Appellant still failed to do so and then eventually, without leave of the Court, filed the documents out of time and after the 1st Respondent had already long closed his case. Upon considering the objection, the trial Court delivered a Ruling whereof it upheld the objection and expunged the Appellant’s documents from the record. At this juncture, the Appellant reserved the right to challenge the Ruling vide an Appeal. It chose not to exercise this right.
34. Having chosen not to Appeal against the Ruling, I find that what the Appellant is now attempting to do is to “sneak in” an appeal within an appeal. This is against procedure and is an abuse of the Court process. Allowing the Application will set a dangerous precedent and will fly against the face of the principal that “litigation must come to an end”.



35. It is true that under Order 42 Rule 27(1)(a) of the *Civil Procedure Rules*, an appellate Court possesses the power to admit additional evidence if the Court from whose decree the appeal is preferred has refused to admit evidence “which ought to have been admitted”. However, I find that in this instant case, the Appellant did not give any sufficient explanation why it failed to comply with the stipulated timelines and also why it failed to comply even when additional time was given or extended by the trial Court. Further, the documents having been filed out of time, without leave and long after the 1st Respondent had already closed his case, admitting the documents at such late stage would have been prejudicial to the 1st Respondent. I do not therefore find any justification warranting this Court to disagree with the trial Court’s decision to expunge the Appellant’s documents. For these reasons, I find that the document sought to now be admitted is not evidence “which ought to have been admitted” and that therefore Order 42 Rule 27(1)(a) does not apply.
36. Further, one of the grounds that an Applicant seeking to adduce additional evidence at the appellate stage ought to satisfy is that such evidence sought to be adduced 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 by the party seeking to adduce the additional evidence. Clearly the grounds preferred by the Appellant fall short of this threshold since it is not denied that the evidence was all along available save that it was filed out of time without leave and was then duly expunged by the trial Court.
37. In analysing the powers of an appellate Court to admit additional evidence, in the case of *Wanjie & Others v Saikwa & Others* [1984] KLR 275, Chesoni JA observed as follows:
- “This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find it needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given should be exercised very sparingly and great caution should be exercised in admitting fresh evidence”
38. Applying the above principles to the instant Application, I also find that what the Appellant is attempting to do is to utilize the alleged evidence for the purpose of removing lacunae and filling gaps in its evidence before the trial Court. I also find that having been unsuccessful at the trial, the Appellant is now seeking to adduce the additional evidence to make a fresh case in appeal, fill up omissions and patch up the weak points in its case. This, the Court will not allow.
39. In any event, allowing the Application would mean that a third party, the alleged purchaser of the motor vehicle, will be adversely mentioned in the Appeal and orders sought to be granted without affording such third party a right to be heard. If the Appellant really wished to raise issues touching on the third party, then it ought to have commenced third party proceedings against the said party at the trial Court. Allowing the Application at appellate stage will prejudice the third party and this will be tantamount to condemning such third party unheard. This, a Court of law, cannot countenance.
40. I also find the Application to be vague insofar as it seeks that the Court be pleased to allow the Applicant to adduce additional evidence at the hearing of the appeal “which shall include” the said Sale Agreement. Apart from the Agreement therefore, the Application seeks leave to adduce other evidence which however has not been specified leaving the Court to speculate.



41. Having carefully considered the matter therefore, I am satisfied that the additional evidence sought to be adduced does not meet the criteria and guidelines applicable in Applications of this nature.

Final Orders

42. The upshot of my findings above is that, considering the facts and circumstances of this case, the Application seeking leave to adduce additional evince at appellate stage is devoid of merits. Accordingly, I issue the following orders:

- i. The Appellant's Notice of Motion dated 9/06/2022 is hereby dismissed with costs to the 1st Respondent.
- ii. Since this Appeal had already been admitted and directions given, the parties shall now take further directions geared towards the expeditious disposal of this Appeal.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 22ND DAY OF SEPTEMBER 2023

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WANANDA J.R. ANURO

JUDGE

