



**APA Insurance Ltd v Mulei (Civil Appeal E167 of 2023)
[2024] KEHC 16137 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16137 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E167 OF 2023
JM NANG'EA, J
DECEMBER 16, 2024**

BETWEEN

APA INSURANCE LTD APPELLANT

AND

BENEDICT MATHEKA MULEI RESPONDENT

RULING

1. The appellant brought this appeal to challenge the decision of the learned trial magistrate at Machakos in Civil Suit No. E616 of 2021 to grant judgement in the sum of Kshs. 2,499,939/= plus costs and interest to the respondent being his commission for brokering an insurance deal between the appellant and Makueni ak County Assembly Public Service Board on behalf of the former for provision of a medical insurance cover in favour of Honourable Members of the County Assembly and its staff. Before hearing and determination of the appeal, the appellant filed a Notice of Motion dated 19/6/2024 for the following reliefs:
 1. Leave to adduce additional evidence on appeal.
 2. The costs of the application.

Affidavit evidence in support of the appellant's Motion

2. By affidavit sworn by Ruth Ambalelo, an advocate of the High Court of Kenya in the employ of the appellant, it is averred inter alia that the appellant now has documentary evidence that the tender subject of the suit in the lower court which is also the substratum of this appeal was an underwriters' only tender and therefore no party could participate in the same through an intermediary. The appellant contends that in the circumstances there was no need for any marketing as it was already an account holder with the Tendering Entity. According to the appellant the tender was awarded directly to it without the intervention of the respondent or any other intermediary.



3. The appellant thus states that the proposed additional evidence is necessary in the interest of justice for the reason that it has a direct bearing on the suit in the lower court and in this appeal and further that the evidence could not have been obtained with reasonable diligence for use at the trial. The court is told that the appellant is not bringing a new case or seeking to fill any lacuna or gaps in its evidence. Copies of general communication from the Insurance Regulatory Authority on insurance matters, a sample model agency contract for insurance companies and intermediaries and the tender document in respect of provision of the medical insurance cover in question are exhibited for the court's perusal.

The respondent's affidavit evidence in reply

4. The respondent swore and filed a brief affidavit in reply opposing the application. He contends that the application is devoid of merit and does not accordingly meet the legal threshold for introduction of new evidence on appeal. The respondent further charges that no reason is given for the failure to present the purported new evidence in the suit before the trial court.

The appellant's submissions

5. Learned Counsel for the appellant cite the provisions of section 78 (1) of the *Civil Procedure Act* as the statutory basis for this application. The enactment provides that a court to which an appeal is preferred "may:
 - a. determine the case finally;
 - b. remand the case;
 - c. frame issues and refer them for trial before the court from which the appeal is preferred ;
 - d. take additional evidence or require the evidence to be taken by the trial court or any other subordinate court or;
 - e. order a new trial.

Subject to the aforesaid provisions, an appellate court shall have the same powers and shall perform as nearly as possible the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of the suit instituted therein.

6. The court is further referred to the provisions of Order 42 Rules 27 and 28 of the Civil Procedure Rules 2010. Rule 27(1) provides that parties to an appeal may produce additional evidence in the appellate court, "but if:-
 - a. the trial court has refused to admit the evidence which ought to have been admitted; or
 - b. the appellate requires any document to be produced or any witness to be examined to enable it pronounce judgement or for any other substantial cause, the appellate court may allow such evidence or document to be produced or witness to be examined".
7. Rule 27(2) states that where additional evidence is allowed, the appellate court may either take such evidence or direct the trial court or any other subordinate court to take such evidence and transmit the same to it.
8. To further buttress the appellant's case, Counsel place reliance on the judicial determination in *Archer & Another vs Archer & 2 Others (Civil Application E058 of 2021)* (2022) KECA 9 (KLR) (21 January 2022) (Ruling) which in turn is fortified by the Supreme Court case of *Hon. Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed & 3 Others* (2018) eKLR. The Supreme and the Court



of Appeal in these decisions set out the following guidelines for admission of new evidence before the appellate court;

- a. The additional evidence must be directly relevant to the suit in the trial court and be in the interest of justice;
 - b. The evidence must be such that, if given, would influence or impact upon the result of the verdict, although it need not be decisive;
 - c. It must be shown that the additional evidence could not have been obtained with reasonable diligence for use at trial, or was not within the knowledge of the applicant or could not have been produced before the trial court.
 - d. The additional evidence removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit.
 - e. The additional evidence must be credible.
 - f. The new evidence should not be so voluminous that the opposite party finds it difficult to respond effectively.
 - g. If a party would reasonably have been aware of and procured the further evidence in the course of trial, this is an essential consideration for the sake of fairness.
 - h. The additional evidence should disclose a strong prima facie case of willful deception of the court.
 - i. The court must be satisfied that the new evidence is not intended to be used to remove a lacuna or fill up gaps. On the contrary it must be needful evidence.
 - j. The unsuccessful party in the trial court must not be allowed to bring new evidence to patch up omissions/gaps in an otherwise weak case.
 - k. Proportionality and prejudice that may be occasioned by allowing new evidence and the imperatives of an expedited trial should be carefully balanced.”
9. The appellant’s advocates also refer the court to the judicial determinations in *Kenya Agricultural & Livestock Research Organization vs Leah Okoko & Another* (2022) eKLR and *Safe Cargo Limited vs Embakasi Properties Limited & 2 Others* (2019) eKLR which caution that the jurisdiction to allow new evidence in an appeal ought to be exercised sparingly and that the evidence must indeed be fresh and impact determination of the appeal.

The respondent’s submissions

10. Learned Counsel for the respondent reiterate the opinion of the Court of Appeal in the case of *Safe Cargo Limited supra* to the effect that the court’s discretion to allow adduction of new evidence on appeal should be exercised sparingly. Case law in *Republic vs Ali Babitu Kololo* (2017) eKLR, a criminal case, is also cited for the same proposition. In particular, the emphasis in *Safe Cargo Limited* on any such new evidence having a direct relevance to the appeal as to influence or impact upon the result of the verdict, and whether the evidence could have been obtained with reasonable diligence are urged by Counsel to be of significance in deciding whether or not to allow such application. It is the respondent’s Advocates’ submissions that the proposed new evidence will not directly impact the appeal.



11. The respondent also faults the appellant's reliance on a communication purportedly from the Insurance Regulatory Authority advising insurance companies to enter into written agreements with intermediaries such as the respondent herein. The court is told that this is only an effort to encourage insurers in that regard but does not invalidate unwritten contracts that may otherwise be entered into with such intermediaries. Counsel for the respondent refer to the judicial determination in *Mamta Peeush Mahajan (Suing on behalf of the Estate of the late Peeush Premal Mhajan) vs Yashwant Kumari Mahajan (sued personally and as Executrix and Beneficiary of the Estate of Krishan Lal Mahajan) (2017) eKLR* where it was held that agreements entered into by parties thereto need not be in writing or in a special form unless expressly provided by statute. Having admitted in the lower court that the respondent is a registered insurance agent who previously transacted with the appellant on many occasions, not necessarily in writing, the appellant cannot be heard to disown him herein, submitted the respondent's advocates.
12. The respondent finally places reliance on the doctrine of "indoor management" which lays down the position that a company's internal operations and arrangements should not prejudice outsiders with no knowledge of internal workings of the organization.

Analysis and determination

13. As deduced from Counsel Submissions, the parties are in agreement with regard to legal principles guiding determination of an application for adduction of additional evidence on appeal. The Court of Appeal further reiterated the above set out guidelines for determination of such application, in *Attorney General vs Torino Enterprises Limited (2019) eKLR*.
14. I am persuaded by this court's observation in the *Kenya Agricultural Research & Livestock Organization* case *supra* that an applicant need not comply with all of the above guidelines. It is sufficient if substantial compliance is demonstrated.
15. The issue for determination is whether the appellant has met the legal threshold for grant of the application. The appellant wants to tender evidence that the respondent was not involved in its procurement of the insurance services in question since the tender was for underwriters only with no role for agents or brokers.
16. The suit the respondent instituted against the appellant in the lower court was for *inter alia* an order directing the latter to pay the former Kshs. 2,500,000/= in insurance agency commission fees. The respondent averred that the appellant had sub-contracted him as its agent to source for business and the agreement was executed at Machakos. Pursuant to the agreement the respondent managed to procure for the appellant a medical insurance tender from the Makeni County Assembly Service Board for the 2020/2021 period and the contract documents were executed by the two principal parties. The respondent, however, lamented that the appellant declined to pay him the agreed commission, hence the suit.
17. In its statement of defence the appellant denied existence of the agency relationship in respect of the tender in question, contending that it had always directly tendered for and obtained medical insurance business from the said County Government and that the business had been in its books since 2016. According to the appellant the tender was floated as an Underwriters Only Tender and it was not therefore open to participation by intermediaries such as the respondent. The appellant therefore denied breaching any contract with the respondent regarding the tender in issue, although it seems to concede that the respondent had been its agent in other insurance tenders.



18. The documentary evidence the appellant states to be now in its possession include a copy of a circular from the Insurance Regulatory Authority to insurance companies attaching a sample model agency contract for insurance companies and intermediaries advising them to enter into formal written agreements for clarity of their business transactions and general efficiency of insurance business. A copy of the Tender Documentation for provision of medical insurance cover for Makueni County Assembly Members and Staff indicating it was floated for Underwriters only is also exhibited in the application.
19. The Insurance Regulatory Authority's advice to insurance companies including the appellant adverted to hereinabove appears not to be legally binding. Insurance companies were only being encouraged to adopt best practices in operating their business with intermediaries. I agree with the respondent that this proposed additional evidence is not directly relevant to the suit before the lower court for its non-binding legal nature and does not therefore impact the court's decision.
20. Although the exhibited Tender Document in respect of the medical insurance cover in question indicates that it was floated as an Underwriters Only tender, the appellant has not explained why the document could not be produced during the trial before the lower court. It is not shown that the evidence was not within the knowledge of the appellant at the time of hearing of the suit. This therefore seems to be an attempt by the appellant to patch up its case and fill gaps. The court is also cognizant of the imperatives of an expedited trial to inter alia avoid unnecessary costs in the interest of justice by dint of the provisions of section 3A of the *Civil Procedure Act*.

Determination

21. In the premises, it is this court's opinion that the appellant has not substantially complied with the law to warrant grant of leave to adduce additional evidence on appeal. The application is hereby dismissed with costs to the respondent.

J. M. NANG'EA - JUDGE

RULING DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER 2024 IN THE PRESENCE OF:

The Appellant/ Applicant's Advocate, Mr Ochieng.

The Respondent's Advocate, Ms Sidika.

J.M. NANG'EA - JUDGE.

