



**City Classic Enterprises Limited & 3 others v The Chief Officer,
Finance County Government of Wajir & 2 others (Commercial Case
E002 of 2023) [2024] KEHC 15785 (KLR) (16 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15785 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
COMMERCIAL CASE E002 OF 2023
JN ONYIEGO, J
DECEMBER 16, 2024**

BETWEEN

**CITY CLASSIC ENTERPRISES LIMITED 1ST PLAINTIFF
GA'ALS AGENCIES LIMITED 2ND PLAINTIFF
CONTRACTORS LIMITED 3RD PLAINTIFF
LIBIQRAR CONSTRUCTION LIMITED 4TH PLAINTIFF**

AND

**THE CHIEF OFFICER, FINANCE COUNTY GOVERNMENT OF
WAJIR 1ST DEFENDANT
THE COUNTY GOVERNMENT OF WAJIR 2ND DEFENDANT
THE GOVERNOR, COUNTY GOVERNMENT OF WAJIR 3RD DEFENDANT**

RULING

1. Through a notice of motion dated 16-09-2024, brought pursuant to Sections 1A,1B,3,3A, (63(e)of the *Civil Procedure Act* cap 21, Section 146 (4) of the *Evidence Act* cap 80, Order 18 rule 10 of the civil procedure rules and Article 50 & 159(2) of *the Constitution*, the applicant sought orders as follows;
 - a. Spent
 - b. That this honourable court be pleased to grant the plaintiffs /applicants leave to file the annexed further list of documents dated 16th September 2024 and the same be deemed as duly filed.



- c. That this honourable court be pleased to order the plaintiff's/applicant's case to be re-opened and heard for purposes of adducing the Wajir County assumption of the office of the Governor committee report dated August 2022 contained in the plaintiffs' further list of documents.
 - d. That this honourable court be pleased to recall the plaintiff's/applicant's witnesses number pw1, pw2 and pw3 being Dakane Dimbil, Abass Salat and Omar Abey respectively for further examination in chief and cross-examination respectively for purposes of adducing the Wajir County Assumption of the office of governor committee report dated August 2022 contained in the plaintiffs' further list of documents.
 - e. That cost of this application be provided for.
2. The application is based on the particulars on the face of it and further amplified by the content contained in the affidavit in support sworn 16-09-2024 by Dakane Dimbil Director of the 1st applicant on his behalf and that of the 1st, 2nd and 3rd plaintiffs/applicants. He averred that on 15-07-2024 they tendered their evidence and closed their case. That while preparing for the defence case scheduled for hearing on 18-09-2024, they came a close copy of the Wajir County Government Assumption of the office of the governor committee report dated August 2022(the report) which also forms part of the defendant's list of documents.
 3. He deponed that the report lists all of the plaintiffs' projects forming the subject of these proceedings as done and completed thus lending credence to the plaintiffs' testimony. That the report is crucial to the plaintiffs' case and the court's substantive administration of justice as it confirms that the relevant departments indeed do have the plaintiffs' project files and documents contrary to the defendants' assertion that the projects were not acquired and completed and therefore serving community to date.
 4. It was averred that the evidence sought to be produced is not new to the proceedings as they already form part of the defendants' documents and that the same will clarify the contentious issues to the claim and therefore aid the court to effectually and completely adjudicate upon those issues. That failure to list the documents was not intentional and that it will not be prejudicial to the defendants as they already have them in their list of documents.
 5. In response, the defendants filed a replying affidavit sworn on 30-09-2024 by Osman Noor Ahmed a procurement officer Wajir County Government thus stating that the claim by the plaintiffs that they chanced to see the subject document in the defence list of document is not correct as the defendant filed and served the same documents upon the applicants in time hence had the opportunity to apply and or respond to them before closure of their case.
 6. It was averred that the existence of those documents does not imply admission of liability. That to allow introduction of those documents at this stage will be prejudicial to the preparation of their case. He further averred that to re-open the plaintiffs' case at this stage will disrupt the orderly progression of the trial hence put the defendants at an unfair disadvantage. That the prayer to recall the plaintiffs' witnesses for further examination in chief is unwarranted hence the intension to fill gaps of the plaintiffs' case.
 7. In their rejoinder, the applicants filed a supplementary affidavit sworn on 11-10-2024 reiterating the content in their supporting affidavit save for the claim that their attempt to re-examine their witnesses on the same documents was resisted by the respondents and upheld by the court on the grounds that the subject document was yet to be produced by the defence.
 8. Parties filed their submissions thus reiterating the content contained in their respective affidavits and documents attached thereto.



9. The applicants through their submissions dated 11-10-2024, made reference to Section 146(4) of the *evidence Act* and order 18 rule 10 of the civil procedure rules which makes provision for a party to recall a witness for further cross examination or re-examination. Counsel submitted that the court has the discretion to grant the prayers sought as sufficient cause has been established. To buttress that position, the court was referred to the case of *Odoyo Osodo v Rael Obara Ojuok & 4 others* (2017) eKLR.
10. Learned counsel submitted that the introduction of the documents sought will assist the court arrive at a just decision without prejudicing any party. In that regard, the court was referred to the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others* (2018) eKLR where the supreme court held that additional evidence must be directly relevant to the matter before the court and in the interest of justice.
11. In conclusion, it was contended that; the introduction of the subject evidence is not new hence nobody will suffer prejudice; the defence has not yet opened its case hence will have an opportunity to examine in chief on the same and cross examine the plaintiffs' witnesses; the witnesses to testify are already in the list of documents; the witnesses are willing to pay throw away costs and; the plaintiffs are likely to suffer prejudice permanently if the documents are not produced.
12. On their part, the respondents filed their submissions dated 22-10-2024. Counsel submitted that although the court has the discretion to allow introduction of new evidence or re-opening of the case, the same has to be exercised judiciously. In that regard, the court was referred to the holding in the case of *David Kipkosgei Kimeli vs Titus Barmasai* (2017)e KLR. Further reliance was placed in the case of *Raindrop Limited v County Government of Kilifi* (2020) eKLR where the court held that; the consideration for allowing introduction of new evidence is the relevance of such evidence and whether it is likely to alter the judgment and; whether the evidence would have been discovered earlier.
13. Counsel opined that the applicants did not exercise due diligence in introducing the subject evidence yet the same was available all through. Counsel further opined that the evidence is intended to fill the gaps of the plaintiffs' case. In that regard the court was referred to the case of *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed & others* (2018) eKLR where the court held that where the intended evidence is intended to fill gaps in a case, it will not be allowed.
14. I have considered the application herein, response thereof and parties' respective submissions. The only issue for determination is; whether the applicants have met the threshold for re-opening the plaintiffs' case to introduce additional evidence.
15. There is no doubt that the applicants/plaintiffs have closed their case. There is no dispute that they want their case to be re-opened to enable them refer to and introduce part of the documents attached and filed as the defendants' list of documents.
16. Under section 146(4) of the *Evidence Act*, the law provides that;

“The court may in all cases permit a witness to be recall either for further examination-in-chief or for further cross examination, and if it does so, the parties have the right of further cross examination and re-examination respectively”.
17. Order 18 rule 10 goes further to provide that;

“The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit”.



18. In as much the law makes provision for a party to re-call a witness, the same is exercised within the court's discretion which has to be exercised judiciously and not capriciously nor whimsically. Samuel Kangu Kamau –vs- Republic (2015) eKLR where the Court of Appeal stated as follows –

“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 determination of the appeal”.

19. The subject on introduction of additional evidence has since been addressed by various superior courts. Principally, the applicant is duty bound to prove that; the evidence sought to be introduced was not within his knowledge upon exercise of due diligence during the time of tendering evidence; the evidence sought is not intended at filling the gaps of the applicant's case; the same is not prejudicial to the rival party's case and; that it is in the interest of justice that such evidence be adduced. See James Mwangi Nganga vs Kenyatta University Council & 4 others (2009) eKLR where the court held that the applicant was obligated to prove that the additional evidence could not have been assumed with reasonable diligence for use during the trial.

20. The Supreme Court in the case of Mohammed Abdi Mohamud Vs Ahmed Abdullahi Mohammed & others (supra) set out the principles guiding admission of additional evidence before the appellate courts in Kenya as follows-;

- “(a) The additional evidence must be directly relevant to the matter before the court and is 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 part 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 purposes 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”.
21. In the instant case, the applicants have not demonstrated why they did introduce the intended evidence during the trial of their case. The documents sought to be introduced were available from the very beginning. They did not act diligently in the circumstances by filing the same in response to the defence case. To seek to introduce the evidence and re-open their case after having closed the same will amount to seeking a chance to fill gaps in the plaintiffs’ case.
22. Since the document is already filed by the defendants, the plaintiffs will not suffer any prejudice as they will have an opportunity to cross examine on the same and even submit. At this stage, the applicants are merely speculating that the document might not be produced. The application is premature as the subject document is listed for production as an exhibit by the defence. Should the respondents fail to produce the same, then, the court will allow the plaintiff to re-call one of the plaintiffs to produce the same. This is in recognition that the document/s in question is/are relevant to the just determination of the case.
23. Having held as above, it is my finding that the application is not merited at this stage hence dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 16TH DAY OF DECEMBER 2024

J. N. ONYIEGO

JUDGE

