



**Embassava Co-operative Society Savings & Credit Society Ltd & another v Singa & 2 others
(Civil Appeal E012 of 2022) [2024] KEHC 15750 (KLR) (Civ) (11 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15750 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E012 OF 2022

JN NJAGI, J

DECEMBER 11, 2024

BETWEEN

**EMBASSAVA CO-OPERATIVE SOCIETY SAVINGS & CREDIT SOCIETY
LTD 1ST APPELLANT**

HEMSON MOBIMI 2ND APPELLANT

AND

DANIEL MORARA SINGA 1ST RESPONDENT

ALFRED NYABUTO BICHANGA 2ND RESPONDENT

JARED CHORE OSIEMO 3RD RESPONDENT

RULING

1. The applicants herein have filed an application by way of a Notice of Motion dated 8th May 2024, seeking leave of this court to file additional documentary evidence on their appeal dated 14th January 2022. The application is supported by an affidavit sworn on the same date by Lucas Kyule, the secretary of the 1st applicant.
2. The brief facts of the case are that the 1st respondent brought suit against the two applicants and the 2nd and 3rd respondents after he was injured in a road traffic accident after the motor vehicle he was travelling in belonging to the 1st applicant and which at the time of the accident was being driven by the 2nd respondent was hit from behind by a motor vehicle belonging to the 2nd respondent and being driven by the 3rd respondent. The trial court upon hearing the matter found both drivers of the motor vehicles and the owners of the vehicles to be jointly liable for the injuries occasioned to the 1st respondent and judgment was entered against them. The applicants were aggrieved by the judgment



of the trial court and filed the appeal pending herein. In the mean time they filed the application herein seeking leave to file additional evidence in the appeal.

3. The grounds in support of the application are that the appellants have in their possession documents that indicate that at the time of the accident the motor vehicle registration number KBS 225V did not belong to the appellant but instead belonged to a third party, Titus Kiplagat Chumba. That the said documents were issued to the advocates for 2nd and 3rd respondents who at the time represented all the respondents. That owing to conflict of interest, counsel for the 2nd and 3rd respondents sought services of the Applicants counsel on record. That during trial in the lower court, the counsel for the applicants was not aware of the existence of the said documents as the documents were not handed over to them by the previous advocates when they took over the matter and as a result the additional documents were not tendered during trial in the lower court.
4. The applicants' deponent avers that the Board of Directors of the 1st applicant learnt after the delivery of the judgment that the subject documents were not produced during the trial. He avers that the evidence sought to be produced will assist this Court in properly determining the appeal. He further states that the respondents will not suffer any prejudice as they will have a chance to respond to the additional evidence. That it is in the interest of justice that the application is allowed.
5. The application was opposed by 1st respondent through the replying affidavit of Kennedy Ochieng, counsel on record for the 1st respondent, sworn on 6th June 2024 wherein he deposes that the applicants were well aware of the existence of the said documents all along and the failure to produce them was deliberate. Further that the applicant has not made a case for this court to exercise its discretion and allow the application.
6. The respondent stated that the applicants having changed their advocates whom they blamed for failure to produce the documents, they nonetheless proceeded to file the appeal without raising the issue of the evidence that was not adduced immediately. It was submitted that the application was an afterthought intended to fill the gaps in the evidence at the trial court and in the premises the interests of the 1st respondent will be affected if the application was to be allowed.
7. The Applicants filed a further affidavit sworn on 24th June 2024 by James N. Njung'e, advocate for the applicants, in response to the 1st respondent's replying affidavit. Counsel deposed that the applicant had met the criterion required for this court to exercise its discretion and allow the introduction of the documents as evidence.
8. The application was disposed of by way of written submissions of the respective advocates for the applicants and those of the 1st respondent.

Applicants' Submissions

9. The applicants submitted that their current advocates were not aware of the existence of the documents as the same were not handed over to them when they took over the case from the previous advocates. That the information of the existence of the new documents only became available after the delivery of the judgment by the trial court and after this appeal had been filed. That the additional evidence is quite crucial and directly relevant to the case as it is likely to change the outcome of the case in that it will prove that the applicant is not the owner of the motor vehicle KBS 225V.
10. Counsel for the applicants submitted that mistake of counsel should not be visited upon a client and in this respect made reference to the cases of *Bank of Africa Kenya Limited and Put Sarajevo Limited v Put Sarajavo General Engineering Co. Ltd & 2 others* (2018) eKLR and *Philip Chemwolo 7 another v Augustine Kubede* (1982-880 KLR 30).



11. It was submitted that the application had met the principles set out in section 78 of the *Civil Procedure Act* and Order 42 rules 27, 28 & 29 of the *Civil Procedure Rules* and the guiding test laid out in the cases *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamed & 3 others* (2018) eKLR and *Attorney General v Torino Enterprises Limited* (2019) eKLR as regards adduction of new evidence. In the latter case, the court of Appeal held that:

We observe that the guidelines given by the Supreme Court are not necessarily conjunctive but an applicant must substantially comply with the guidelines. Whether the additional evidence will impact the result of the case is a matter to be determined on merit upon evaluation of the additional evidence with all other evidence on record.

12. It was submitted that the evidence sought to be produced is likely to influence or impact upon the result of the appeal. That the same could not have been obtained in reasonable diligence for use at the trial as it was not within the knowledge of the applicants or their advocate at the time of the suit. That the evidence sought to be adduced removes vagueness and or doubt over the case. That there no issue of filing gaps in the case.
13. The applicants submitted that the court has discretion to allow additional evidence in a case and in this respect cited the case of *Safe Cargo Limited v Embakasi Properties Limited & 2 others* (2019) eKLR, as cited in *Kenya Agricultural and Livestock Research Organization v Leah Okolo & another* (2022) eKLR where it was held that:

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.

14. The applicants urged the court to allow the application.

1st Respondent's Submissions

15. The 1st applicant submitted that the power of the court to allow introduction of new evidence is discretionary. That the applicant had not met the requirements under section 78 of the *Civil Procedure Act* and Order 42 rule 27 of the *Civil Procedure Rules* and the guiding principles set out in the Supreme Court case of *Mohamed Abdi Mohamud v Ahmed Abdullahi Mohamed & 3 others* (2018) eKLR.
16. The 1st respondent submitted that upon being served with summons to enter appearance in the suit before the trial court, the applicants entered appearance and filed a joint statement of defense in which the 1st applicant denied owning the subject motor vehicle. However, they failed to plead that the motor vehicle had been sold to a third party. That the witness for the appellant, Lukas Kyule, did not allude to the said motor vehicle having been sold to a third party as alluded to in the instant application, which information was always within his knowledge. That it was upon the 1st applicant to bring to the attention of his new advocates of the existence of the documents as it is trite law that a case belongs to the parties and not to advocates.
17. The 1st respondent submitted that adduction of additional evidence can only be ordered in exceptional circumstances. The court was referred to the case of *National Cereals and Produce Board v Erad Suppliers & General Contracts Ltd* (2014) eKLR where the Court of Appeal cited the case of *Mzee Wanje and 93 others v A K Saikwa and others* (1982-88) KAR, 462, where the Court cautioned that the power to receive further evidence should be exercised very sparingly and that great caution should be exercised in admitting fresh evidence.



18. It was further submitted that the 1st applicant failed to prove at the trial court that it was not the owner of the motor vehicle. More so that the 1st applicant also instituted a suit for enforcement of an insurance contract and settlement of the judgment that is the subject of the appeal herein. That there is no logical reason why the 1st applicant would take out an insurance cover over a vehicle that it had no interest in and further seek to enforce the said insurance contract. Therefore that the application is an afterthought as a result of fabricated evidence.
19. It was submitted that the evidence sought to be adduced will not aid the determination of the appeal as the issues raised in the appeal relate to questions of liability and quantum and not on ownership of the subject motor vehicle. That the question of ownership of the motor vehicle was proved by production of the motor vehicle copy of records which evidence was not challenged by the 1st appellant. Therefore, that the 1st applicant cannot seek to reopen the matter for fresh trial so as to seal the gaps in its case. That there are no exceptional circumstances to warrant the introduction of new evidence at this stage of the appeal. The 1st respondent in this respect made reliance on the case of [*Nayan Mansukhlal Salva v Hanikssa Nayan Salva*](#) (2019) eKLR where it was held that:
- On the other hand, courts have been urged to administer justice by exercising a delicate balance and in exceptional circumstances, new evidence should be allowed after weighing the two interests, that of doing justice and that of avoiding being mired by endless litigation which would occur if parties were allowed to adduce fresh evidence at any time during and after the trial without any restrictions. (see *General Parts (u) Ltd V Kunnal Pradit Kariaca* No 26 Of 2013 UCA.
20. The 1st respondent urged the court to dismiss the application with costs.

Analysis and determination

21. I have considered the grounds in support of the application and the grounds in opposition thereto. I have given equal consideration to the submissions and authorities cited by counsels for both parties. The issue for determination in the application is whether the 1st Applicant/Appellant has made out a case for leave to be granted to adduce additional evidence on appeal.
22. The application is filed pursuant to Sections 2A & 3A of the [*Civil Procedure Act*](#), Order 42, Rules 27, 28 & Order 51 Rule 1 of the [*Civil Procedure Rules*](#), 2010 and Section 78 of the [*Civil Procedure Act*](#). The latter section provides as follows:
- On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power
- (a) To re-appraise the evidence and to draw inferences of fact; and
 - (b) In its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.
23. In the case of *Mzee Wanje & 93 others v A.K. Saikwa & others* (1982-88) KAR, 462, Chesoni Ag JA (as he then was) observed as follows:-
- “The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:



- (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
- (c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

24. In Civil Appeal (Application) 84/2012, *Attorney General v Torino Enterprises Limited* [2019] eKLR, the Court of Appeal on the question of whether or not an appellate Court should allow an application for adduction of new evidence, the Court cited Rule 29(1)(b) of its Rules and other decisions and stated:

“ 13. In Dorothy Nelima Wafula Versus *Hellen Nekesa Nielsen and Paul Fredrick Nelson* [2017] eKLR, it was expressed 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 be incontrovertible.”

25. The same Court in the case of *Safe Cargo Limited v Embakasi Properties Limited & 2 Others* (2019) eKLR stated as follows on the subject:

“ 12. 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.”

26. In the case of *Mohamed Abdi Mahamud –v- Ahemed Abdullahi Mohamed & 3 others* (2018) eKLR the Supreme Court stated as follows at paragraph 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 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.

27. The Supreme Court in the mentioned case stressed that additional evidence at the appellate level should be allowed on a case-by-case basis and even then, sparingly and with abundant caution. It is to be noted that the guidelines issued by the Supreme Court are not conjunctive but an applicant has to substantially comply with the guidelines. From the above guidelines, this court is called upon to determine:

- (a) Whether there is additional new evidence;
- (b) Whether that evidence could have been obtained by the Applicant after reasonable diligence before and during the hearing;
- (c) If there is a probability that the additional evidence would have an important influence on the result of the case and;
- (d) Whether based on the foregoing there is sufficient reason to admit the additional evidence.



28. The 1st applicant wishes to adduce new evidence to show that at the time of the accident the vehicle belonged to a third party and therefore that it was not the owner of the motor vehicle at the time of the accident. It is however clear that the applicant never raised such an issue in their statement of defence. Neither did their witness, Mr. Kyule who testified in the case refer to such kind of defence in court. It is clear that the evidence the applicant wishes to adduce during the appeal is not fresh evidence as the applicants were aware of the existence of the evidence but never raised it in their defence and in their evidence in court. It was the obligation of the applicant to bring the information to the attention of their current advocates. Had the applicant exercised due diligence as required, they would have raised the issue in their defence and tendered the evidence in court during the hearing of the case.
29. In *Attorney General Versus Torino Enterprises Limited* (2019) eKLR it was held that the question whether the additional evidence will impact the result of the case is a matter to be determined on merit upon the evaluation of the additional evidence with all other evidence on record. It is trite that parties are bound by their pleadings and a court cannot go outside what is pleaded in determination of a case. In the case of *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* (2014) eKLR the Court of Appeal cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC SC 91/2002* where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
- “.....it is now(settled) principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....”
30. In view of the fact that the issue raised in the fresh documents was not raised in the defence filed at the lower court and the same was not an issue for determination at the lower court, what the applicants are doing in seeking to adduce additional evidence is to make out a fresh case on appeal, which position the law does not allow. In the premises, the documents even if produced will not impact on the result of the appeal.
31. In the final end, I find no sufficient reason to warrant the grant of the application. There are no exceptional circumstances that have been demonstrated to warrant the grant of the orders sought. I therefore find no merit in the application and in the premises the same is dismissed with costs to the 1st respondent.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF DECEMBER 2024

J. N. NJAGI

JUDGE

In the presence of:

Mr Njung`e for Appellants/Applicants

Miss Nakel for 1st Respondent

Court Assistant -

