Garissa Maize Milers Limited v Attorney General & 2 others (Civil Case 12 of 2013) [2025] KEHC 13655 (KLR) (30 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13655 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL CASE 12 OF 2013

JN ONYIEGO, J

SEPTEMBER 30, 2025

BETWEEN

GARISSA MAIZE MILERS LIMITED ..... PLAINTIFF

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

MINISTRY OF STATE FOR DEFENCE ..... 2ND RESPONDENT

CHIEF OF DEFENCE FORCES ..... 3RD RESPONDENT

RULING

1. The application pending determination before this court is a notice of motion dated 28.04.2025 seeking for orders:

    i. That this Honourable Court be pleased to admit new/additional evidence by way of a supplementary list of documents attached herein.

    ii. That this Honourable Court be pleased to grant leave to the plaintiff/applicant to render new documentary evidence crucial to the determination of the matter.

    iii. That this Honourable Court be pleased to direct that the said supplementary list of documents be filed and made part of the record of these proceedings.

    iv. That costs of this application be provided for.

2. The application is supported by the affidavit of Hassan Ibrahim Ahmed sworn on 28-04-2025 deponing that the Court of Appeal in its judgment delivered on 08.12.2023 remitted this matter for fresh hearing and determination of a global quantum award after the dismissal of the plaintiff's/ applicant's suit in this court's judgment delivered on 09.03.2016. That following the judgment delivered by the Court of Appeal, the plaintiff/applicant proceeded to file a supplementary list of

documents dated 14.05.2024 to which the court via a ruling dated 11.10.2024, expunged the same from the court record.

3. That the applicant through this application once more seeks to introduce additional documents which include the annual company's report for the year 2010 -2014, replacement value report for the year 2012 – 2013, cash flow projections for the year, bill of quantities dated 25.02.2015 and loss/ income statements from the year 2012 – 2013 which are material to the fair and just determination of the issues herein. It was averred that this court has discretion to re-open proceedings where new or additional evidence is available provided that the application is made in good faith.

4. It was deposed that the documents are necessary to provide an accurate valuation of the company at the time of filing the plaint noting that the company's documents got lost as a result of the fire and the consequent destruction of the applicant's company property. That due to the destruction by the said fire, finding the said destroyed documents could not have been obtained with reasonable diligence. According to the applicant, its ability to produce the documents at the initial trial was severely impaired and could not be cured by any measure of diligence on its part. That had the evidence been available at the time the suit was being heard and determined, the same would have inevitably formed part of the applicant's documents.

5. It was averred that the documents in question have significant probative value particularly in the assessment of quantum of damages that should be awarded to the applicant and should the same be admitted, it would probably have an influence on the result of the case. That noting that this matter was remitted to this court for consideration regarding quantum of a global award, in allowing the supplementary list of documents to be admitted as new evidence, the same shall guide the court in reaching a proper determination in regard to quantum. That no prejudice will be occasioned to the respondents as the parties will have the opportunity to impeach the evidence and/ or cross examine the maker. This court was thus urged to allow the application as prayed.

6. The respondents in opposing the application filed a replying affidavit sworn by Grace Ajierh on 13.05.2025 deponing that the Court of Appeal delivered a judgment on 08.12.2023 remitting this matter to this Honourable Court for a fresh hearing and determination of a global quantum award after dismissal of the applicant's suit in the High Court's judgment delivered on 09.03.2016.

7. That the applicant previously filed a supplementary list of documents dated 14.05.2024 which this court via a ruling dated 10.10.2024 expunged stating that a fresh hearing does not constitute filing of fresh documents. It was deposed that the applicant previously had sought leave to introduce additional evidence and the Court of Appeal via a ruling dated 05.11.2021 dismissed the same on the ground that the applicant was seeking a second bite at the cherry by filling gaps which only became evident after the delivery of the judgment. The forgoing notwithstanding, it was averred that the application herein is a matter already determined by the Court of Appeal hence res judicata.

8. That the attempt to introduce the intended additional evidence by the applicant was an attempt to make a fresh case, fill up omissions and patch up the weak points. It was stated that the evidence the applicant sought to adduce was in its possession at the time of the hearing of this case and thus no exceptional circumstances or reasons have been tendered to warrant this court to allow admission of the same at this stage. That the respondents shall suffer substantial injustice if additional evidence is allowed as the valuation report seeks to introduce new figures that were not pleaded initially with a view to alter the scope of the suit. It was stated that the said documents would thus overstate the initial claim that was for Kes. 407,172,999,000/- to a colossal sum of Kes. 1,377,840,000/-. This court was therefore urged to disallow the application as prayed.

9. The application was canvassed by way of written submissions. The plaintiff/applicant in its submissions dated 23.07.2025 contended that the main issue for determination is whether the application dated 25.04.2025 is merited.

10. The applicant urged that the power to re-open proceedings for the purpose of adducing additional evidence lies within the inherent discretionary jurisdiction of the court. The applicant in support of its argument relied on the case of Gulf Energy Limited vs East Africa Safari Air Express Limited [2020] eKLR where the court held that:

> " ...whether or not to allow a party to re-open its case and to adduce additional evidence is a matter of discretion..."

11. Counsel for the applicant urged that he did not seek to introduce the proposed evidence to fill gaps in the existing case rather, it sought to place before the court, the material evidence that will aid in the fair resolution of the dispute at hand. It was contended that the additional documents are material to the fair and just determination of the issues in controversy. That the non-inclusion of the supplementary documents was not deliberate as at the time when the applicant filed its suit. That the said documents necessary to provide an accurate valuation of the company were lost as a result of the fire and consequent destruction of the applicant's company. That the lost documents therefore could not have been obtained with reasonable diligence. In support of the foregoing, reliance was placed on the case of David Kipkosgei Kimeli vs Titus Barmasai [2017] eKLR where the court stated that:

> " ...if an application is made to re-open on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing...'

12. This court was urged that it is clear that the applicant's ability to produce the documents at the initial trial was severely impaired and could not be cured by any measure of diligence on its part. That had the evidence been available at the time of filing the suit, the same would have inevitably formed part of the applicant's pleadings. It was contended that the Court of Appeal in its judgment remitted this matter back to this court for consideration regarding quantum of a global award to be awarded to the applicant. That in allowing the supplementary list of documents as new evidence, the same shall guide the court in reaching a proper determination of this suit. To that end, the applicant urged that its application be allowed as prayed.

13. The respondents on the other hand filed submissions dated 16.05.2025 urging that the main issue for determination is whether the application herein is res judicata and whether, leave should be granted to the applicant to introduce already expunged evidence?

14. That the applicant previously sought to introduce new and additional evidence and via its ruling delivered on 11.10.2024 the court declined the said prayer. It was contended that a fresh hearing does not encompass filing fresh supporting documentation to determine an aspect. It was opined that the Court of Appeal in its ruling dated 05.11.2021 further stated that there was no plausible explanation as to why the said documents were not produced in court as evidence. That the applicant simply was determined to patch up his case by seeking the orders herein to be granted.

15. The respondent in supporting the allegation that this suit is res judicata, relied on the case of Hags Birikiti Tewoldenrehen De La Torre Ramirez Nelly Victoria (suing as the administrator of the estate

of Mendoza Lopez Aquelina(deceased) vs Evans Ihura & Another [2021] KEHC 3208 (KLR) where the court held as follows:

> " I am satisfied that the motion in as far as it is seeking for an order for stay of execution of this court's judgment is re judicata. A similar application was heard and dismissed on 11.12.2022 therefore, the issue cannot be relitigated under section 7 of the *Civil Procedure Act*".

16. On whether leave should be granted to the applicant to introduce already expunged evidence vide its supplementary list of documents dated 14.05.2024, it was averred that no exceptional circumstance/s had been adduced to warrant admission of new and additional evidence that changes the global sum initially pleaded in its entirety. Further, that filing of additional evidence in essence is akin to amending the pleadings and prejudicing the respondents herein. That the foregoing would be contrary to the Court of Appeal's finding dated 05.11.2021 and this Court's decision dated 11.10.2024. To that end, support was drawn from the case of Mohamed Abdi Mahamud vs Ahmed Mohamad & 3 Others [2018] eKLR where the court held that:

> " ...additional evidence should not be utilized for the purpose of removing the lacunae and filling gaps in the evidence."

17. In conclusion, this court was urged to find that the application herein is res judicata and dismiss the same with costs.

18. The Court has carefully read through the application, the affidavit in support and the submissions thereto. The only issue for determination is; whether the applicant has met the threshold for grant of the order sought.

19. Ordinarily, the Civil Procedure Rules, 2010 and specifically Order 11 detail the procedure regarding the filing of documents by parties in preparation for a trial. This is in addition to the procedure of discovery in the *Evidence Act*, Chapter 80 of the Laws of Kenya which is the parent law in regard to adduction of evidence and proof of facts in issue.

20. In the case of DHL Wordwide Express Kenya Ltd vs Andrew Mutuma C.a. Civil Appeal No E526 of 2022 [2024 KECA 938 KLR], the trial judge declined to accept the filing of a supplementary list of documents by the appellant yet leave had previously been granted to the respondent to file documents on the eve of the hearing of the case. In allowing the appeal, the Court of Appeal had this to say at paragraph 29 of it's judgment.

> " 29: Looking at the totality of the foregoing, we find that the learned judge injudiciously exercised her discretion in refusing to admit the appellants' supplementary documents. We find that the application complies with the guiding principles set out by our apex court in Mohammed Abdi Mohamud -v- Ahmed Abdulahi Mohamed & 3 Others [2018] (supra)."
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> In the said case of Mohammed Abdi Mohamud -v- Ahmed Abdulahi Mohamud & 3 Others, Supreme Court Petition No 7 Of 2018 As Consolidated with No 9 of 2018 [2018 eKLR], the Supreme Court while considering the interpretation of Rule 26 of it's rules, laid down the following principles in considering the filing of additional evidence:
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> 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 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 addressed 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 cause 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 filing 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 same breadth, in the case of Johana Kipkemei Too v Hellen Tum (2014) eKLR Justice Sila Munyao persuasively stated thus; -

> " The court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules. This was indeed the reasoning of the Supreme Court in the case of Raila Odinga & 5 Others v IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3,4 and 5 of 2013 (2013) eKLR, where in a presidential electoral dispute, the Supreme Court declined to allow additional evidence filed outside the contemplation of the rules.
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> This however is not to say, that the court can never under any circumstances, permit a party to adduce additional evidence, that was not furnished to the other party as provided under the rules. The court as a shrine of justice, has a mandate to do justice to all parties and not to

be too strictly bound by procedural technicalities. This flows from the provisions of Article 159 (2) (d) of *the Constitution*. Where such evidence can be adduced, without causing undue prejudice to the other party, the court ought to allow the application, so as to allow such party, the opportunity to present his case in full. The court may consider various factors including, but not restricted to, the earlier availability of the witness, the discovery of a new document, and the stage of the proceedings at which the additional evidence is sought to be introduced. If for example, the trial has not started, little prejudice may be caused to either party if one is permitted to introduce additional evidence. The prejudice to the other party no doubt increases as the trial progresses. But it is up to each court to weigh the surrounding circumstances of each case, and determine whether it will be in the interests of justice, to allow such evidence to be tendered, though outside the time frame provided by the rules. Emphasis is mine.

22. As already pointed in the case Mohammed Abdi Mohamud vs Ahmed Abdulahi Mohamud & 3 Others, Supreme Court Petition No 7 Of 2018 as Consolidated with No 9 of 2018 (supra), the Supreme Court appreciated that it has very limited mandate to allow parties before them to re-open their cases for admission of fresh evidence.

23. The foregoing notwithstanding, it is clear from the available jurisprudence that, in order to do substantive justice to the parties, the court should lean towards allowing additional evidence. The only limitation to the exercise of this right would be if there was prejudice to be caused to the defendant in allowing the plaintiff to file additional witnesses and documents.

24. In this case, the twist is that the hearing of the plaintiff/applicant's case commenced on 17.05.2013 and upon the suit being dismissed by this court, the plaintiff/applicant preferred an appeal to the Court of Appeal where a judgment was delivered on 08.12.2023 overturning the decision of this court. The Court of Appeal thus remitted this suit back to this court having determined the issue of liability thus directing this court to determine the issue of quantum by considering a global award to be awarded to the applicant.

25. The directions by the Court of Appeal notwithstanding, this court has previously determined a similar application seeking to introduce supplementary list of documents filed to allegedly help this court reach a fair determination. The question that I must address first is whether these additional documents will cause any prejudice to the defendants/respondents if allowed on record. As already listed elsewhere, the said documents include the annual company's report for the year 2010 -2014, replacement value report for the year 2012 – 2013, cash flow projections for the year, bill of quantities dated 25.02.2015 and loss income statements from the year 2012 – 2013.

26. In answering the question as to whether the admission of the supplementary documents will cause any prejudice to the defendants/respondents, I'm inclined to take cognizance of the fact that a similar application had been made by the applicant herein before the Court of Appeal via an application dated 05.02.2021 under Rule 29(1)b of the Court of Appeal Rules (the Rules). The said application sought for orders as follows;

    a. That the Honourable Court be pleased to grant Leave to the Appellant to introduce additional evidence, namely forensic report dated 28th January, audited accounts, bill of quantities, architectural drawings and invoices;

    b. That upon granting prayer 2 herein above, this Honourable Court be pleased to order the evidence annexed to the Supporting Affidavit sworn by Hassan Ibrahim Ahamed filed

herewith, namely forensic report dated 28th January 2013, audited accounts, bill of quantities, architectural drawings and invoices be deemed as part of the record;

c. That in the alternative to prayers 2 and 3, this Honourable Court be pleased to order that the matter be referred to the High Court for re-trial on additional evidence, namely forensic report dated January 2013, audited accounts, bill of quantities, architectural drawings and invoices to be deemed as part of the record;

d. Costs of and incidental to this application abide the result of Civil Appeal.

27. Upon consideration of the said application, the Court of Appeal vide a ruling delivered on 05.11.2021 dismissed the said application with costs to the respondents. It is the foregoing finding that enabled the respondents' claim that the application herein was res judicata. Indeed, it will be prejudicial to the respondent to re-open the matter again and further enable the applicants plead a fresh the suit notwithstanding that the matter has been pending for long.

28. Besides, the doctrine of res judicata under Section 7 of the *Civil Procedure Act* is quite clear. This Section does provide that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

29. I will not be shy to state that this doctrine applies to bar subsequent proceedings where there has been adjudication by a court of competent and/or concurrent jurisdiction which conclusively determined the rights of the parties in regard to all or any matters in controversy.

30. Seeking comfort in the case of John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment), the Supreme Court delved into an in-depth discussion of the concept of res judicata by stating thus:

> " This court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another Motion No 42 of 2014 [2016] eKLR (Muiri Coffiee case) held as follows regarding the doctrine of res judicata:
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> "Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights...The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action...

31. The above notwithstanding, the Court of Appeal in remitting this suit back to this court found liability on the part of the respondents but ordered a fresh hearing and consideration regarding quantum of a global award to be awarded to the plaintiff/respondent herein.

31. But even for a moment, noting that this court was urged to invoke its discretionary jurisdiction, something that I grapple with is, it is public knowledge that ordinarily, the memorandum and articles of an association just like those of the plaintiff/applicant, must have been in the custody of the companies' registry since the incorporation and further, financial statements are generated on an annual basis and annual returns of a company are required to be filed at the companies' registry on

a yearly basis. It is therefore insincere for the applicant to claim that these documents could not be accessed at the time of filing the initial pleadings in as much as fire razed down the company offices.

31. In any event, a similar application having been disallowed, the applicants have failed to meet the threshold laid out under order 45(1) of the civil procedure rules which provides that for a court to review an order made or decree passed, the applicant must establish discovery of new and important matter or evidence which after the due exercise of diligence was not within his knowledge or could not be produced by him by the time the decree was passed or the order made on account of some mistake or error apparent on the face of the record or for any other sufficient reason. In this case none of those conditions have been established to enable me exercise discretion in the applicant's favour in the interest of justice. See National Bank Of Kenya v Ndung'u Njau Civil Appeal No 211 of 1996 where the court held as follows-

> " A review will be granted whenever the court considers it is necessary to correct an error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law".

31. For the above reasons stated, I do not find merit in the application herein hence the same is disallowed with orders that;

i. The application dated 28.04.2025 be and is hereby dismissed for want of merit.

ii. The supplementary list of documents dated 04.05.2024 be and is hereby expunged from the court record.

iii. Costs to the respondents.

iv. Parties to expedite the hearing of this case without further delay.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF SEPTEMBER, 2025

J. N. ONYIEGO

JUDGE