



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**CIVIL APPEAL NO. E144 OF 2021**

**FRANCIS MWANZIA MULWA.....1<sup>ST</sup>**

**APPELLANT**

**GRACE MWANZIA MULWA.....2<sup>ND</sup>**

**APPELLANT**

**VERSUS**

**DANIEL MUTUNGA MULUKI..... RESPONDENT**

*(Being an appeal from the ruling and Order of Hon C. Ondieki  
(Principal Magistrate) delivered on 10<sup>th</sup> February 2021 in Machakos  
Civil Suit No. 66 of 2019*

**JUDGMENT**

1.This is an appeal against the ruling dated 10/02/2021 which dismissed the Appellants application dated 4/11/2020 for want of merit. The Appellants herein were the Plaintiffs/Applicants in the court below. By the said application the appellant was seeking leave to file a supplementary list of witnesses, witness statements and that the annexed draft supplementary list of witnesses together with the statements be deemed as duly filed and served.

2. Being aggrieved, by the dismissal of the application, the Appellants preferred this appeal. The appeal is premised on grounds that:

***“a. Considering that the Plaintiffs had not closed their case, the learned trial magistrate grossly misdirected himself and erred in not according***

**the Plaintiffs a fair trial as envisaged by Article 50 of the Constitution when he debarred the Plaintiff's from relying on witnesses whose list and statements had not been furnished at the filing of the pleadings but whose evidence had duly been filed in form of payment vouchers and invoices.**

- b. That the learned Trial Magistrate erred in failing to note and hold that the purpose of the supplementary list of witnesses together with their statements for which leave to file was sought was merely to produce documents which had been furnished at the filing of the pleadings.**
- c. That the learned Trial Magistrate was not considerate in refusing to allow the Plaintiff's application whose purpose could not amount to additional evidence since the document to be produced had already been furnished at the time of filing the pleadings.**
- d. The decision of the Learned Trial Magistrate does not manifest due delivery of substantial justice as provided for under Article 159 (2) (d) of the Constitution. The said decision is capricious since the Learned Trial Magistrate had on 9<sup>th</sup> September 2020 given the order directing the Plaintiff to call the makers of the documents relied upon**
- e. The Learned Trial Magistrate grossly misdirected himself and erred in proceeding as if the Plaintiffs had sought leave to introduce new documents or witnesses while indeed the documents had already been filed and their makers disclosed at the time of filing the pleadings.**
- f. The decision of the said magistrate is in violation of the rules of natural justice and particularly the doctrine of audi alterem partem**
- g. The decision of the said magistrate was against the weight of what was presented to him."**

3. Counsel for the parties consented to canvas this appeal by way of written submissions.
4. The Appellant's submissions are dated 15/02/2025. Counsel submitted that this court can consider and allow an application for additional evidence even after the lapse of the requisite period for bringing such an application, so as to allow such party the opportunity to present his case in full. That little prejudice will be occasioned to the Respondent herein if the additional witnesses are allowed to testify as the Appellant's/Plaintiffs case had not closed. It was contended that should documents not be available, at the time of filing pleadings, a party should seek leave of the court to file the said documents before the hearing of the case commences. Similarly, any party wishing to introduce new or additional evidence must in similar light seek leave of the court to file such statements and/or documents before the hearing of the plaintiff's case. That the objective of the case management conferences under Order 11 of the Civil Procedure Rules is to facilitate the expeditious disposal of cases by ensuring proper management of cases before the courts; that the Appellant informed the court below the reasons for filing statements and introducing the witnesses late in the day; that the application was filed in accordance with the directions of 9/9/2020; that this court should note that other than reiterating what was already on record no new issues are being introduced as such.
5. Learned counsel for the appellant drew support from the cases of **P H. Ogola Onyango t/a Pitts Consult Consulting Engineers vs Daniel Githegi t/a Quantalysis [2002]eKLR, Raila Odinga &**

**5 Others vs IEBC & 3 Others, Supreme Court of Kenya, Petitions Nos. 3, 4 and 5 of 2013 [2013]eKLR, Microsoft Corporation vs Mitsumi Computer Garage Ltd & Another [2001] eKLR, Joseph Mumero Wanyama v Jared Wanjala Lyani & another [2019] eKLR.**

6. For the Respondent it was submitted that the Appellants were undeserving of the of the orders they were seeking, for being indolent as they should have filed the witness statements and list of witnesses at the very beginning hence this appeal has no merit and should be dismissed. That in the case of **Pinnacle Projects Limited vs Africa & Another [2019] eKLR**, the Appellant did not introduce new evidence. That the appellant's application, was only made once the Appellant and her co-plaintiff were denied the opportunity to produce their documents without calling the makers. The documents had been filed prior to the hearing and no plausible reason has been advanced for the delay as all the documents date back to 2018 and the hearing only commenced in September 2020. In support of the submissions, reliance was placed on the following cases; **Samwel Kiptoo Rop & Anor v Beatrice Nakhumicha & 3 others - Kitale ELC No. 46 of 2011, Mbithi v Mureithi & another; Nairobi City County (Interested Party) (Environment & Land Case 346 of 2019, Preview Property Agency & another v Terrie Wanjiku Miano [2021]eKLR.**

### **Analysis and determination.**

7. This court has considered the impugned ruling, the grounds of appeal, the rival submissions, cases cited and the law. The issue before this court is whether the learned magistrate erred in

rejecting the appellant's application to introduce new witnesses and evidence.

8. The frame and institution of suits and the documents to be filed are governed by **Order 3 of the Civil Procedure Rules. Sub rule 2** states:

***“(2) All suits filed under rule 1(1) including suits against the government, except small claims, shall be accompanied by—***

***(a) the affidavit referred to under Order 4 rule 1(2);***

***(b) a list of witnesses to be called at the trial;***

***(c) written statements signed by the witnesses excluding expert witnesses; and***

***(d) copies of documents to be relied on at the trial including a demand letter before action:***

***Provided that statement under sub rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order 11.”***

9. Be that as it may **Section 95 of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules** endows this court with power to enlarge the time limited for the doing of any act even though such time may have expired. The power to enlarge time is discretionary and is not fettered save that it is exercised depending on the justice of the case. The discretion must also be exercised judicially but not whimsically or capriciously.

10. It is exactly for stemming situation such as the appellant found himself in, that the Rules Committee enacted Order 11 of the Civil

Procedure Rules. Parties must hold case management conferences to ensure that everything is in order before a case is fixed for hearing. This is intended to facilitate fairness in the hearing and the expeditious disposal of cases as adjournments are minimized.

11. The objective of pre-trial case management was discussed in the case of **Ketno Sacco & 2 others v Namu [2022] KEHC 16124 (KLR)** where the court stated;

***“It can be seen from the above that both the plaintiff and defendant are required to furnish their evidence when filing their pleadings. It is only with the leave of the court that documents may be supplied later, at least 15 days before the pre-trial conference. In practice, the courts do conduct the pre-trial conference through a mention, where parties confirm that they have complied with Order 11 and that they have exchanged the requisite documents.***

***24. The provisions of Orders 3 and 7 are meant to curb trials by ambush. The objective is to make clear to the other party, the nature of evidence that he shall face at the trial. In the same breadth, the Rules do not state that such party will be barred from filing of his documents but the same should be done with leave of the court. But the Constitution under Article 50 (1), provides that every party deserves a fair trial, and it is arguable, that a trial will not be a fair trial, if a party is ambushed with documents that he/she did not anticipate...***

***...The court may consider various factors including, but not limited to, the 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***

***nce. The prejudice to the other party no doubt increases as the trial progresses.***

***Nonetheless, it is up to the court to weigh the 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.”***

12. The Court of Appeal dealing with a similar application for additional witness statements after pleadings had closed, held as follows in **Govani v Shah & another; Jaff (Third party) [2024] KECA 1775 (KLR)**;

***“23.The single issue for determination is whether the learned Judge exercised her discretion properly in refusing to grant an adjournment and to grant leave for the appellant to file documents and witness statements.***

***24.Discretion is generally defined to mean the power and/or ability an individual has, to make decisions based on the assessment of the circumstances before him. The Black’s Law Dictionary 9<sup>th</sup> Edition defines judicial discretion as:***

***“court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”***

.....

***31. To us, it behoves a party who is in default, and who seeks the court’s discretion, to place relevant material before the court to satisfy the court that despite his/her omission, discretion should nevertheless be exercised in his/her favour. This, is a burden which the appellant has not discharged.***

***32.In the premises, we find no basis to fault the decision of the learned Judge in exercising her***

***discretion to disallow the adjournment sought and the admission of documents and witness statements by the appellant. It follows that this appeal has no merit and we hereby dismiss it with costs to the respondents.”***

13. In considering whether the learned magistrate exercised his discretion judicially, I will go back to the record which indicates as follows;

***a. On 17/10/2019, the Plaintiff’s advocate indicated that they had fully complied when the matter came up for pre-trial directions.***

***b. As at 4/3/2020, counsel for the parties informed the court they were in negotiations.***

***c. On 5/8/2020, the Plaintiff’s advocate sought leave to put in further supporting documents to which the advocate for the Defendant expressed he had no objection to. The court granted the Plaintiff leave to file a supplementary list of documents.***

***d. On 12/11/2020, the Plaintiff indicated that they had filed another application to file a further list of witnesses and witness statements. The said application is dated 4/11/2020. This was after PW1 had testified on 9/9/2020.***

14. The reasons given for the application was that the appellants had discovered crucial evidence which could have assisted the court to arrive at a just determination of the case and it was in the interest of justice that the application was allowed. However, it transpired from the affidavit in support, that the application arose from the objection that had been raised by counsel for the respondents against production of certain documents without

calling the makers. It is clear therefore that the new evidence was being introduced so as to fill in gaps in the case. The application was an afterthought and did not meet the threshold for new evidence. And the learned magistrate was correct in rejecting it. I find that the learned magistrate exercised his discretion properly and that this appeal has no merit.

15. The upshot is that the appeal is dismissed with costs to the respondent.

**Judgment, signed, dated and delivered on this 27<sup>th</sup> November 2025.**

**E. N. MAINA  
JUDGE**

**IN PRESENCE OF:**

Ms Mutua for the Appellant

Ms Ngocho for the Respondent

Geoffrey - Court Assistant/Interpreter -