



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL APPEAL NO. E002 OF 2025

LARSEN & TOUBRO.....APPELLANT

VERSUS

TROMEX INVESTMENTS LTD.....

.....RESPONDENT

(An appeal from the ruling of Chief Magistrate B. Ojoo at Mavoko Law Courts in Mavoko CMCC No.E308 of 2023 delivered on 23rd December 2024.)

JUDGMENT

1.This appeal is against a ruling delivered which dismissed the Appellant’s application seeking to file additional documents after the commencement of the hearing. The grounds of appeal are that:-

“a.The learned Chief Magistrate erred in law in finding that there is no provision under the rules of procedure for filing additional documents after the commencement of the trial and thereby unduly fettered her discretion in considering the application before her.

b. The Learned Magistrate failed to take into account important uncontested facts that would have tilted the scales of justice in favour of granting the orders sought. In particular, but without prejudice to the foregoing, the Learned Chief Magistrate failed to consider that;

- i. The document sought to be produced was not contested by the plaintiff.*
 - ii. The document was always in the custody of the plaintiff.*
 - iii. There was sufficient opportunity under the rules of evidence to produce evidence in rebuttal.*
 - iv. The defendant's witness who was to produce the document had not testified and was available for cross-examination.*
 - v. In the circumstances the plaintiff could not be said to have been prejudiced by the finding of the additional document.*
 - vi. The defendant had given a reasonable explanation for the failure to include the document in its list of documents.*
- b. The ruling was patently against the weight of the evidence."***

2. Simultaneously with the appeal, the applicant filed an application dated 9th July 2025 seeking to stay the proceedings in the court below pending determination of this appeal. The same is now dependent on the outcome of this judgment.

3. The appeal was canvassed by way of written submissions.

4. For the Plaintiff/Respondent it was submitted that the learned Magistrate prioritized procedural rigidity over the admission of relevant, uncontested evidence; that the law prioritizes substantive justice over procedural formalism; that the document in question was in the Respondent's custody and therefore could not be obtained earlier even with reasonable diligence and that it shall help determine the core issues in dispute. Reliance was placed on the following cases; ***Johana Kipkemei Too v Hellen Tum [2014]***

eKLR, Preview Property Agency & another v Terrie Wanjiku Miano [2021] eKLR, Attorney General v. Torino Enterprises Limited [2019] eKLR, Ladd vs Marshall [1954] 1 WLR, DT Dobie & Company Ltd v Joseph Mbaria Muchina [1982] eKLR, , ABN Amro Bank N.V v Kenya Pipeline Company Limited [2019] Eklr, XSafe Carho Limited vs Embakasi Properties Limited & 2 others [2019] e KLR and Attorney General 7 3 others vs Tott & 8 other [2024] KECA 1275 (KLR).

5. Learned Counsel for the Respondent on the other hand submitted that the Respondent would be greatly prejudiced if the orders sought are granted; that this would also contravene the right to fair trial; that the document sought to be produced pertains to an entirely different transaction unrelated to the subject matter of the present suit; that the said letter was prepared by one of the Appellant's witnesses, Murithi Anampiu and was in their possession from the time they entered appearance on 2nd August 2023. Learned Counsel drew from the following cases; **Charles Waku Otukoma vs Joyce Malala & 6 others (2020) e KLR, Kennedy Nyamwaya Bundi vs Insta Products (EPZ) Limited (2017) eKLR and Kanyuira vs Kenya Airports Authority (2021) eKLR.**

Analysis and determination

6.As the first appellate court I have a duty to re-analyze the evidence in the court below so as to reach by own conclusion on the issue in dispute. The appellate court will only interfere with the trial court's findings if relevant factors were not taken into account or irrelevant factors were considered or the trial court otherwise misdirected

itself. (see **Ocean Freight Shipping Co. Ltd vs. Oakdale Commodities Ltd (1997) eKLR.**

7. From the record the Plaintiff/Respondent had closed its case when the Defendant/Appellant made the application for additional evidence. According to the Civil Procedure Rules the evidence should have been filed together with the defence -see Order 7 Rule 5 of the Civil Procedure Rules.
8. In the case of **Joseph Muya Njuru vs Stephen Njoroge Kunda & 4 Others [2019] eKLR** while dealing with a similar application the court stated:

“9. The reason why these rules were enacted is so as to enable each party know the other party’s position on the matter and prevent an ambush during the hearing of the case. The rules are of course not cast in stone and the court does retain some discretion, depending on the reasons and circumstances of the case, to allow a party to present some additional evidence not earlier disclosed. It is easier for example for the court to extend time when the trial has not begun or has just begun, for the defendant may still be able to counter the new evidence.

10. But the more advanced the trial gets, the more prejudice the other party suffers, and the more difficult it is for the court to allow the presentation of additional evidence that was not earlier discovered. Thus in the case of Johana Kipkemei Too vs Hellen Tum (2014) e KLR, I was not persuaded to allow the defendant to call additional evidence not earlier discovered at the defence stage of the proceedings.

11. I have not seen any reason to depart from my position in the above mentioned decision. In this

instance, the defendants wish to call witnesses who were never disclosed and also seeks to rely on documents which were never discovered to the plaintiff. The plaintiff has already closed his case, and will not be able to call forth any additional evidence to counter any, that may be presented by the two officers sought to be called to testify for the defendants. To me it will defeat the very purpose why the rules on prior discovery were enacted if I am to allow the application before me, and it goes without saying, that the plaintiff will be greatly prejudiced.”

9. Further, the Supreme Court laid down the principles to guide courts in such application. In the case of **Mahamud v Mohamad & 3 others (Petition 7 & 9 of 2018 (Consolidated)) [2018] KESC 62 (KLR)**

“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.*
- 80. We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”**

10. From the record, this case went for pretrial on two occasions. On 2nd May 2024, parties were allowed to file and serve any further documents they wished to. The learned Magistrate stated:-

“I have considered the above plaintiff’s witness statements filed and served on 30/4/2024 by and is hereby deemed as properly filed. Accordingly, the defendant is granted leave to file and serve any further documents or statements, if any within 14 days hereof.”

11. Before the hearing commenced and before the Defendant/Appellant the commenced its case, it did not indicate that there was a document it wanted to produce but which was not in its possession. It waited until the plaintiff/Respondent had closed its case to make the application which clearly was an ambush given the order of the learned magistrate dated 2nd May 2024. There is no evidence that the Appellant took steps to try and trace the said document. The application was made very late in the day and guided by the Supreme Court in the case of **Mahamud v Mohamad & 3 others (supra)** the Defendant/Applicant is not deserving of the order for additional evidence.

12. In the upshot I find no merit in this appeal and it is dismissed with costs to the Respondent. The application dated 9th July, 2025 is also dismissed.

Orders accordingly.

Judgment signed, dated and delivered virtually this 18th December, 2025.

E. N. MAINA

JUDGE

In the presence of:

Mr. Kanga for Respondent

No appearance for the Appellant

Geoffrey - Court Assistant/Interpreter

ORIGINAL