

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL APPEAL NO. E018 OF 2025

STELLA WABWIRE & 2 OTHERS
(Suing as admin of the estate of
ROBERT WABWILE WANJALA (DCSD)
.....APPELLANT
VERSUS

JOHN MUTHUI.....RESPONDENT **KITAVAI**

(Being an appeal from the Judgement and Decree of the Chief Magistrate’s Court in Bungoma Civil Case No. E257 of 2022 delivered by Hon. Maloba (SPM) on 2nd January 2025.)

JUDGEMENT

A. INTRODUCTION

1. In the case of **Charles Wakhu Otokoma -v- Joyce Malala & 6 Others 2020 eKLR**, the Court stated the following with regard to the need for the parties to file their witness statements and documents in time as required by the rules of procedure:

“In order to ensure an orderly way of conducting the trial process, parties are required to disclose their cases at an early stage. This ensures that there are no delays or ambush of a party and also promotes the expeditious disposal of cases while minimizing costs. That is why under Order 3 Rule 2 of the Civil Procedure Rules, the plaintiff is required to file a verifying affidavit, list of witnesses and their statements and copies of the documents to be relied upon during the trial. Similarly, the defendant is

obliged under Order 7 Rule 5 of the Civil Procedure Rules to file the same documents together with his defence and Counter - Claim, if any. Before the pre - trial conference, statements may be filed with leave of the Court. Thereafter, all the parties will have disclosed their respective cases so that the trial can proceed in a seamless manner. All this is geared towards ensuring a fair trial as guaranteed under Article 50(1) of the Constitution. However, these are pre - trial directions and in ensuring that justice is administered without undue regard to technicalities as provided under Article 159(2) (d) of the Constitution, the Court can exercise its discretion in allowing a party to file fresh statements and documents but in so doing, no prejudice should be occasioned to either party. Each case must therefore be decided on its own peculiar circumstances”.

2. Similarly, in the case of **Marcus Kibuku Nimrod & Another -v- Nesy Kuthii Justus 2017 eKLR**, the Court expressed myself as follows:

“It is instructive to note that neither Order 3 nor Order 7 of the Civil Procedure Rules prohibits the trial Court, upon application, from accepting late filing of statements or documents sought to be relied upon. In my view, and in keeping with Article 50 of the Constitution which provides for a fair hearing of any dispute, a trial Court is not barred from allowing a party, with leave, to introduce new statements and documents that were not previously filed and served as mandated by the provisions of Order 3 and Order 7 of the Civil Procedure Rules because the primary duty of the Court is to do justice to the parties by allowing them to present all the relevant evidence to support their respective claims. Each case will however be

decided on its own peculiar circumstances and among the issues that the Court will take into account before granting such leave may include the reason why the statements and documents were not filed at the right time, the stage of the proceedings and the prejudice that may be caused to the other party. Ideally, where the trial has not commenced or it is at its early stages, no prejudice will be caused to the other party.”

3. Anew, this Court is faced with the same specter in these proceedings.

B. THE DUTY OF A FIRST APPELLATE COURT

4. A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See **Selle & another v Associated Motor Boat Co. Ltd.& others {1968} EA 123**). As was held by the Court of Appeal for **East Africa in Peters v Sunday Post Limited {1958} E.A. page 424: -**

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution;

it is not enough that the appellate court might itself have come to a different conclusion.”

5. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. The judgment of the appellate Court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first appellate Court had discharged the duty expected of it. (See **Santosh Hazari vs. Purushottam Tiwari (Deceased) by L. Rs {2001} 3 SCC 179**).

C. PLEADINGS

6. Vide an application dated **13th June 2024**, the Appellants herein drew the court’s attention to the fact that they sought to be granted leave to introduce a new witness and file a further list of witness and witness statement. The application was premised on the grounds that their witness was deceased and that having been an eye witness her evidence was crucial to enable to Court understand the circumstances under which the accident occurred.
7. Opposing the application, the Respondent filed a Replying Affidavit sworn on 27th June 2024, by his Counsel, **Anne Halwenge Odwa**, wherein she averred that the Appellant’s application: was an abuse of the Court process, was a mere afterthought, was made too late in the day as the said matter has been pending in Court since 2022, that there was

no evidence availed to prove the demise of Bridgit Nasambu Mluhya, that there was no reasons availed as to why the proposed witness was not enlisted as a witness and his statement filed, if indeed he was a necessary witness and that the alleged witness statement seemed to be a duplication and adoption of the contents of the recorded witness statement by the late Brigit.

8. The application was canvassed by written submission and the trial Court concurring with the Respondent held that there was no availed evidence by the Appellants of the demise of their crucial witness:with no evidence was adduced to indicate where and when the said demise occurred. Further, the trial Court held that with lack of tangible documentary evidence to corroborate the alleged death, the application dated **13th June 2024** was devoid of merit.

D. APPEAL

9. The Appellants seek to overturn the ruling citing the following grounds: -
 - a. **The Learned Trial Magistrate erred in law and in fact by dismissing the Appellants application dated 13th June 2024, thereby occasioning miscarriage of justice.**
 - b. **The Learned Trial Magistrate erred in law and in fact by finding that the Appellants ought to have produced a burial permit when the deceased witness was not related to the Appellants hence making it impossible to obtain the burial permit.**
 - c. **The Learned Trial Magistrate erred in law and in fact by denying the Appellant a chance to call their witness who was to be subjected to cross-examination by the Respondent thereby occasioning miscarriage of justice.**

d. The Court did not address itself on the prejudice that the Appellant was subjected to.

10. The Appellant prayed that this Court do set aside the ruling of the trial Court dated and delivered on 2nd January 2025 and substitute the same with an order allowing the Appellants application dated 13th June 2024 and costs of the appeal.
11. Vide Court directions issued on 17th June 2025, this Court directed the parties to canvass the appeal by way of written submissions.
12. At the point of writing this judgement and after strict perusal of the Court record and the Court Tracking System both parties to this appeal complied with the Court directions as issued on 17th June 2025.

E. ANALYSIS AND DETERMINATION

13. Order 3 Rule 2 of the Civil Procedure Rules provides that:

“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.”

14. However, **Section 95** of the Civil Procedure Act allows the Court to extend time. It reads:

95:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

15. I shall also be guided by **Article 159 (2) (d)** of the Constitution which states that:

“Justice shall be administered without undue regard to procedural technicalities.”

16. And also, Article 50 (1) which provides that:

50(1)

“Every person has the rights to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”

17. This Court in various cases, took the view that a party can be allowed to file documents and statements late in the trial but that will depend on the circumstances of each case including the stage at which the trial has reached and the prejudice, if any, that will be caused to the other party.

18. In this appeal it is common ground that notwithstanding the fact that this suit in the lower was filed in 2022, was part heard and the Appellants were yet to close their case, wherefore Respondent’s case has not matured. The appellant has made full disclosure of the identity of the proposed witness and some of the documents which the

Appellants want to introduce. Since the Appellants are yet to even close their case, no prejudice will be caused to Respondent by allowing the filing and serving of fresh statements and documents because the Respondent can be granted corresponding leave to file any additional documents to rebut any documents filed by the Appellants. The new witness will of course also be subjected to cross-examination. The Court should always strive towards giving the parties an opportunity to present before it all available and relevant evidence so as to advance the course of justice. That is the primary duty of any Court or Tribunal called upon to determine disputes between parties. Therefore, unless there is evidence of fraud or any intention to overreach or steal a march over the other party, the cause of justice will best be served by allowing all the parties to play their cards by placing before the Court or Tribunal all available evidence. In any event, in the course of rendering its decision, the Court or Tribunal will have the last say as to what is or is not relevant evidence in the dispute.

19. In the case of **Dhl Worldwide Express Kenya Ltd -v- Andrew Mutuma C.a. Civil Appeal No E526 of 2022 [2024 KECA 938 KLR]**, the trial judge had 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 had this to say at paragraph 29 of its judgment.

29:

“Looking at the totality of the 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).”

20. 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 its rules, laid down the following principles in considering the filing of additional evidence:

- 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 disclose 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.”**
21. The Supreme Court was of course considering an application for additional evidence at the appeal stage which is not the case in the matter now before me. Also, 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.
22. The available jurisprudence suggests, however, that in order to do substantive justice to the parties in the matter before it, this Court should lean towards allowing additional evidence especially in a case such as this one where the trial hearing of the Plaintiffs case has not been closed and where the other party will have adequate opportunity to rebut such additional evidence. In the circumstances of this case, that

would be the most pragmatic route to take as no prejudice will be caused to the Respondent (Defendant).

F. CONCLUSION

23. In the circumstances, the Appellants application in the trial Court dated 13th July 2024, is allowed and the appellants are directed to file and serve the new witness statement and supplementary list of documents within 30 days from this date. The Respondent has corresponding leave to file additional witness statement and supplementary list of documents within 50 days from the date hereof.
24. Each party shall shoulder it's own costs of this appeal.
25. The trial file be returned back to the trial court for hearing and determination.

Orders accordingly

Delivered, Signed and Dated at Bungoma this 18th day of December 2025.

Mwanaisha.S. Shariff
Judge

In the presence of:

N/A BY MUKISU FOR APPELLANT

MS CHEBET FOR RESPONDENT

PETER MACHONI - COURT ASSISTANT