



**African Banking Corporation Limited v Make Limited & 3 others (Civil Appeal E167 of 2022) [2026] KEHC 5827 (KLR) (Commercial and Tax) (30 April 2026) (Judgment)**

Neutral citation: [2026] KEHC 5827 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E167 OF 2022**

**AA VISRAM, J**

**APRIL 30, 2026**

**BETWEEN**

**AFRICAN BANKING CORPORATION LIMITED ..... APPELLANT**

**AND**

**MAKE LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**MACED LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**KENNETH NJIRU MUGANE ..... 3<sup>RD</sup> RESPONDENT**

**MICHAEL MACKENZIE MUSEMBI T/A MARRIETTA BAKERS & AUTO TEST  
MERCHANTS ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. This appeal arises from the ruling of the Chief Magistrate's Court at Milimani (Hon. A. N. Makau, PM) delivered on 10th December 2021 in Civil Case No. 6789 of 2017.
2. By that ruling, the learned magistrate declined the Appellant's application dated 26th October 2020 seeking leave to file and rely on a supplementary list and bundle of documents after the commencement of the hearing.
3. The Appellant, being dissatisfied with that decision, lodged the present appeal based on the grounds set out in the Memorandum of Appeal set out below.
4. The factual background as set out in the record shows that the Appellant instituted suit against the Respondents seeking recovery of a sum of Kshs. 3,919,951.44 together with interest and costs arising from banking facilities advanced to the Respondents.



5. The matter proceeded to hearing. The Appellant called its witness and the witness was subjected to cross-examination.
6. Thereafter, the Appellant sought to introduce additional documents by way of a supplementary list and bundle of documents. This necessitated the filing of the application dated 26th October 2020.
7. The Respondents opposed the application on the basis, inter alia, that:
  - a) the introduction of the documents would occasion prejudice, particularly as cross-examination had already been undertaken.
  - b) no sufficient explanation had been given for the delay; and
    - a) the application was brought late in the proceedings;
8. In a considered ruling, the learned magistrate dismissed the application.
9. Aggrieved by the said ruling, the appellant filed this Appeal. The Memorandum of Appeal has been reproduced below:
  - a. That the learned magistrate failed to consider the overriding objective of ensuring all relevant evidence is placed before the court;
  - b. That the learned magistrate erred in finding that prejudice would be occasioned to the Respondents;
  - c. That the learned magistrate failed to appreciate that the documents sought to be introduced were executed by the Respondents and were central to the dispute;
  - d. That the learned magistrate thereby misdirected herself on both fact and law.

### **Issue For Determination**

10. The central issue for determination is whether the learned magistrate properly exercised her discretion in declining to grant leave to the Appellant to file additional documents.

### **Analysis And Determination:**

11. This being an appeal against the exercise of judicial discretion, the applicable principles are settled. In *Mbogo v Shah* [1968] EA 93, the Court of Appeal stated:

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that the decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

12. Further, on the question of admission of additional evidence after the commencement of trial, the High Court in *Preview Property Agency & another v Terrie Wanjiku Miano* [2021] eKLR held:

“If the application to introduce the evidence and documents will be considered in light of the following: the nature of the evidence sought to be adduced and the reasons why it was not availed at the proper stage, the prejudice that may be caused to the other party among other reasons.” (emphasis mine)



13. These principles are consistent with the overriding objective under sections 1A and 1B of the *Civil Procedure Act*, which require courts to facilitate the just, expeditious and efficient disposal of cases.
14. The ruling appealed against is a discretionary decision made in the course of case management. This Court must therefore exercise restraint and only interfere where the threshold in *Mbogo v Shah* (supra) is met.
15. The record shows that the application for leave to introduce additional documents was made after the Appellant had already called its witness and the witness had been subjected to cross-examination.
16. This is not disputed and is evident from the sequence of proceedings reflected in the record.
17. The timing of the application was therefore late in the proceedings.
18. The Appellant's explanation for the delay was that the documents had been misplaced at its offices.
19. The learned magistrate considered this explanation and found it insufficient. The magistrate was explicit in her reasoning. She stated that the case had been filed in the year 2017. It was therefore an old case and ought to proceed. The documents had been apparently missing for almost 4 years with no explanation. And finally, in her view, the true intention of the application was to cure gaps arising during cross examination.
20. Upon review of the impugned ruling and the reasons cited, I find no basis to fault the court for the conclusion reached.
21. Litigation is conducted on the basis of orderly procedure, and parties are ordinarily expected to place all material before the court at the appropriate stage.
22. The Appellant relied on the decision of *Mary Wamuyu Thuku & another v Sarah Wanjiku & 2 others* [2022] eKLR, in support of the argument that the court in exercising its discretion should be guided by the circumstances of each case including the availability of witnesses, and the stage at which the case has reached for the additional evidence to be introduced.
23. The appellant further submitted that the defendant has the option of recalling witnesses who had testified for cross-examination if it will be necessitated by additional evidence. It submitted that locking out crucial witnesses would occasion injustice to it.
24. The appellant urged the court to adopt the reasoning set out in the decision of the High Court in *Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel* [2022] eKLR where the court held that:

“There is no law that bars a party from obtaining evidence after a suit is filed in court. This is so because some evidence comes to the attention or knowledge or possession of parties even after the hearing of the suit and it is on that account that law under section 78 of the *Civil Procedure Act* acknowledges that additional evidence can be adduced even on appeal.” (emphasis mine)
25. The above principles are sound. The court must however consider the circumstances and the facts of each case, any prejudice that may be occasioned to the parties, and the overriding objective of the Act and the rules.
26. A bare assertion of misplacement of documents, without more, does not however amount to sufficient cause.



- 27 As the appellate court, this court did not have the opportunity to hear or see the witnesses or assess demeanor during the hearing.
28. The lower court had such opportunity to do so. I therefore may not disregard a statement to the effect that of its perception that the application was made solely to cure gaps that arose during the course of cross examination.
29. If this is so, then the purpose is improper. An analysis of the circumstances reveals that the lower court was accurate in its assessment. I say so because the record shows that the additional list and bundle of documents sought to included were not new; and the applicant did demonstrate that the evidence sought to be adduced was not available and could not, with reasonable diligence, have been obtained prior to the close of cross examination.
30. The sole explanation provided, appears to raise more questions than answers. I do not think that it musters the threshold applicable to section 79G of the Civil Procedure Rules. The Court of Appeal pronounced itself on the applicable principles in *Wanjie & Others v Sakwa & Others* [1984] KLR 275, in the following terms:
- “This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the court of appeal. Additional evidence should only be admitted where it is shown that the evidence could not have been obtained with reasonable diligence for use at the trial, and that it would probably have an important influence on the result of the case...” (emphasis mine)
31. The same principles and rationale apply in so far as the explanation of misplaced documents falls short of the expected due diligence. Additionally, the timing of the application, which was after cross examination raises clear prejudice concerns. Finally, the application bears the hallmark of filling evidentiary gaps. To allow such an application in such circumstances would not only occasion delay but would also undermine the fairness of the trial process.
32. A perusal of the ruling demonstrates that the lower court identified the correct legal principles, considered the stage of the proceedings, evaluated the explanation for delay, and addressed the issue of prejudice.
33. There is no indication that the learned magistrate took into account irrelevant considerations or failed to consider relevant ones.
34. Nor can it be said that the decision reached was plainly wrong.

### **Conclusion**

35. Based on the reasons set out above, I find that the Appellant failed to demonstrated that the learned magistrate misdirected herself in law or fact, or that she exercised her discretion injudiciously.
36. On the contrary, the ruling reflects a proper application of the law to the facts and a sound exercise of judicial discretion.
37. Accordingly, I find and hold that the appeal is without merit.

### **Orders**

38. The appeal is hereby dismissed with costs.



39. The ruling of the Chief Magistrate delivered on 10th December 2021 is hereby upheld.

**DATED AND SIGNED AT NAIROBI, THE 30<sup>TH</sup> DAY OF APRIL 2026. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**ALEEM VISRAM, FCIArb**

**JUDGE**

