REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITUI

ELC APPEAL NO. E30 OF 2024

DR. JOSHUA MALITI MATU ……. APPELLANT

VERSUS

DR. KENNEDY NGUMBAU MULWA ……. RESPONDENT

RULING

1. What is before me for determination is a motion on notice dated 4/3/2025 brought by the appellant – DR. JOSHUA MALITI MATU – and expressed to be brought under Order 42 Rule 27, 28, and 29 of Civil Procedure Rules, Article 159 (2) of the Constitution of Kenya, 2010, and Sections 1A, 1B and 3A of the Civil Procedure Act. The application is against the respondent – DR. KENNEDY NGUMBAO MULWA. The prayers sought in it are as follows:

Prayer 1: That this honourable court be pleased to grant leave to the appellant/applicant to adduce additional evidence in the form of bank statements

for the period between 11th September 2014 to 7th August 2018.

Prayer 2: That the said additional evidence be admitted as part of the record of appeal for consideration in determining the appeal.

Prayer 3: That costs of this application be in the cause.

2. The application is anchored on the grounds, inter alia, that the lower court determined the case partly on the basis that the appellant had not paid rent amounting to Kshs. 2,736,000/= for the period running from 2012 to 2018; that the evidence intended to be made available is meant to show that the appellant paid rent in full during the period; that the evidence was not available at the time of trial and the bank was unable to provide it as it related a long period before the trial; and that no prejudice will be suffered by the respondent.
3. The application came with a supporting affidavit which gives more details surrounding the matter. In essence the substance of the supporting affidavit is an elaboration of the grounds on which the application is anchored.

4. The application was responded to via a replying affidavit dated 25/3/2025. In the affidavit, the appellant's application was said to be an afterthought and an abuse of the court process. The appellant was said to be hell bent on re-litigating and re-casting his case at the appellate level. It was denied that the new evidence sought to be adduced was unavailable during trial and the respondent felt that allowing the application will prejudice him.
5. The response by the respondent provoked the filing of a supplementary affidavit by the appellant. The appellant denied that his application is an afterthought. He denied too that he is re-litigating the matter. According to him, his application has met the threshold for allowing adduction of new evidence.
6. The application was canvassed by way of written submissions. The appellant's submissions are dated 12/6/2025. The submissions start with a highlight of the substance of the application and the response made thereto. The focus then shifts to the applicable law and in this regard Order 42 Rule 27 of the Civil Procedure Rules, Article 159 (2)

of the Constitution, and Sections 78 (1) (d) & (e), 1A, 1B and 3A of the Civil Procedure Act (Cap 21) were adverted to for illumination, general succor, and validation of the application.

7. Further, the decided cases of **Tarmohed & Another –vs- Lakhan & Co. [1958] EA 567, Mohammed Abdi Mohamed –vs- Ahmed Abdullahi Mohamed & 3 others [2018] eKLR, Francis Atanasio Kithure –vs- County Government of Meru: Ethics & Anti-Corruption Commissioin (Interested Party) [2021] eKLR, Abdirahim Abdi also known as Abdirahman Muhamed Abdi –vs- Safi Petroleum Products & 6 others: Civil Application No. Nai 173 of 2020, Gerita Nasipondi Bukunya & 2 others –vs- Attorney General [2019] eKLR, and Wachira Karani –vs- Bildad Wachira [2016] eKLR**, were all cited and/or quoted as deemed necessary. The main aim was mainly to show the threshold to be met in a case where new evidence is sought to be introduced during appeal and also to drive home the point that the overall aim is, or should be, to meet the ends of justice.

8. Of crucial relevance are the guidelines annunciated by the Supreme Court in Mohamed Abdi Mohamed's case (supra) which emphasized that:

"....

(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 to 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 petitioner by the party seeking to adduce additional evidence.

(d) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has 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) Whether 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 purposes of removing lacunae and filling gaps in evidence.

(j) The court must find the further evidence needful.

(k) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh on appeal, fill up the omissions or patch up the weak points in his/her case."

9. The appellant then submitted that the new evidence is necessary as the trial court had concluded that the appellant had not paid rent for the period running from 2012 to 2018 yet the appellant had paid rent in full; that the new evidence is also likely to change this finding; that the banks were unable to retrieve the evidence at the time of trial as the evidence related to a rather long period and the appellant was only able to access the evidence later; that the evidence

is credible; that the respondent was in any case aware of the evidence and will therefore not suffer prejudice; that the appellants made all necessary effort to get the evidence but the bank was not in a position to give it at the time; and that the evidence discloses a strong prima facie case of willful deception by the respondent.

10. It was emphasized that the evidence was meant to serve the interest of justice.

11. Ultimately, the court was asked to allow the additional evidence, permit its inclusion into the record of appeal, and give an order that costs be in the cause.

12. The respondent's submissions are dated 2/7/2025. In the submissions there are concise prefatory remarks that make reference to the nature of the application, the response made, and the issues to be addressed or determined.

13. There was then extensive reference to case law and the cases of **Wanje –vs- A. K. Saikwa [1984] eKLR, Jamil Mohamed Farah Said –vs- Hussein Shariffa Adnan [2004] eKLR**, and **Kenya Forest Research Institute & Another –vs- Stephen Mureithi Ndungu: Civil Appeal**

Application No. 2 of 2019 eKLR were cited and quoted as deemed appropriate to show the principles applicable to the matter and to persuade the court that this is not a deserving case where additional evidence should be taken or allowed. The respondent submitted that consequences of allowing the application *"are far too dire as the respondent will be prejudiced."* The additional evidence was said to *"amount to re-opening the trial and therefore allow the appellant to refashion and/or recast its case thereby resulting to an abuse of the court process."*

14. Ultimately, the court was asked to dismiss the application with costs.

15. I have considered the application, the response made to it, and the rival submissions. In my view, the main concern of the court is to find out whether the merits of the application have been demonstrated. The threshold to be met was clearly set out in the Supreme Court's case of Mohamed Abdi Mohamed (supra) and the same court stated them again in the case of **Kombe Harrison Garama –vs- Kenga Stanley Karisa: Petition No. E020 of 2023**. The other

cases cited and/or quoted by both sides are more or less alluding to that threshold. The cases cited are among a long line of others which include **Naomi Njeri Gachuki & Another –vs- James Kihumba Njenga & two others [2025] KECA 451 (KLR), and Dorothy Nelima Wafula – vs- Hellen Nekesa Nielson & Another [2017] KECA 654 (KLR).**

16. From both the case law and existing statutory provisions, it's clear that new evidence can be allowed during an appeal but it is not a matter of right. Appellate courts usually rely on the record of appeal culled or compiled from the record of the lower court. The lower court record itself is also used. The admission of new evidence is usually an exception which is allowed only sparingly and only with court's permission. Usually, new evidence will also be allowed if it was refused improperly in the lower court. It will be allowed too if in the opinion of the court, a proper or just decision will only be reached by admitting it. While considering the issue, the court has to appreciate whether the new evidence is relevant to the core issues in the

matter and whether it holds enough weight to potentially alter the results of the case. The party wishing to have such evidence admitted has to show that there was due diligence exercised but the evidence simply could not be obtained or was not available at the time.

17. In the matter on hand, the appellant was the defendant in case No. MCCC E 171 of 2020 in which he had been impleaded by the respondent, who was the plaintiff, for among others, selling to him some property, specifically unsurveyed plot No. 24 situate within Jordan Estate, Kitui town, which he allegedly didn't own. There were arrangements that the appellant would be paying rent amounting to Kshs. 48,000/= per month because he had use for the premises standing on the property. The respondent had pleaded that the appellant only paid rent upto the year 2012. From that same year (2012) to 2018, the appellant allegedly failed or refused to pay rent. In the defence filed in the lower court, the appellant had denied failing or refusing to pay rent as alleged. He averred that he fully paid rent upto and including August 2017.

18. The matter was tried by the lower court and in the judgement that ensued, the appellant was found to have paid rent amounting to Kshs. 720,000/=. The respondent on his part was claiming unpaid rent amounting to Kshs. 3,456,000/=. What the trial court did was to subtract the proven paid rent amounting to Kshs. 720,000/= from the claimed rent amounting to Kshs. 3,456,000/=. The result or outcome was that a balance of Kshs. 2,736,000/= allegedly remained unpaid and the appellant was ordered to pay that amount.

19. I think it is necessary to point out that the respondent had sought other remedies in the lower court and he largely succeeded in his claim. But for purposes of the application under consideration, it is only the rent issue that is relevant. The relevance itself only concerns whether new or additional evidence should be allowed. Any other different thing to do with rent should await the hearing and/or disposal of the appeal.

20. The main reason given for by the appellant for not making the evidence available during trial in the lower court is that

the bank couldn't make the evidence available at the time. The evidence was said to have been archived and retrieving it at that time was not possible. The respondent denied this but the basis for that denial was not made apparent or known to the court. Some substantiation was required. Bare or mere denial is not enough. As things stand now, I find the explanation given by the appellant plausible.

21. I have also had a look at the pleadings in the lower court. The respondent pleaded, inter alia, that the appellant had not paid rent at all from year 2012 to 2018. During trial however, the appellant was able to show that he paid some rent during the period. The judgement delivered by the lower court is even clearer. It is shown well that the appellant had paid rent on fifteen (15) separate instances running from the year 2014 to 2017. In all, he had paid a total amount of Kshs. 720,000/=. Overall therefore, the averment in the pleading that the appellant had not paid rent at all during the material period was not entirely true. Each of the fifteen (15) instances showing that the rent was

paid during the period was actually an affirmation that the pleading was less than true. It was, at best, a half-truth.

22. Some questions then arise: What if, per chance, the appellant was not able to show the rest of the payments because it was not possible at the time to make the evidence available? What if the whole truth is that the appellant had paid all the rent? Given that the evidence sought to be made available is meant to bring out the whole truth, I think that a decision made on the basis of the whole truth is more sound than the one apparently made on the basis of half-truth. Or it could well be that the respondent will be able to make an effective rebuttal, and hence show that the whole thing is a lie, but either way, a proven lie or proven truth comprise a better premise for making a decision than a half-truth. I feel persuaded that it is better to allow in the evidence than to lock it out.

23. The respondent alleged that if the application is allowed, he will suffer prejudice as it will be tantamount to re-opening the case for trial. While it is easy to appreciate this averment, it is also necessary to consider where the

interests of justice lie. The appellant was ordered to pay Kshs. 2,736,000/= which the lower court found to be unpaid rent. That amount is not small by any standards. But what if it turns out that the amount was fully paid? If the situation is left to remain like it is, there is real danger that the appellant might be unjustifiably made to pay rent twice over. What this means in effect is that on the issue of rent alone, the appellant would wrongly or unlawfully have paid double the amount, that is Kshs. 5,472,000/=. Given this scenario, who then will suffer the greater prejudice? Is it not the appellant who will obviously have unfairly and unjustifiably enriched the respondent? Wouldn't this kind of payment amount to a court-endorsed or court-permitted rip-off? In my view, the appellant would be more prejudiced than the respondent if the court rejects evidence that is obviously germane to one of the core issues in the appeal.

24. The respondents fears the re-opening of the case as the appellant might *"refashion" or "recast"* his case. This is not entirely convincing. The respondent will be allowed to interrogate the evidence and give his own side of the story.

It should be appreciated in any case that a first appeal like this one is in law handled by the court as a re-trial, with the only rider being that the court should give due allowance to the fact that it didn't see or hear the witnesses as the lower court did. I think that this aspect of treating the matter as a re-trial justifies admission of new evidence in appropriate cases. It should not therefore be made unduly difficult for a deserving party to give evidence that could not be given at the time of the earlier trial.

25. Given what the court has said heretofore, it is clear that the court is minded to allow the appellant's application. The application therefore is allowed in terms of prayers 1, 2, and 3.

RULING DATED, SIGNED and **DELIVERED** in open court at **KITUI** this **7TH** day of **MAY, 2026**.

In the presence of;

Court Assistant – Musyoki

Uvyu for Appellant/Applicant

Maingi Musili for the Respondent

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI