Kigo v Attorney General. & 4 others (Civil Appeal (Application) E561 of 2023) [2025] KECA 267 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 267 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) E561 OF 2023

MSA MAKHANDIA, A ALI-ARONI & LA ACHODE, JJA

FEBRUARY 21, 2025

BETWEEN

MOSES MACHARIA KIGO ..... APPLICANT

AND

ATTORNEY GENERAL. ..... 1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS ..... 2ND RESPONDENT

INSPECTOR GENERAL OF POLICE ..... 3RD RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS ..... 4TH RESPONDENT

MUSA YEGO ..... 5TH RESPONDENT

(Being an application for leave to adduce new evidence in the appeal against the decision of the High Court at Nairobi (Ong'udi, J.) delivered on 26th May 2023 in Petition No. 217 of 2019)

RULING

1. Before the court is the notice of motion dated 15th April 2024, brought under sections 1A, 1B, 3A of the *Civil Procedure Act*, Order 51, rule 1 of the Civil Procedure Rules, 2010, and rules 31 and 107 of the Court of Appeal Rules, 2022, seeking leave to adduce new and fresh evidence.

2. The application is supported by the grounds on the face of it, which include that the new and fresh evidence will show that the applicant sought buyers for his assets to enable him to settle debts owed to the bank following the loss of business suffered due to the actions of the respondents. Further, the evidence could not have been adduced earlier, even with due diligence. The new and fresh evidence will assist the court in establishing the loss suffered by the applicant due to the actions complaint of. It is credible, not voluminous, such that the respondents would have no difficulty responding to the same; the interest of justice will be served, and no prejudice will be occasioned to the respondents, absent which, the applicant will continue to suffer irreparably.

3. The applicant filed an affidavit sworn on 15th April 2024 in support of the application wherein he deposes that he had been charged with 7 counts contrary to the *Standards Act* in the Chief Magistrate's Court at Nyahururu in Criminal Case No. 1424 of 2018, where he entered a plea of not guilty and the matter proceeded to trial. At the close of the prosecution case, in a ruling dated 19th December 2018 the court found that he had no case to answer, and acquitted him. The trial court made a further order that the exhibits tendered in evidence be released to him; the respondents failed to comply with the release order and subsequently filed an application to the High Court at Nyahururu vide Misc. Criminal Application *No. 7 of 2019* having been dissatisfied with the trial court's orders; the High Court affirmed the trial court's decision, upon which the exhibits were released to the applicant. Despite the express orders of both the trial and High Court the 4th respondent ignored the court order and proceeded to impound the applicant's motor vehicle alongside the other exhibits that were ordered for release.

4. The applicant further deposes that due to the 4th respondent's action, on 26th May 2022, he filed a petition against the respondent for disregarding the rule of law and violating his constitutional right; the court allowed the petition and awarded him Kshs. 600,000 as general damages and Kshs. 150,000 as exemplary damages, which awards the applicant finds inordinately low, contending that the honourable judge misdirected herself by misapprehending the evidence and relying on the wrong notion that the sugar released to the applicant was suitable for consumption, therefore arriving at an award that was inordinately too low given the loss the applicant incurred and continues to incur, as the respondents action, disrupted his only source of income resulting in the loss of his supermarket; loss of credibility for purposes of accessing loans; default in payment of loans which eventually led to selling some of his properties in order to pay off debts owed to banks and credit facilities; his health deteriorated resulting to constant visits to the hospital where he has been undergoing treatment for psychological and physical ailments; the new additional evidence was not available by the time the pleadings in the trial court were closed; he was still in the process of looking for buyers for his properties to enable him settle some of the debts; that when he finally garnered the necessary transfer documentation, judgment had already been entered and the matter finalized hence his inability to present the same before the trial court.

5. Further, in support of the application, the applicant filed written submissions and a list of authorities dated 29th April 2024. Learned counsel for the applicant submitted that rule 31(1) of the Court of Appeal Rules, 2022, allows the court to re-appraise and take additional evidence. In support, he relies on the case of Safe Cargo Limited vs. Embakasi Properties Limited & 2 Others [2019] eKLR, where this Court cited the case of Republic vs. Ali Babitu Kololo [2017] eKLR, where it was stated that the unfettered power of this Court to receive additional evidence should be used sparingly and only where it is shown the evidence is fresh and would make an impact in the determination of the appeal.

6. On satisfying the necessary criteria required for granting leave being sought, he submits that the documents attached to the application are new evidence and were not produced at the trial due to reasons beyond the applicant's control; the new evidence will be in support of the losses occasioned to his business and the psychological trauma he has undergone and is still enduring. In support of this proposition, the applicant relies on the case of Raila Odinga & 5 Others vs. I.E.B.C. and 3 Others [2013] eKLR, where the Supreme Court was of the view that a court ought to consider the context and extent of the new material intended to be produced. If the additional evidence is small and limited and the other party can respond to it, the court ought to be considerate, taking into account all aspects of the case. But if the intended new evidence is such as would make it difficult for the other side to respond, the court must act with caution and care.

7. We did not come across any replying affidavits in opposition by the respondents, save for submissions. The 1st, 3rd and 4th respondents filed their submissions dated 15th July 2024. Learned counsel for the

said respondents submitted that the applicant has not placed any material before this Court to support his averment that the lorry subject matter was not roadworthy at the time it was released to him; the application is based on beliefs, suppositions, and untruths; neither did the applicant place any material before the court demonstrating that the action of the 3rd and 4th respondents of impound and detaining the motor vehicle was unlawful; further the police have immunity for acts done in good faith in the exercise of their lawful mandate; there was no evidence of the nature of the repairs done or prove that the applicant spent Kshs. 690,000 on the alleged repair work; additionally, the applicant had not demonstrated that any repairs done to the lorry were a consequence of the motor vehicle lying idle in the police yard; nor has he demonstrated that he warrants the grant of the orders sought. Learned counsel cited sections 107 to 109 of the *Evidence Act* to support their contention there was no proof placed before the court of repair work done on the vehicle and the cases of Rheir Shipping Co. SA vs Edmunds [1955] 1WLR 948 and Hellen Wangari Wangechi vs. Carumera Muthini Gathua [2005] eKLR for the proposition that the applicant had the burden to lay the proof. In both cases, the courts lay the burden of proof on the person asserting a fact.

8. The respondents submitted further that the sale of land and the medical reports without clear and direct correlation to the damages initially claimed do not meet the threshold for re- consideration of the awarded amount. In this regard, they relied on several cases where the court held that appellate courts have been reluctant to allow parties to adduce additional evidence on appeal except for exceptional circumstances. Those cases are Nayan Mansukhal Salva vs. Hanikssa Nayan Salva [2019] eKLR, where the court reiterated the holding in the case of Fiber Link Limited vs. Star Television Production Limited [2015] eKLR, National Cereals and Produce Board vs. Erad Supplies and General Contracts Limited, Civil Appeal No. 9 of 2012 and The Administrator, HH The Aga Khan Platinum Jubilee Hospital vs. Munyambu [1985] KLR 127.

9. The 2nd and 5th respondents filed submissions dated 15th July 2024. Learned counsel submitted that if the evidence that the applicant seeks to adduce was non–existent while the matter was before the trial court, then it cannot be introduced at the appellate stage as the learned judge of the superior court did not have an opportunity to consider the same and cannot be blamed for failing to consider the same when she awarded the impugned damages.

10. They further submitted that the applicant was bound by his pleadings at the High Court; his claim before the High Court was purely for general and exemplary damages, yet what he seeks to adduce as new evidence at the appellate level is in the nature of special damages which had not been subjected and tested in a trial by the parties; the debt he owed to the bank was known and ascertainable at the trial; the value of the properties he sold was also known and ascertainable; the action of selling the applicant's properties to offset his commercial debts after the determination of his petition could only give rise to a fresh cause of action as the same is remotely connected to the issues which were in the petition and to allow the same would be going against the legal maxim, "in jure non-remota causa sed proxima spectatur." (meaning "the immediate and not the remote cause')

11. To appreciate the application, we need to summarize the facts of the dispute between the parties. The applicant was charged in Criminal Case No. 1424 of 2018 in the Chief Magistrate's Court at Nyahururu, with 7 counts contrary to the *Standards Act*. He pleaded not guilty, and the prosecution presented its evidence with 8 witnesses and produced 22 exhibits. At the close of the prosecution case, in its ruling of 19th December 2018, the trial court found that the applicant had no case to answer concerning counts 4, 5, 6, and 7. The applicant was accordingly acquitted of the same. Further, the court ordered that exhibits 3, 4, 5, 6, 14, and 22 be released to the applicant. The respondents were dissatisfied with the trial court's ruling and moved the High Court at Nyahururu in Misc. Criminal Application No. 7 of 2019. In its ruling, the High Court affirmed the trial court's orders and issued

an order releasing the exhibits on 27th May 2019; the same day, the applicant's lorry registration No. KBK 825B, transporting the exhibits along the Nyahururu-Nyeri Highway, was again stopped by the 4th respondent's flying squad unit, led by the 5th respondent and his driver directed to drive to the 4th respondent's headquarters, where the exhibits were impounded; the driver and turn-boy were also detained.

12. The above action of the 4th respondent precipitated the filing of a petition dated 6th June 2019 by the applicant seeking various orders, including a declaration that the respondent's action violated his rights under Articles 73(1) and (2) of *the Constitution*; a prayer for general and exemplary damages; an order of prohibition against arrest and harassment by the respondents and costs.

13. The respondents opposed the petition. In the end, the trial court found the petition merited allowed the same, having found the action of the respondents to have been calculated, deliberate disobedience of lawful orders in violation of the constitutional obligations of state officers and amounts to a flagrant breach of Articles 73(1) and (2) of *the Constitution*. The court awarded the applicant Kshs. 600,000 as general damages against the 4th and 5th respondents and Kshs. 150,000 as exemplary damages against the 1st, 3rd, 4th and 5th respondents. This decision of the High Court aggrieved the applicant, who preferred an appeal to this Court and which has given rise to the application subject of this ruling.

14. Returning to the application before us, we have considered the application, the rival affidavits, the cases cited, and the law. The singular issue for determination is whether the applicant has made a case to introduce additional evidence on appeal. The rule that donates discretion on whether to allow additional evidence or not is rule 31(b) of this Court Rules in the following terms:

    31.

    (1) On an appeal from the decision of a superior court acting in the exercise of its original jurisdiction, the Court Shall have power-

    a. ...

    b. In its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court.

15. It is undisputed that the petition before the High Court sought a declaration that the respondents' actions ultra vires their mandate and infringed on the applicant's constitutional rights. As a result, the applicant sought general and exemplary damages.

16. The applicant's intention of introducing new evidence is demonstrated in his affidavit in support of the application, where he deposes that:

> " 11. That the respondent's action disrupted my only source of income resulting in the loss of my supermarket, losing my credibility for accessing loans and defaulting in payments of loans which eventually led to me selling some of my properties to realize the debts owed to bank/credit facilities.
>
> 12. That further to the above stated my health has deteriorated with constant visits to the hospital undergoing treatment for psychological and physical ailments."

17. Further, the applicant claims that he incurred unending debts due to the disruption of his business and had to sell his properties to settle the debts. That he sold his properties after the case was determined and, therefore, did not have the new evidence at hand.

18. This Court, in numerous of its decisions, has dealt with the issue at hand. Cases in mind are: Attorney General vs. Torino Enterprises Limited [2019] eKLR, wherein this Court dealt with the question of whether or not an appellate court should allow an application for the introduction of new evidence. The court cited the case of Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen and Paul Fredrick Nelson [2017] eKLR, where it was stated:

> " Though what constitutes "Sufficient reason" is not explained in the rule, through Judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a Party seeking to present additional evidence on appeal. Before this Court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible." (emphasis added)

In the often-cited case of Wanje vs. A. K. Saikwa [1984] eKLR, this Court stated that rule 29 (now rule 31(b)) of the Court of Appeal Rules 2022 is not meant to aid a litigant who lost in the trial in introducing evidence that will patch up weak points and fill up omissions on appeal.

19. Further, in the case of Mohammed Abdi Mohamud vs. Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR, the Supreme Court laid the principles to be considered in allowing additional evidence as follows:

> " 79...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 proportionality and prejudice when allowing 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."

20. We discern from the applicant's averments that the evidence he placed before the trial court was insufficient and could not therefore have achieved the desired results because he lacked the requisite evidence at the time. As time went by, he realized that his loss was more due to the debts he faced, leading to the sale of his properties to redeem his debts and costs occasioned by his failing health.

21. It is clear that debts, property sales, and failing health issues were not before the trial court and, therefore, could not have been considered then, and his pleadings bound him. We do not think that the new evidence based on the pleadings before the High Court will assist the applicant in his quest to enhance the damages he was awarded; in other words, it has not been demonstrated how the new evidence is directly related to the matter before the court. The evidence appears to be introducing a fresh claim in the nature of special damages that was not part of the pleadings before the trial court.

22. It would also appear as though the applicant is attempting to patch up and fill in gaps in his otherwise weak case as presented in the trial court. Similarly, the new evidence sought to be introduced is in regards to events that have occurred post judgment. This Court will be opening a Pandoras box if we were to allow events that have happened post judgment to be treated as new and additional evidence. That way, there will be no end to litigation.

23. In the end, we do not find the application merited and proceed to dismiss it with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY, 2025.

ASIKE–MAKHANDIA

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JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.