



**Singh v Nyanja Holdings Limited & 4 others (Civil Appeal (Application)  
E174 of 2021) [2024] KECA 601 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 601 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E174 OF 2021  
DK MUSINGA, P NYAMWEYA & LA ACHODE, JJA  
MAY 24, 2024**

**BETWEEN**

**JAMES GITAU SINGH ..... APPELLANT**

**AND**

**NYANJA HOLDINGS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE NJAU MBUGUA NYANJA ..... 2<sup>ND</sup> RESPONDENT**

**MRS. ENID N. NYANJA ..... 3<sup>RD</sup> RESPONDENT**

**CITY FINANCE LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**REDMARS HOLDINGS LIMITED ..... 5<sup>TH</sup> RESPONDENT**

*(Applications to strike out the Record of Appeal from the Judgment of the High Court of Kenya in Nairobi, Milimani Commercial Court (Kasango J.) delivered on 5th May 2020 in HCCC No 251 of 2008 as consolidated with HCCC 1965 of 1991; for consolidation of Civil Appeal No. 244 of 2022, Civil Appeal No. E166 of 2021 and Civil Appeal No. E174 of 2021; and to adduce additional evidence in the consolidated appeals.)*

**RULING**

1. The subject of this ruling are two applications. The first is a Notice of Motion dated 16<sup>th</sup> April 2021 filed by Nyanja Holdings Limited, George Njau Mbugua Nyanja and Mrs. Enid N. Nyanja, who we shall refer to as “the Applicants,” and it seeks orders to strike out the appeal filed herein by James Gitau Singh, who we shall refer to as “the Appellant”. The second application is a Notice of Motion dated 6<sup>th</sup> August 2021 filed by the Appellant, seeking the following orders:

1. There be a consolidation of the present appeal with Civil Appeal No. 224 of 2020, City Finance Limited vs Nanja Holdings Ltd & 3 Others and Civil



Appeal No. E 166 of 2021, Redmars Holdings Ltd vs Nyanja Holdings Ltd & 3 Others with Civil Appeal No. 224 of 2020, City Finance Limited vs Nanja Holdings Ltd & 3 Others being the lead file for hearing and final determination.

2. That leave be and is hereby granted to the Applicant to lodge A Supplementary Record of Appeal adducing additional evidence in the consolidated appeal limited to:

- i. Agreement for sale rotated 30<sup>th</sup> January 2007,
  - ii. Proof of payment of Purchase Price
  - iii. Proof of the merger between Singh Gitau Advocates and Mukite Musangi advocates to form LJA Associates took place.
3. Alternatively, that the Court be at liberty to make any further orders in the interest of justice.

2. We shall commence with the determination of the first application for striking out of the appeal, since its outcome will determine whether or not the prayers for consolidation and adducing of additional evidence will still obtain. We will begin by setting out the applicable law and principles to contextualise the application, and rule 86 of the Court of Appeal Rules of 2010, which provides as follows in this regard:

“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies, or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.

Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be”.

3. The Applicants seek to strike out the appeal filed by the Appellant for the reasons that this Court has no jurisdiction to hear the appeal, since the Appellant ought to have first sought leave to file the appeal. The Applicants argue that the Appellant was not a party to the suits in HCCC 1965 of 1991 consolidated with HCCC 251 of 2008, whose judgment is appealed from, and he therefore does not have any locus standi to file the appeal. Additionally, that the Appellant was the advocate acting at one time for City Finance Limited, the 4<sup>th</sup> Respondent herein, and was also acting for Redmars Holding Limited, the 5<sup>th</sup> Respondent herein in the trial court, and could not now change that role to become a litigant. Furthermore, that his law firm, namely LJA Associates LLP, has filed a separate record of appeal, being Civil Appeal No E166 of 2021, on behalf of the 5<sup>th</sup> Respondent.

4. It was their contention that the appeal herein is not only invalid and incompetent, but also vexatious, frivolous and an abuse of the process of the Court, as it is meant to supplement similar appeals filed by the Appellant’s clients . These averments were reiterated in a supporting and further affidavit sworn by George Njau Mbugua Nyanja, the 2<sup>nd</sup> Applicant and a shareholder and director of the 1<sup>st</sup> Applicant, and in submissions dated 30<sup>th</sup> September 2021 and 25<sup>th</sup> January 2024, which were highlighted by the Applicants’ learned counsel, Mr. J.P. Machira and Mr. Thangei, during the virtual hearing of the applications that we held on 18<sup>th</sup> March 2024.



5. Mr. Machira pointed out that the 4<sup>th</sup> and 5<sup>th</sup> Respondents filed Civil Appeal No 224 of 2020 and Civil Appeal No E166 of 2021 against the impugned judgment, and additionally, Civil Appeal No E166 of 2021 was filed by the Appellant's law firm, LJA Associates LLP. It was their submission that the said litigants, having filed their respective civil appeals, the Appellant's appeal, being Civil Appeal No E174 of 2021, was duplicitous and ought to be struck out, and that the Appellant was neither a party to the suit nor did he participate at the hearing of the same in the trial Court.
6. When asked by the Court about the provisions of rule 77(1) of the Court of Appeal Rules, 2022 which allow any person to file an appeal, Mr. Machira submitted that an advocate was not a litigant but an officer of the Court, and should not get emotionally involved in his client's case. Therefore, the Appellant had overstepped his special position of an advocate by opting to file his appeal, in order to fill gaps in his clients' cases as demonstrated by his seeking leave to introduce additional evidence. It was his further contention that the Appellant was neither an aggrieved person, nor did the said judgment make any order against him, and that losing cases is a common tragedy and misfortune that advocates confront in their everyday profession, and while such a loss was a humbling and learning experience for lawyers, it did not give him the right of appeal. The decisions in the cases of London Distillers (K) Ltd. vs Cabinet Secretary, Ministry of Education & 4 Others (2022) eKLR, and Center for Rights Education and Awareness & Another vs. John Harun Mwau & 6 Others (2012) eKLR were cited by the counsel for the submissions that advocates as officers of the Court, should avoid the temptation to jump into the arena of litigation, and that an aggrieved party is one who has some proprietary interest in the suit property.
7. Therefore, the Appellant ought to have sought this Court's leave to appeal against the said judgment, as he was neither a party to the suit, nor did he participate at the hearing of the same in the trial court. It was their conclusion that save for normal evaluation, analysis and rationalization of the evidence, the learned trial Judge did not at any one time make any personal attack on the Appellant, and that his name was only mentioned in the perspective of his relationship with Mr. Pomes Shah, a director of Chester Insurance Brokers. In any event, the Appellant's complaint against the trial Judge lay in another forum, but not before this Court.
8. The Appellant filed a replying affidavit sworn on 19<sup>th</sup> May 2021 in opposition to the application. He gave a background to the suit in the High Court, which revolved around the sale of LR No. 7583/1, Karen (the suit property), a property that was charged to the 4<sup>th</sup> Respondent to secure a loan facility by the 2<sup>nd</sup> Respondent. Upon default of payment, the 1<sup>st</sup> to 3<sup>rd</sup> Applicants filed the suit in HCCC No 1965 of 1991, seeking to restrain the sale of the suit property, which was dismissed on 29<sup>th</sup> April 2009 by Nambuye J. (as she then was). The 1<sup>st</sup> to 3<sup>rd</sup> Applicants thereupon filed a fresh suit namely, HCCC No. 251 of 2008, in which injunctive orders were granted by Khaminwa, J. The Appellant stated that the firm of Singh Gitau Advocates was then on record for the 4<sup>th</sup> Respondent for both matters, while Mukite Musangi & Company Advocates acted for the 5<sup>th</sup> Respondent in HCCC No. 251 of 2008. The matters were subsequently consolidated and heard by Kasango, J., who set aside the sale and transfer of the suit property to the 5<sup>th</sup> Respondent in a judgment dated 5<sup>th</sup> May 2020, on the ground that the sale to the 5<sup>th</sup> Respondent was tainted with fraud and therefore illegal.
9. The Appellant referenced the findings in paragraphs 109 to 120 of the said judgment, which was to the effect that the lawyer for the 4<sup>th</sup> Respondent had colluded with the 5<sup>th</sup> Respondent, and asserted that the Judge could not have come to such a conclusion when he was not a party to the suit and his conduct was not impugned. He contended that had this been an issue, he would have shown that, at the time of the sale and transfer, Singh Gitau & Company Advocates and Mukite Musangi & Company Advocates were distinct law firms and he was not in partnership with Andrew Musangi. Further, that



the law firm of LJA Associates in which Andrew Musangi and James Gitau Singh became partners was formed on 6<sup>th</sup> May 2011, well after the property had been transferred on 21<sup>st</sup> August 2007, and several years after the 1<sup>st</sup> to 3<sup>rd</sup> Applicants had filed HCCC No 251 of 2008.

10. He deponed that the trial Judge made adverse findings touching on him personally, and that being an advocate of 25 years standing, whose integrity had never been questioned, the judgment had a negative impact on his psychological wellbeing and social standing. It also negatively impacted his legal practice and position as a senior member of the bar, since the finding of the Judge imputed deceit and criminal motive. He was therefore adversely affected by the judgement, and it was important that this issue be resolved irrespective of the ultimate outcome of the appeal. He stated that unless the judgment is set aside, it would stand as uncontested proof that he was dishonest and unworthy of being an advocate.
11. The learned counsel for the Appellant, Mr. Steve Kimathi, reiterated these averments while highlighting written submissions dated 29<sup>th</sup> November 2021, and cited the decisions in *Onjula Enterprises vs R. K. Sumaria* [1986] eKLR and *M.S.K vs S.N.K* [2010] eKLR to submit that the persons directly affected by an appeal need not be only those who were parties to the proceedings, and that courts should not lock out affected parties.
12. The 4<sup>th</sup> Respondent opposed the application for striking out of the appeal vide a replying affidavit sworn on 8<sup>th</sup> October 2021 by Jackson Kimathi, its head of the Legal Department. The 4<sup>th</sup> Respondent asserted that the learned trial Judge set aside the sale, inter alia, on the basis that its lawyer, James Gitau Singh, had colluded to sell the property with the justification that he was now in partnership with Mukite Musangi, the advocate for the 5<sup>th</sup> Respondent, and that he was also a director in Chester Insurance Brokers Limited, which had common shareholders with the 5<sup>th</sup> Respondent.

However, that James Gitau Singh was not a party to the proceedings; there were no allegations against the integrity and personal conduct of the advocate in the pleadings; it was neither alleged nor proved how Singh Gitau could have influenced the 4<sup>th</sup> Respondent, which had an independent Board and member shareholders, to sanction the sale of the suit property to the 5<sup>th</sup> Respondent in a sale that was advertised.

13. Learned counsel Mr. Caxstone Kigata appeared for the 4<sup>th</sup> Respondent during the hearing of the applications, and submitted that the learned trial Judge attacked the integrity of the Appellant when no averments in the pleadings had been raised against him. Counsel placed reliance on rule 77
  1. of the Court of Appeal Rules, 2022, and the decision in *Onjula Enterprises vs R. K. Sumaria* (supra) to submit that a person directly affected by an appeal need not be only those who were parties to the proceedings, and since the trial Judge had impugned the character and integrity of the Appellant, the said Appellant was thus affected by the judgement of the trial court and had a right to lodge an appeal against the said judgement.
14. The 5<sup>th</sup> Respondent also opposed the application for the striking out of the Appellant's appeal in submissions dated 29<sup>th</sup> November 2021 and 22<sup>nd</sup> January 2024, which were highlighted during the hearing by its learned counsel, Mr. James Gitau Singh. It was submitted that the present appeal was based on adverse findings against the Appellant by the trial Judge in *Milimani Commercial Court Civil Suit HCCC No 251 of 2008* consolidated with *HCCC No. 1965 of 1991*, when the Appellant, who is an advocate, was neither a party to the High Court proceedings, nor was his conduct questioned. Therefore, that unless the Appellant is allowed to vindicate himself, there will be unresolved questions concerning his integrity. In addition that a person directly affected by a decision need not be only those who were parties to the proceedings, but also parties who have not taken part in the proceedings but are or may be directly affected, as held in *Kenya Commercial Bank Limited vs Benjoh Amalgamated*



Limited & another [2015] eKLR , Heineken Uganda Ltd & Another vs Maxam Limited & 5 others [2017] eKLR and Law Society of Kenya Nairobi Branch vs Malindi Law Society & 6 others [2017] eKLR.

15. As we have noted, the proviso to rule 86 of the Court of Appeal Rules, 2022, requires that an application to strike out an appeal shall not be brought after the expiry of thirty (30) days after the date of service of the notice of appeal or record of appeal. The Applicants in the present application seek to strike out the Appellant's Record of Appeal dated 30<sup>th</sup> March 2021, and the instant application, which is dated 16<sup>th</sup> April 2021 is therefore filed within time. On the grounds raised by the Applicants for striking out the appeal, they have mainly taken issue with the locus and capacity of the Appellant, who was an advocate for one of the parties in the suit in the trial court, and state that he had no proprietary interest arising from the impugned judgment, nor were there any orders made against him in the said judgment to justify the filing of an appeal in his own right.
16. We note in this regard that rule 77(1) provides that any person can appeal to this Court. This rule (then rule 75(1) of the 2010 Court of Appeal Rules), was explained by this Court (Waki, Nambuye, Musinga, Gatembu & Murgor JJ.A.) in *Law Society of Kenya, Nairobi Branch vs Malindi Law Society & 6 others* [supra] as follows:
- “25. It seems to us from that interpretation that the issue as to who has locus standi before a court of law has now been crystallized. It is any aggrieved party.
26. This brings us to the applicability of Rule 75 of the Rules of this Court. It provides:
- “75 (1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the Registrar of the superior court.” [Emphasis added]
26. The Rule is specific about “a person who desires to appeal” and not a party to the impugned decision. Halsbury's Laws of England's 4<sup>th</sup> Edition Para. 49 page 52, has this to state on locus standi:
- “In order to maintain proceedings successfully, a plaintiff or applicant must show not only that the court has power to determine the issue, but also that he is entitled to bring the matter before the court.....
- In other contexts, locus standi depends primarily on the nature of the remedy or relief sought .....a right of appeal.....is frequently confined to a “ person aggrieved” or a person who claims to be or feels aggrieved....”
26. Paragraph 66 page 92 of the same treatise defines an aggrieved party as follows:-
- “The meaning of a person aggrieved may vary according to the context. However, as a matter of general principle, any person who has a decision decided against him (particularly in adversarial proceedings) will be a person aggrieved for the purposes of appealing against that decision unless the decision amounts to an acquittal of a criminal offence.”
26. When Rule 75 as well as the above extracts from Halsbury's Laws of England are read in conjunction with the Supreme Court's interpretation of Articles 22, 258 and 260 of *the Constitution*, this creates no doubt in our minds that a person, association, body corporate or an unincorporated body, have the locus standi, not only to institute original proceedings but also appellate proceedings provided that such a party is aggrieved by the decision intended to be challenged. The respondent branches asserted that they were aggrieved by the impugned decision as the same had impacted negatively on their legal



practice in particular and the general welfare of their members. In our view, such an assertion was sufficient justification for them to intervene irrespective of its ultimate outcome.”

17. The question that we need to answer, therefore, is whether the Appellant has demonstrated that he is sufficiently aggrieved by the judgment appealed from. We have perused the said judgment and note that the finding the Appellant is aggrieved with was as follows:

“ 109. Nyanja in his evidence accused the bank lawyer of colluding with Redmars.

110. I would respond to that accusation by saying that my view, after reviewing the evidence before me, is that the accusation is not farfetched. I venture to explain, myself, with the greatest respect to the persons I will discuss.”

18. The learned trial Judge proceeded to discuss the representation of the 4<sup>th</sup> and 5<sup>th</sup> Respondents by the Appellant in the two consolidated cases, the partnership during the pendency of the suit between the Appellant and Mukite Musangi, who appeared for the 5<sup>th</sup> Respondent, and the shareholding of Chester Insurance Brokers Ltd from which the learned Judge found that “ It follows that Pomesh Shah knew James Gitau Singh, the bank’s lawyer, at the time of sale and purchase of the Karen property.” We are of the view that there is an adverse tenor in these findings that would justify the Appellant, who is an advocate, to be sufficiently aggrieved, and that he therefore has locus to file an appeal. We will not delve into the merits or otherwise of the findings at this stage, as this is a matter to be dealt during the hearing of the substantive appeal.

19. This finding leads us to the second application, which seeks consolidation of the appeals and additional evidence. Again, we begin by contextualising the applications by setting out the applicable law. Consolidation of appeals is allowed under rule 106 of the Court of Appeal Rules, 2022, which provides that this Court may, for sufficient reason, order any two or more appeals to be consolidated on such terms as it thinks just; any two or more appeals to be heard at the same time or one immediately after the other; or that any one or more appeals to be stayed until after the determination of any other of them. As regards, adducing of additional evidence, rule 31 provides as follows:

1. On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—
  - a. to re-appraise the evidence and to draw inferences of fact; and
  - b. in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.
2. When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the cross-examination of any deponent.
3. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the Court, without any such statements of opinion.
4. The parties to the appeal shall be entitled to be present when such additional evidence is taken.



20. Leave to adduce additional evidence is therefore at the discretion of the Court, and the principles applicable in the exercise of the Court's discretion under rule 29 were summarized by Chesoni, Ag. JA. (as he then was) in *Mzee Wanjie and 93 others vs A. K. Saikwa and others* (supra) as follows:

“The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:

1. (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- b. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
- c. The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

21. The grounds for consolidation set out by the Appellant were that the three appeals sought to be consolidated arise out of the same judgment and decree made by the High Court on 5<sup>th</sup> May 2020 in HCCC 1965 of 1991 - *Nyanja Holdings Limited, George Njau Mbugua Nyanja and Mrs. Enid N. Nyanja* as consolidated with HCCC 251 of 2008 - *Nyanja Holdings Limited and 2 Others vs City Finance Bank Limited Redmars Holding Limited*, and therefore raise common issues of fact and law, and that the consolidation of the appeals is necessary so as to save judicial time and to ensure justice is dispensed without danger of duplication and/or contradiction. On the additional evidence, it was stated that since the Appellant was not a party in the proceedings before the trial Court, he could not produce the additional evidence sought to be adduced, which is directly relevant to the appeals before the Court, and their production is in the interest or justice. Further, that the additional evidence is authentic, and exculpatory in impugning the findings of fact by the trial court, and that the facts of the existence of Agreement of Sale, payment of the purchase price and representation of parties were not in issue during trial, yet the trial court made adverse findings on them.

22. These grounds were reiterated in submissions dated 10<sup>th</sup> September 2021 and highlighted by Mr. Kimathi during the hearing, who cited the decision by this Court in *David Ojwang Okebe & 11 Others vs. South Nyanza Sugar Company Limited & 2 Others* [2009] eKLR and by the Supreme Court of Kenya in *Law Society of Kenya vs Centre for Human Rights & Democracy & 12 Others* [2014] eKLR, where it was held that consolidation is a case management tool, and its essence is to facilitate the efficient and expeditious disposal of disputes. Counsel also submitted that in setting aside the sale and transfer of the suit property, the trial Judge was primarily motivated by the assumption that at the time of transfer, the Appellant and Andrew Mukite Musangi were partners in a law firm, and the additional evidence that the Applicant wishes to include were the Deed of Partnership dated May 6, 2011 and sole practitioner certificates for Andrew Mukite Musangi and James Gitau Singh.

23. Further, that the trial Judge was also swayed by the fact that the litigants had not produced any evidence of payment of the purchase price, nor of the Agreement for Sale, and that the additional evidence will reveal that payment was made and was also acknowledged by the Bank, and that there was a sale agreement. Lastly, that each of the items of additional evidence sought by the Applicant meets the detailed guidelines and criteria laid down by the Supreme Court in *Mohamed Abdi Mohamud vs. Ahmed Abdullahi Mohamed and 3 Others* [2018] eKLR.



24. The 5<sup>th</sup> Respondent filed a replying affidavit sworn on 29<sup>th</sup> October 2021 supporting the application on similar grounds.
25. The Applicants on their part opposed the application vide a replying affidavit sworn by the 2<sup>nd</sup> Applicant on 30<sup>th</sup> August 2021, wherein it was reiterated that the Appellant was not a litigant in the trial Court and therefore did not have locus, and that the judgment did not in any manner affect his pecuniary or property rights of the Appellant herein. Specifically, on the question of adducing of additional evidence, it was averred that the issue of payment of the purported purchase price is a critical issue which was contained in the Applicant's pleadings and contested in their submissions, and was indeed a critical issue in the trial court. Furthermore, that the purported Sale Agreement and receipt for payment of the alleged purchase price were never produced at the trial in the High Court and was a fundamental issue which was also emphasized their submissions.
26. Therefore, that it will be unfair and unjust for the Appellant to be allowed to produce this new critical evidence before this Court, which evidence is meant to supplement and improve his client's appeal, namely, Civil Appeal No. E166 of 2021, which was filed by the Applicant's Legal Firm. Lastly, that the evidence that the Applicant seeks leave to adduce is not new, he has all along been in possession of the documents that he now seeks to adduce as evidence, and that the trial Judge was justified and obligated to write her judgment on the basis of the evidence and the law.
27. These grounds were reiterated in the submissions dated 24<sup>th</sup> September 2021 filed by the Applicants' counsel, who submitted that Civil Appeal No. E174 of 2021 is patently invalid and incompetent, and is incapable of being joined with the other valid and competent Civil Appeals, and that the law on additional evidence is neither intended to import it, and nor is it intended for a litigant to patch up his weak points in his case and to fill up omissions in the Court of Appeal, which is what the Appellant is doing for his client, the 5<sup>th</sup> Respondent.
28. It is not disputed that all the three appeals sought to be consolidated emanate from, and seek to challenge the judgment and decree of 5<sup>th</sup> May 2020 issued in HCCC 1965 of 1991 - Nyanja Holdings Limited, George Njau Mbugua Nyanja and Mrs. Enid N. Nyanja as consolidated with HCCC 251 of 2008 - Nyanja Holdings Limited and 2 Others vs City Finance Bank Limited Redmars Holding Limited . In addition, the parties in the three appeals were either parties or advocates in the suit in the trial court. We therefore find that the threshold for consolidation of suits as set out by the Supreme Court of Kenya in *Omoke vs Kenyatta & 83 others* (Petition 11 (E015) of 2021) [2021] KESC 27 (KLR) has been met, namely, that there are common questions of either law or fact in the three appeals, and it was desirable that all the related matters be disposed of at the same time. The purpose is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties in terms of saving of costs, time and other resources and avoidance of multiplicity of proceedings. Having admitted the Appellant's appeal, we also do not see the prejudice that the Applicants will suffer if the appeals are consolidated.
29. As regards taking of additional evidence, we note that this application is being made by the Appellant in relation to the appeal he has filed in Civil Appeal No. E174 of 2021, arising from what he has pleaded were adverse findings made against him by the trial Judge. The Supreme Court of Kenya has, in this regard, set out guidelines for the admission of additional evidence before appellate courts in *Hon. Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed and 3 others* [supra] as follows:

“(79) ... (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.”

30. The Supreme Court in addition stressed that additional evidence at appellate level should be allowed on a case-by-case basis and even then “sparingly with abundant caution.” We however appreciate that the evidence sought to be adduced by the Appellant on the Agreement for Sale entered between the 4<sup>th</sup> and 5<sup>th</sup> Respondent and the payment of the purchase price is relevant, in light of the grounds he has pleaded for being aggrieved by the findings of the trial Court in relation thereto. To this extent there is no risk that the evidence may be used to fill in gaps in the Appellants’ cases or introduce a new case on appeal, and the Applicants will not suffer prejudice, as they will have the opportunity to examine and submit on the evidence. In the circumstances, the additional evidence that we find falls within the parameters of the guidelines set out in Hon. Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed and 3 others [supra] as having a direct bearing on the Appellant’s appeal, is the evidence relating to the existence of the partnership between Singh Gitau Advocates and Mukite Musangi Advocates to form LJA Associates, and evidence of the time of execution of the sale agreement between the 4<sup>th</sup> and 5<sup>th</sup> Respondents and of payment of the purchase price, in so far as it relates to the time when the partnership was formed. These facts were not an issue during the hearing at the trial



Court and there was therefore no basis of producing the evidence then. But now that the issue has arisen, it will be in the interests of justice to allow the evidence to be produced.

31. In conclusion, we accordingly find that the Applicants' application dated 16<sup>th</sup> April 2021 is not merited, and the said application is hereby dismissed with costs to the Appellant. We however allow the Appellant's application dated 6<sup>th</sup> August 2021 to the extent of the following orders:

1. Civil Appeal No. 224 of 2020 - City Finance Limited vs Nanja Holdings Ltd & 3 Others, Civil Appeal No. E166 of 2021- Redmars Holdings Ltd vs Nyanja Holdings Ltd & 3 Others and Civil Appeal No. E174 of 2021- James Gitau Singh vs Nyanja Holdings Ltd & 4 Others be and are hereby consolidated for hearing and determination together, and the lead file shall be that of Civil Appeal No. 224 of 2020-City Finance Limited vs Nanja Holdings Ltd & 3 Others for purposes of recording of proceedings.
2. That leave be and is hereby granted to the Appellant in Civil Appeal No. E174 of 2021- James Gitau Singh vs Nyanja Holdings Ltd & 4 Others to adduce additional evidence in the consolidated appeal limited in proof of the partnership between Singh Gitau Advocates and Mukite Musangi Advocates to form LJA Associates, and evidence of the date of execution of the sale agreement between the 4<sup>th</sup> and 5<sup>th</sup> Respondents and of the date of payment of the purchase price, by way of lodging and serving a Supplementary Record of Appeal containing the said additional evidence within 30 days of today's date.

The costs of the Appellants application dated 6<sup>th</sup> August 2021 shall abide the outcome of the consolidated appeals.

32. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY, 2024**

**D. K. MUSINGA (P)**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

