



**Young Traders Limited v Gumchem (K) Limited (Civil Appeal (Application)
E532 of 2020) [2023] KECA 388 (KLR) (31 March 2023) (Ruling)**

Neutral citation: [2023] KECA 388 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) E532 OF 2020
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
MARCH 31, 2023**

BETWEEN

YOUNG TRADERS LIMITED APPLICANT

AND

GUMCHEM (K) LIMITED RESPONDENT

(Being an application to re-open the hearing of application E006 of 2020 and to admit new evidence in an appeal from the judgment of the High Court of Kenya at Nairobi (Sergon, J.) dated 6th November 2020 in H.C.C.C. No. 1260 of 2004)

RULING

1. The Notice of Motion dated July 11, 2022 brought pursuant to Section 3, 3A and 3B of the [Appellate Jurisdiction Act](#), and rule 29(2) of the [Court of Appeal Rules](#) and supported by the affidavit of even date sworn by Monica Wambui Kinuthia, seeks that:
 - a. The court be pleased to take and admit new and additional evidence in the form of the Supporting Affidavit of Monica Wambui Kinuthia in respect of the documents annexed thereto.
 - b. That the said documents be deemed as part of the record of appeal in Civil Appeal No E532 of 2020 & Civil Application No E006 of 2020.
 - c. Costs in the cause.
2. The application is opposed through the replying affidavit of John Peter Kamau Ruhangi dated August 17, 2022.
3. The application is premised on grounds that new and important evidence has come to light in support of the appeal after the filing of the appeal; that the said evidence is compelling proof that the respondent herein, Gumchem (K) Limited, was dissolved in 2006 pursuant to Gazette Notice No 2217 of March



24, 2006, and ceased being a legal entity and, as such, could not maintain the suit in the trial court nor the appeal before this Court.

The applicant contends that the new evidence is credible and relevant to the dispute before this Court; that its admission is necessary for the fair and just determination of the appeal, and that it would have had an influence on the said application.

4. That the respondent will not suffer any prejudice if the orders sought are granted.
5. The respondent, on the other hand, contends that the applicant fully participated in the hearing of the suit in the trial court with no objection and/or raised issue regarding the respondent's capacity; that the applicant admitted the description of the respondent as competent to file suit before the High Court.
6. The respondent points out that, in the High Court, the applicant did not produce evidence to demonstrate the non-existence of the respondent company; and that it is unfair for the applicant to be allowed to adduce additional evidence at the appellate level, especially when the evidence arises from a different suit, HCCC COMM Misc E733 of 2021, and that the appeal ought to be argued on the basis of what was before the superior court.
7. We take into consideration the sentiments by this Court in the case of *Mzee Wanjie & 93 others v AK Saikwa & others [1982-88] 1 KAR 642* and, as restated in *Edgar Ogechi & 12 Others Civil Appeal (Application) No 130 of 1997 (UR)*, which held that, before the court permits adduction of new evidence, the applicant must show, firstly, that the additional evidence could not have been obtained by reasonable diligence during the trial in the High Court; and, secondly, that such evidence, had it been made available to the trial court, it would have likely affected the outcome of the suit.
8. For one to be able to understand the context in which this application is made, it is necessary for us to point out that the parties have ongoing litigation before the courts, being Civil Appeal No E532 of 2020 - Young Traders (K) Ltd v Gumchem (K) Ltd, which was scheduled for hearing on July 12, 2022, and Civil Application No E006 of 2020 Young Traders (K) Ltd v Gumchem (K) Ltd, which was scheduled for ruling on July 22, 2022. The applicant had always contended that the respondent had been dissolved way back in the year 2006, but the respondent had contested this assertion, insisting that there was a court order which had reinstated it. According to the applicant, the respondent secretly obtained a court order directing the Registrar of Companies to reinstate it, and, based on that order, the respondent eventually obtained judgment in its favour, against the applicant in HCCC No 1260 of 2004 (Sergon, J) delivered on November 6, 2020.
9. The crux of the application is the affirmation by the High Court (Mabeya, J) on May 6, 2006 in Misc Application Cause No E733 of 2021 - John Peter Ruhangi v Registrar of Companies and Another that the respondent was in fact dissolved pursuant to gazette notice No 2217 of March 24, 2006, and is therefore non-existent in law, and with no capacity to sue or be sued. The applicant explains that although the issue regarding the respondent's legal status had all along been alive in HCCC No 1260 of 2004, the ruling by Mabeya J was delivered after hearing of the contested application, and, now, the appeal from that decision is also due to be heard.
10. The respondent, on the other hand, claims that the applicant seeks to introduce evidence on a matter not pleaded before the High Court, and yet we note that the ruling of Mabeya, J is evidence in the court below of the non-existence of Gumchem as a company, which is why the applicant is before this Court, seeking to be allowed to tender the new evidence that it did not have in its possession at the beginning of the case in the superior court below.
11. So why didn't the applicant present the evidence alluded to earlier? The applicant explains that after learning about the respondent's efforts to resume its legal status, it sought to review and set aside that



order of reinstatement, but had to wait for the High Court to deliver its ruling which reversed the reinstatement of the respondent. This position is not contested.

12. In considering the place of additional evidence, we are guided by the Supreme Court in the case of *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others [2018] eKLR*, which set out the governing principals of allowing additional evidence 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 wilful 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.'
13. Drawing from the foregoing, we are satisfied that the applicant has demonstrated the nature of evidence that is intended to be adduced. It is also clear that the applicant did not have the evidence at hand at the time of filing the appeal and this fact has not been refuted by the respondent. The applicant has also alluded to the fact that had the issue regarding the respondent being struck out from the Register of Companies been duly considered, the judgment of the High Court would have turned out differently. The new evidence is directly relevant to the matter before this Court, and is certainly in the interest of justice that it should be allowed on record.
14. Indeed, the new evidence is also credible as it forms part of the proceedings of the court; that it is precise and simple, and that we do not perceive the respondent facing any difficulty in its response, considering



that the new evidence stems from its alleged action of covertly moving the High Court to grant an order for reinstatement to the register of companies. We are unable to detect any likely prejudice that the respondent would suffer if this Court allows the applicant's additional new evidence. As a matter of fact, the respondent is at liberty to respond to any issues if it so wishes so that the appeal may be determined with finality with the Court having the advantage of all the evidence tabled before it.

The appeal is yet to be heard, and we are of the view that the nature and significance of the new evidence will not in any manner be an obstacle to the swift conduct of the appeal; and it would be proper for all evidence to be tabled so that this Court can determine the matter with finality.

15. Accordingly, this Court finds that the Notice of Motion dated July 11, 2022 is merited and allows the same on the following conditions:
- a. The applicant shall file and serve the additional documentary evidence upon the respondent within 14 days of this ruling.
 - b. That the respondent is at liberty to reply to the documents within 14 days of service.
 - c. For avoidance of doubt, the additional documents as filed by the applicant shall constitute a Supplementary Record of Appeal.

16. The costs of this application shall abide the outcome of the appeal.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MARCH, 2023.

K. M'INOTI

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

