



REPUBLIC OF KENYA



Chanzu v Ochieng (Civil Appeal E030 of 2024) [2025] KEHC 7479 (KLR) (29 May 2025) (Ruling)

Neutral citation: [2025] KEHC 7479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E030 OF 2024**

JN KAMAU, J

MAY 29, 2025

BETWEEN

ABDALLA ADAK CHANZU APPELLANT

AND

SALMA FLORENCE B OCHIENG RESPONDENT

RULING

Introduction

1. In his Notice of Motion dated 2nd October 2024 and filed on 3rd October 2024, the Appellant herein sought leave to introduce new evidence in the appeal.
2. He swore an Affidavit in support of the said application on 2nd October 2024. He averred that during the trial at the Trial Court (Kadhi), he was unrepresented hence was not able to adhere to the court procedures to the letter.
3. He stated that he wished to produce his payslip for Kenya Power and attach an affidavit of means to show his current expenditure and earnings as per the *Evidence Act* and Rules of this court. He asserted that the introduction of the said document would assist the court to arrive at a decision expeditiously as the orders he had sought to appeal against touched on his salary. He averred that he stood to suffer irreparable damage if the same was not admitted at the appeal stage. He added that there would be no prejudice if the same was introduced as the Trial Court's order and decree exceeded his salary.
4. In opposition to the said application, the Respondent swore a Replying Affidavit on 29th October 2024. The same was filed on 30th October 2024.
5. She explained that the Appellant divorced her after pronouncing talaq three (3) times. She stated that the matter was referred to Mediation and they both attended the sessions. She asserted that he did not disclose to this court that the Mediation Report was filed and presented to the Trial Court for



- purposes of determining issues related to maintenance, custody and access of the minor in accordance with Article 53 of *the Constitution* of Kenya, 2010 and Chapter 4 of the Holy Quran-Sura An-Nisa.
6. She pointed out that whereas she produced evidence during trial that as of July 2023 he earned a net pay of Kshs 111,420/=, which excludes other sources of earnings, he had stated that his net salary was Kshs 110,690/= as of April 2024, which difference was negligible having regard to inflationary trends.
 7. She was emphatic that he had not demonstrated that he did not have the Payslip that he wished to be admitted as additional evidence or adduce evidence of liabilities. She added that the further evidence he intended to produce was not necessary to determine the merits of the appeal but rather, it was to re-litigate the primary suit. She thus urged this court to dismiss his application with costs.
 8. In response to the Respondent's Replying Affidavit, the Appellant swore a Further Affidavit on 11th November 2024. The same was filed on 12th November 2024.
 9. He reiterated that the Respondent had not demonstrated the prejudice that would be caused if the additional evidence of the Payslip and his Affidavit of Means was admitted. He asserted that the Trial Court ought to have issued summons for him to produce the said Payslip and hence, this court would be proceeding and adjudicating the Appeal herein without proper documentation.
 10. The Appellant's Written Submissions were dated 11th November 2024 and filed on 12th November 2024 while those of the Respondent were dated 13th January 2025 and filed on 20th January 2025. The Ruling herein is therefore based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

11. To buttress his arguments, the Appellant herein invoked Section 78 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) and Rule 29(1)(b) of the Court of Appeal Rules and placed reliance on the case of Attorney General vs Torino Enterprises Limited [2019]eKLR which cited the case of Dorothy Nelima Wafula vs Hellen Nekesa & Paul Fredrick Nelson [2017]eKLR where it was held that additional evidence could be introduced on appeal at the discretion of the court if sufficient reason was shown which reason included that such evidence could not have been obtained by reasonable diligence before and during the hearing, that it would probably have had an important influence on the result of the case if it was available at the time of the trial and that it was credible and not necessarily incontrovertible.
12. He admitted that this was a power that had to be exercised sparingly, that it was not intended to assist a party patch his weak case and that the opposing side should not suffer prejudice.
13. In this regard, he placed reliance on the case of Mzee Wanje & 93 Others vs AK Saikwa (1982-88) 1 KAR 463 where it was held that Rule 29 of the Court of Appeal Rules was not intended to enable a party who had discovered fresh evidence to import it or for a litigant who had been unsuccessful at the trial, to patch up the weak points in his case and fill up omissions in the Court of Appeal.
14. He also relied on the cases of Raila Odinga & 5 Others vs IEBC & 3 Others [2013]eKLR and IEBC vs Robert K. Nyengi[2015]eKLR where the common thread was that in exercising its discretion to admit additional evidence, a court should ensure no prejudice was occasioned to a party if the evidence was admitted.
15. He further cited several cases among them the case of John Kiplangat Barbaret & 8 Others vs Isaiah Kiplangat Arap Cheloget[2016]eKLR where the court allowed additional evidence in the form of a Survey Map and Air Cartography Map.



16. He argued that he sought to introduce the Payslip that had been mentioned by the Decree as he appealed against as the same which affected his said Payslip. He said that that his deductions were more than a third (1/3) of his salary which would be shown in the Affidavit of Means. He admitted that ignorance was not an excuse but he pleaded with the court to do justice.
17. On her part, the Respondent invoked Section 78 of the Civil Procedure Act Cap 21 (Laws of Kenya) and placed reliance on the case of *The Administrator of His Highness the Aga Khan Platinum Jubilee Hospital vs Munyambu C.A No 18 of 1983* (eKLR citation not given) where the Court of Appeal set two (2) pre-conditions for adducing additional evidence being, that the evidence sought to be adduced could not have been obtained with reasonable diligence during the course of the trial and that it would have an important influence on the outcome of the matter and was credible enough.
18. She also relied on the case of *Mzee Wanje & Others vs Sakwa & Others* (Supra) and submitted that there would be no end to litigation if the rule allowing introduction of new evidence were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence.
19. She further cited the case of *Patrick Thoithi Kanyuira vs Kenya Airports Authority*(2017)(eKLR citation not given) where in dismissing an application seeking additional of new evidence, the court held that a party should not be allowed to engage in forum shopping by seeking a court that would favour them procedurally.
20. She reiterated her averments in her Replying Affidavit and asserted that the Appellant had not explained why he did not produce the Payslips which were available to him throughout and during the hearing at the Trial Court yet the same were readily available.
21. She was categorical that appellate courts were generally bound to consider only matters raised and evidence presented in the Trial Court unless exceptional circumstances were proven. She asserted that the Appellant wanted to frustrate, intimidate and use the court to forum shop and delay the sanity of justice on her part and the minor.
22. She asked this court to disregard his Affidavit of Means dated 2nd October 2024 as its credibility had not been supported by tangible evidence. It was her submission that he was bound by parental responsibility which was to be equally shared as provided in Section 8(1) of the *Children Act* of 2022.
23. She asserted that he had not come to court with clean hands as he violated the principles of fairness and justice and hence urged this court to uphold the principles of fairness, finality of litigation and the integrity of the appellate process.
24. The introduction of new evidence in an appeal ought not to be for the purpose of giving the concerned party an upper hand or to fill gaps in the appeal.
25. Section 78 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) provides for the powers of appellate court in the following terms:-
 1. Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-
 - a. to determine a case finally;
 - b. to remand a case;
 - c. to frame issues and refer them for trial;
 - d. to take additional evidence or to require the evidence to be taken (emphasis court);



- e. to order for a new trial”
26. Order 42 Rule 27 (1) of the Civil Procedure Rules sets out the legal thresholds which were to be met before additional evidence could be admitted during appeal.
27. Order 42 Rule 27 of the Civil Procedure Rules, 2010 provides that:-
1. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—
 - a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
 2. Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.”
28. This court had due regard to the case of Tarmohamed & Another vs Lakhan & Co [1958] EA 567 where the Court of Appeal held that the conditions for admitting new evidence were that the applicant had to show that the evidence could not have been obtained with reasonable diligence for use at the trial, that if the evidence was to be given, it would probably have an important influence on the result of the case but need not be decisive and that the evidence had to be apparently credible but not necessarily incontrovertible.
29. Notably, additional evidence ought not to give a party a new chance to make out a fresh case in appeal or a second bite at the cherry. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence because there had to be an end to litigation.
30. In the instant case, the Appellant contended that the documents were omitted because of his ignorance and the fact that he was legally unrepresented. A perusal of the Judgment showed that the Trial Court had noted his deceit and had at one point ordered that he should not take additional loans from Stima Sacco. It further observed that he seemed not to appear to adhere to interim court orders and treated them casually.
31. He was given a chance to present his case, which he did. The Payslip he sought to be admitted as new evidence was available as at 26th April 2024. The Judgment was delivered on 23rd July 2024. He did not demonstrate to this court that he was unable to obtain the said Payslip with reasonable diligence to be used during trial.
32. He did not also persuade this court that he suffered prejudice due to lack of legal counsel. It was clear that he was trying to patch up the gaps in his case in the appeal by introducing new evidence that would assist his case for reduction of the monies he ought to pay to the Respondent herein.
33. In the premises, this court was not satisfied that the application herein met the legal threshold for admission of the new evidence. It was an afterthought that was intended to circumvent the cause of justice and steal a match against the Respondent.



Disposition

34. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 2nd October 2024 and filed on 3rd October 2024 was not merited and the same be and is hereby dismissed. As this was a family matter and this court did not wish to further escalate the dispute between the Appellant and the Respondent herein, it is hereby directed that each party will bear its own costs of the application herein.
35. It is hereby directed that the proceedings of the lower court file be typed forthwith.
36. This matter will be mentioned on 30th September 2025 to confirm compliance and/or for further orders and/or directions.
37. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 29TH DAY OF MAY 2025

J. KAMAU

JUDGE

