



**Kiu Construction Limited v Karoo Limited (Civil Appeal
E293 of 2023) [2024] KEHC 6379 (KLR) (Civ) (31 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 6379 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL APPEAL E293 OF 2023**

AN ONGERI, J

MAY 31, 2024

BETWEEN

KIU CONSTRUCTION LIMITED APPELLANT

AND

KAROO LIMITED RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 16/1/2024 brought under Sections 2A and 3A of the *Civil Procedure Act*, Order 42, Rules 27, 28 and Order 5, Rule 1 of the *Civil Procedure Rules* 2010, Cap 21 of the Laws of Kenya seeking the following orders;
 - i. That this application be certified urgent and be heard exparte in the first instance.
 - ii. That this Honourable Court be pleased to grant leave to the appellant/applicant herein to produce additional evidence in appeal
 - iii. That the costs of this Application be provided for.
2. It is based on the following grounds;
 - i. That the appellant has now obtained additional evidence being a notice of termination of contract dated 3rd December, 2018.
 - ii. That the said notice shows that the respondent had terminated the contract to provide car tracking services to the appellant on 3rd December, 2018.
 - iii. That this additional evidence could not be produced during trial in the lower court as it was not within the knowledge of the appellant's counsel.



- iv. That the respondent's claim is for the alleged nonpayment of car tracking services rendered to the appellant after the termination of the contract
 - v. That this additional evidence is directly relevant to the matter before the court and is in the interest of justice that the same should be produced.
 - vi. That the admission of the notice of termination shall influence/impact upon the result of the court.
 - vii. That the evidence contained in the notice of termination of contract has a direct bearing on the outcome of the main suit.
 - viii. That the applicants will not suffer any prejudice as they will have a chance to respond to the additional evidence
 - ix. That it is in the interest of justice that this application be allowed.
3. The application is supported by the affidavit of Kariuki Theuri sworn on 16/1/2024 as follows;
- i. That I am the managing director of the appellant/ applicant in this matter with knowledge of the matter hence competent to swear this affidavit.
 - ii. That the parties herein conducted a trial in Milimani SCCC No. E7587 of 2023 *Karoo Ltd (formerly Retriever Ltd) v Kiu Construction Ltd.*
 - iii. That judgment was rendered on 3rd March 2023 in favour of the respondent as against the applicant for a sum of kshs.806,384.
 - iv. That deeply aggrieved by the decision the applicant filed an appeal and the same is coming up for directions on 18th June, 2024.
 - v. That the appellant has now obtained additional evidence being a notice of termination of car tracking services dated 3rd December, 2018.
 - vi. That the said notice shows that the respondent had terminated the contract to provide car tracking services to the appellant on 3rd December 2018.
 - vii. That the respondent had therefore no basis to continue billing the applicant's motor vehicles for car tracking after 3rd December, 2018.
 - viii. That during the material period of the car tracking contract all correspondences with the respondent were being handled by the applicant's accountant by the name Mai, who left the applicant's employment in 2020.
 - ix. That without the knowledge of the appellant the said accountant had after receiving the notice of termination of contract, closed the file with the respondent had taken the same to the appellant's archives store located in Thindigua Kiambu county.
 - x. That out of sheer luck the appellant has managed to obtain the file containing the correspondences between the respondent during the existence of the contract.



- xi. That it is upon perusal of that file that the appellant has obtained the additional evidence being a notice of termination of car tracking series issued by the respondent to the appellant.
 - xii. That the said notice is dated 3rd December, 2018 (Attached and marked KT.1 is the said notice)
 - xiii. That this additional evidence could not be produced during trial as it was not within the knowledge of the appellant's counsel.
 - xiv. That the respondent's claim is for the alleged nonpayment of car tracking services rendered to the appellant after the termination of the contract.
 - xv. That this additional evidence is directly relevant to the matter before the court and is in the interest of justice.
 - xvi. That the admission of the notice of termination shall influence/impact upon the result of the court.
 - xvii. That the evidence contained in the notice of termination of contract has a direct bearing on the outcome of the main suit.
 - xviii. That it is in the interest of justice that his application be allowed.
 - xix. That for the aforesaid reasons I verily believe that it is just and fair that the orders sought herein do issue as prayed.
 - xx. That the facts deponed to herein are true to the best of my knowledge, information and belief save as to matters deponed to on information sources whereof have been disclosed and matters deponed to on belief the grounds whereupon have been given".
4. The respondents filed a replying affidavit sworn by Nelson Mureithi on 23/1/2024 opposing the application in which he deposed as follows;
- i. "That I am the credit controller of the Respondent herein and I am fully conversant with the issues hereof and I have been duly authorised to swear this affidavit.
 - ii. That I have read and understood the contents of the applicant's application dated 16th January 2024 and its supporting affidavit thereof and wish to reply as follows.
 - iii. That I am advised by my advocates on record which advice I verily believe to be true that the application is misguided because a simple perusal of the said notice dated 3rd December 2018 shows that there was no notice of termination but rather that failure to make payment will result in legal action and the listing with a credit bureau.
 - iv. That most importantly, the application is misguided because the document was already produced by the Respondent herein, who was the Claimant in the lower court and it is listed in the lower court's Claimant's list of documents dated 27th June, 2022 at item number 7 and the notice itself is found at document numbered 9 in the bundle of documents. (Annexed herewith and marked 'NM-Ia' and 'NM-Ib' is a copy of the Claimant's list of documents in the lower court dated 27th June 2022 and an extract of page 9 of its bundle of documents respectively)



- v. That the Applicant's whole application fails because the document is not newly discovered evidence since it has been on record at the lower court from the inception of the case and the Applicant had the opportunity to interact with the document and cross examine on it during the hearing. Further, the document being part of the pleadings shall form part of the record of appeal once the Applicant herein files the same.
 - vi. That the entire application is therefore misguided, fatally defective and ought to be dismissed with costs to the Respondent."
5. The parties filed written submissions as follows; the applicant submitted that the notice dated 3/12/2018 shows that the respondent has on its own motion terminated the contract with the applicant for provision of car tracking services and there was no justifiable reason for the respondent to continue billing the appellant after 3/12/2018. The alleged unpaid invoices relate to periods after 3/12/2018 and this additional evidence is crucial and should it have been produced during trial it would have altered the outcome of the case.
 6. The applicant submitted that the additional evidence could not be produced during trial on the lower court as it was not within the knowledge of the appellant nor its counsel since during the material period of the car tracking contract all correspondences with the respondent were being handled by the applicant's accountant who left the applicant's employment in 2020.
 7. That without the knowledge of the appellant or their counsel on record, the said accountant had after receiving the notice of termination of contract, closed the file with the respondent and taken the same to the appellant's archives store located in Thindigua , Kiambu county and in fact it is out of sheer luck that the appellant has managed to obtain the file containing the correspondences that were exchanged with the respondent during the existence of the contract and thus came across the said notice of termination.
 8. Finally, the applicant submitted that the substantive claim by the respondent is for payment of invoices not paid amounting to kshs. 806,384.61. The invoices are for periods between 3/12/2018 and 29/5/2019 and thus there was no basis for the respondent to continue charging the applicant yet the contract for car tracking had already been terminated by them.
 9. The respondent on the other hand submitted that annexure "KT-1" in the applicant's supporting affidavit is a letter dated 3/12/2018 and is the very same document that was filed and produced by the respondent at the trial court and which now the applicant seeks leave to introduce. The document which the applicant seeks to introduce was already filed at the trial court and will form part of the record of appeal.
 10. The respondent argued that the application herein is therefore fatally defective misconceived and a waste of precious judicial time as the applicant seeks to patch up its case at appeal level. While the applicant depones that it was not able to retrieve the letter dated 3/12/2018 as it had been taken to its archives in Thindigua, the applicant ought to have been vigor in prosecuting its case upon being served with court pleadings and as such ought to have retrieved the letter from its archives as it was always aware where its closed files were stored.
 11. The sole issue for determination is whether the appellant should be granted leave to produce additional evidence at the appeal stage.



12. The legal provision for adducing additional evidence at appeal stage is as follows; Section 78(1) of the Civil Procedure Act affords an appellate court discretion to take additional evidence. This is what that section provides:-

- “(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;”

13. The Supreme Court in the case Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 Others (2018) eKLR set out the governing principles of allowing additional evidence as follows:-

“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 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.”

14. I find that there is plausible reason why the appellant/applicant did not call the evidence they seek to adduce during the hearing of the case.
15. The appellant claims to have obtained additional evidence being a notice of termination of car tracking services dated 3rd December 2018 after the case had been heard.
16. The respondent submitted that while the applicant claims that it was not able to retrieve the letter dated 3/12/2018 as it had been taken to its archives in Thindigua, that the applicant ought to have been keen in prosecuting its case upon being served with court pleadings and as such ought to have retrieved the letter from its archives as it was always aware where its closed files were stored.
17. The respondent did not dispute that during the material period of the car tracking contract all correspondences with the respondent were being handled by the applicant’s accountant who left the applicant’s employment in 2020.
18. I find that the additional evidence sought to be adduced is not voluminous and the respondent will be able to respond to the same effectively.
19. The respondent will not be prejudiced by production of the Notice since it emanates from them and further, they will have a chance to file their response.
20. I allow the application dated 16/1/2024 in the following terms;
 - i. That the appellant is granted leave to call additional evidence.
 - ii. That the document together with any witness statement to be filed and served upon the respondent within 14 days of this date.
 - iii. That the Respondent is granted leave to file and serve their response within 14 days thereafter.
 - iv. The appellant to pay the costs of this application assessed at kshs. 10,000 before the hearing of the additional evidence.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2024.

.....

A. N. ONGERI

JUDGE

In the presence of:

..... for the Appellant

..... for the Respondent

