



**Kabuu v Chinga Tea Factory Company Limited (Civil Appeal  
E005 of 2021) [2024] KEHC 9434 (KLR) (27 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 9434 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYERI  
CIVIL APPEAL E005 OF 2021  
AB MWAMUYE, J  
JUNE 27, 2024**

**BETWEEN**

**HARUN KAGWI KABUU ..... APPELLANT**

**AND**

**CHINGA TEA FACTORY COMPANY LIMITED ..... RESPONDENT**

*(Being an Appeal against the Ruling of the Hon. S.I. Ismael (Adjudicator/  
RM) delivered on 24th November, 2022 in SCCC No. E72 of 2022)*

**RULING**

1. Before this Court is the Appellant/Applicant's Notice of Motion Application dated 11<sup>th</sup> April, 2022. The Notice of Motion Application seeks the following orders:
  - i. Spent
  - ii. That the Applicant be granted leave to file additional evidence in support of their case.
  - iii. That the costs of this Application be provided for.
2. The further evidence sought to be adduced by the Appellant/Applicant is the bundle of lease agreements and payment advice slips annexed to the Supporting Affidavit of Harun Kagwi Kabuu dated 11<sup>th</sup> April, 2022 as annexure "HKK 1."
3. In the Supporting Affidavit dated 11<sup>th</sup> April, 2022 the Appellant/Applicant concedes that those documents were available to him during the trial before the lower court. At Paragraph 5 of the



Supporting Affidavit, the Appellant/Applicant explains why he did not adduce that evidence during the trial in the following words:

“That during the trial in the lower court, I did not know the legal importance of the document[s] at that time and the weight that they would add to the case.”

4. The Respondent opposed the Appellant/Applicant’s Notice of Motion Application dated 11<sup>th</sup> April, 2022 through a Replying Affidavit dated 8<sup>th</sup> November, 2022 sworn by James Kuungania. The grounds for the Respondent/Respondent’s opposition to the application for leave to file new evidence is set forth in various paragraphs of the Replying Affidavit dated 8<sup>th</sup> November, 2022 as follows:
  6. That the application for leave to adduce additional evidence on appeal is opposed, as the Applicant has not met the legal threshold for the granting of the orders sought;
  9. That the Applicant had the custody of the documents he desired to be included as additional evidence at the trial. He has not shown that the said documents could not have been obtained with reasonable diligence for use at the trial, or that they were not within his knowledge at the time of the trial;
  10. That the Applicant is seeking to adduce additional evidence for the purpose of removing lacunae and filling gaps in his evidence at the trial;
  11. That further, the application is intended to make a fresh case of on appeal by filling up the omissions and patching up the weak point in the Applicant’s case.”
5. The Appellant/Applicant filed written submissions dated 8<sup>th</sup> March, 2023; while the Respondent/Respondent filed written submissions dated 9<sup>th</sup> March, 2023. Both sets of written submissions agree that the leading case on the question of adducing additional evidence at the appellate stage is the Supreme Court case of *Mohamed Abdi Mohamed V Ahmed Abdullahi Mohamed & 3 Others, [Supreme Court Petition No. 7 of 2018]*.
6. Having considered the Application, the Affidavits, and the Written Submissions in this matter; and after applying them to the guidelines pronounced by the Supreme Court in *Mohamed Abdi Mohamed V Ahmed Abdullahi Mohamed & 3 Others* [supra] I find that it would not be fair or just to allow the Appellant/Applicant to adduce the desired additional evidence at this appellate stage for the following reasons:
  - i. The Appellant/Applicant has admitted that the evidence was available to him and within his knowledge during the trial but he did not adduce it because he did not understand its legal import, which is not a legally satisfactory reason for the positive exercise of this Court’s discretion in favour of an applicant;
  - ii. The Appellant/Applicant was represented by Counsel during the trial;
  - iii. It is clear that the Appellant/Applicant seeks to adduce the said additional evidence to remove lacunae and fill gaps in the evidence that was tendered;
  - iv. I am satisfied that allowing the additional evidence to be adduced would create a fresh case at the appellate stage, and that it would be a new case where the Appellant/Applicant would have had the opportunity to correct omissions and patch up weak points in his case so as to reverse the unsuccessful outcome of the trial; and



- v. The Respondent's right to a fair and balanced appellate process would be greatly prejudiced by the admission of the additional evidence in the present circumstances as it is not itself seeking to adduce evidence it did not produce at the trial.
7. Having found that the Appellant/Applicant's Notice of Motion Application is unmerited, I issue the following orders:
- a. The Appellant/Applicant's Notice of Motion Application 11<sup>th</sup> April, 2022 is dismissed with costs to the Respondent;
  - b. The Matter shall be mentioned on 8<sup>th</sup> July, 2024 before the Deputy Registrar to take directions on hearing.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE, 2024.**

**BAHATI MWAMUYE**

**JUDGE**

In the presence of:

Ms. Magwa Counsel for the Appellant

Counsel for the Respondent absent

Mr. Guyo, Court Assistant

