



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI

SUCCESSION CAUSE APPEAL NO. 35 OF 2016

In the matter of the estate of Said Abdulrahman Ahmed Said- Deceased)

AISHA BREK.....APPELLANT/RESPONDENT

VERSUS

AISHA MOHAMED NZAWA.....1ST RESPONDENT/APPLICANT

SAADA SAID.....2ND RESPONDENT

RULING

[1st Respondent's Notice of Motion dated 17th September, 2018]

1. The 1st Respondent in the appeal Aisha Mohamed Nzawa through the Notice of Motion dated 17th September, 2018 prays for orders as follows:-

“ a) That this Honourable Court be pleased to grant leave to the applicant to adduce additional evidence before it, or orders that the additional evidence be taken by any other court of competent jurisdiction.

b) That the costs of this application be in the cause.”

2. The application is supported by the grounds on its face that:-

“a) The applicant wishes to produce a copy of an indenture for a parcel of land known as portion No. 3659 (original No. 3476/184) Malindi. The said parcel of land has a house christened “Kwa Chocha Villa”.

b) That the applicant did not manage to get a copy of the indenture with reasonable diligence for use at the trial.

c) That the indenture if allowed to be produced as additional evidence will have an important influence on the result of the appeal.

d) That the ends of justice demands that the application be allowed.”

3. The application is also supported by an affidavit sworn by the Applicant. The Appellant, Aisha Brek, who is the Respondent in regard to the instant application opposed the application through her affidavit sworn on 27th September, 2018. I will revert to the contents of the affidavits of the opposing parties in due course.

4. Saada Said, the 2nd Respondent in the appeal has not taken any position in regard to the application.

5. The question to be answered in this ruling is whether the Applicant has met the conditions for grant of leave to adduce additional evidence. The conditions for grant of leave to adduce fresh evidence in a case in which a judgment has already been delivered were laid down by Lord Denning in the English case of **Ladd v Marshall [1954] 1 W.L.R. 1489** as follows:-

“In order to justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown

that the evidence could not have been obtained with reasonable diligence for use at the trial; second, 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; thirdly, 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.”

6. In a ruling delivered on 28th September, 2018 in **Mohamed Abdi Mohamud v Ahmed Abdullahi & 3 others [2018] eKLR; Petition No 7 of 2018**, the Supreme Court after extensively reviewing global jurisprudence relating to allowance of additional evidence, laid down the applicable principles as follows:-

[79] Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis, exercise our discretion and call for and allow additional evidence to be adduced before us. 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 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.*

[80] We must stress here that this Court even with the Application of the above-stated principles will only allow additional evidence on a case-by-case basis and even then sparingly with abundant caution.”

7. Explaining the purpose and reach of the power to allow a party to adduce additional evidence at the appellate stage, the Court of Appeal in **Wanje v Saikwa [1984] KLR 275** stated at pages 280 – 281 that:-

“[T]his rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule was used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

8. In the affidavit sworn in support of the application, the Applicant avers that at the trial she testified that “Kwa Chocha Villa” was not part of the estate of the deceased but was purchased and owned by the deceased’s children Samra Said Abdulrahman and Abdulrahman Said Abdulrahman.

9. The Applicant also states that at the time of the trial she did not have the title documents to prove her averment as the said children stay in Switzerland. Further, that she found “**the documents mid this year after the trial was over and this appeal had been filed**”.

10. The Applicant avers that she had found a copy of the indenture which she wants to be allowed to produce during the appeal.

11. In her replying affidavit, the Respondent/Appellant avers that the Applicant has not demonstrated how the additional evidence she wishes

to produce was beyond her reach during the trial. Also, that the Applicant has not shown that this piece of evidence was not known to her.

12. Further, that the Applicant has not demonstrated that she was prevented from getting the new evidence at the time of the trial and neither has she disclosed how and where she found the evidence.

13. The Respondent questions the fact that the alleged indenture was made in 2001 and ever since the title has not been processed making the indenture suspect.

14. It is the Respondent's averment that from the time the matter was filed there was no indication of the existence of the document and the Applicant neither mentioned it in her list of documents or during her testimony.

15. According to the Respondent, the Applicant is attempting to amend the pleadings late in the day and such an attempt should not be allowed by the court.

16. In order to do justice in this matter, I will look at the pleadings and proceedings before the Kadhi's Court. In the succession petition filed before the Kadhi's Court at Malindi by Aisha Mohamed Nzawa, the Applicant herein, she indicated that she was the mother of the deceased Said Abdulrahman Ahmed Said and a beneficiary of his estate. She identified the other beneficiaries as Aisha Brek (the Appellant/Respondent), Saada Said (the 2nd Respondent in the appeal) and Abdul Saada, Samira Said, Samir Said and Manar Said being sons and daughters of the deceased.

17. In paragraph 6 of her petition, she identified the properties of the deceased as follows:

“(a) House at Malindi Central.

(b) Shamba on portion No. 309 Malindi Airstrip area.

(c) Cash at Bank either Barclays Bank (K) Limited and or Standard Chartered Bank of Kenya Limited”

18. The Applicant's prayers were:

“(a) Appointment of the Petitioner as the Administrator or Administratrix of the estate.

(b) Determining the heirs and assets.

(c) Distributing the Assets according to Islamic Sharia of the deceased.

(d) Any other relief(s) the court deems fit to grant in the interest of justice.

(e) Costs to be borne by the Estate.”

19. On 18th December, 2013, Aisha Brek (the Appellant and the Respondent in respect of this application) filed her reply to the petition before the Kadhi in which she asserted that Saada Said was not a wife of the deceased. She also averred that Samir Said and Manar Said were not children of the deceased. The Respondent at paragraph 7 of her reply to the petition agreed with the Applicant as to what constituted the estate of the deceased by stating that:-

“7. The Respondent admits the contents of paragraph 5 of the Succession Cause and in particular that the deceased left the following properties;

a) House at Malindi Central and

b) Shamba on Plot No. 309 Malindi Airstrip Area.”

20. She however denied that the deceased had bank accounts with Barclays Bank (K) or Standard Chartered Bank of Kenya Limited.

21. In a statement made on 13th February, 2015 and filed in court on 16th February, 2015, the Respondent stated at paragraph 6 as follows:-

“THAT as far as am concerned the deceased had all his immovable assets here in Kenya which comprises of;

i) 7.2 Acre piece of land at kwa Chocha in Malindi

ii) A flat at Majengo in Malindi

iii) Chocha villas at Malindi.”

22. In his judgment, Hon. Salim S. Mohamed, Kadhi I identified the immoveable properties of the estate of the deceased as:-

“1. House at Malindi Central.

2. Shamba portion 309 at Malindi which is approximately 12 Acres or 60.3 Acres as the case may be as a search has to be done before sub-division to the heirs.

3. Kwa Chocha Villa.

23. Saada Said, the 2nd Respondent in the appeal testified on 15th March, 2016 and identified the estate of the deceased as:-

“1. He has a Chocha villa.

2. A House at Central.

3. A Shamba at kwa chocha opposite (sic)

4. He had an Account with Gulf Bank.”

24. Looking at the pleadings and evidence adduced before the trial court as outlined above, it becomes apparent that there was concurrence by the parties that Kwa Chocha Villa belonged to the deceased.

25. In the instant application, the Applicant wants to introduce new evidence altogether. She wishes to demonstrate that Kwa Chocha Villa was not part of the estate of the deceased. She does not explain when all that came to light. She wants to direct, at the appellate stage, the litigation into an entirely new direction. That is not the purpose for which a party can be allowed to adduce additional evidence.

26. It is also noted that the Applicant has not filed a cross-appeal to challenge the finding by the Kadhi's Court that Kwa Chocha Villa belongs to the estate of the deceased. Even if she is allowed to adduce new evidence such evidence will not add any value to the appeal.

27. The Applicant did not also disclose how and at what stage she discovered the new evidence. It was incumbent upon her to inform the court when she came by the evidence so that it could be decided if the evidence could have been available to her at the trial had she acted diligently.

28. Considering the material placed before this court, I find that Aisha Mohamed Nzawa's Notice of Motion dated 17th September, 2018 is without merit. The same is therefore dismissed with costs to Aisha Brek.

Dated and Signed at Nairobi this 15th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 23rd day of May 2019

R. Nyakundi,

Judge of the High Court