



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUSIA**

**ELC APPEAL NO. 3 OF 2021**

**LIVINGSTONE WERE MUDONDO.....APPELLANT**

**VERSUS**

**MILDRED ATHIENO.....RESPONDENT**

**RULING**

1. The Appellant brought an application under Certificate of Urgency seeking for the following orders;

**i. This Honourable Court be pleased to certify this application as urgent and hear it on a priority basis if possible before 26/03/2021 as the court may deem just so on 8/4/2021 can proceed with directions on how the appeal should be heard to save time.**

**ii. This Honourable Court be pleased to accept and consider any document listed in the record of appeal dated 15/03/2021 but not filed in the lower court by the appellant as from page 55 to page 80 or any other page to be found not having been so filed.**

**iii. Costs of this application be costs in the appeal.**

**iv. Any order be made as the court deems fit.**

2. The application was premised on the following grounds;

a. The Respondent prosecuted the case in the lower court under tricky and concealment of material facts from the lower court and the appellant in order to avoid the production of such documents to the lower court.

b. The appellant was not properly served with all documents and allowed sufficient time to extract the documents from the relevant court files to enable him to file the same in the lower court before hearing of the matter.

c. The lower court has refused or ignored to allow time for the appellant to bring in the said documents to enable him to challenge the documents and the allegations filed by the respondent.

d. It is in the interest of justice that this Honourable Court be pleased to accept and see such documents in order to know the tricks played by the respondent in the lower court.

e. The documents are documents filed in court there before by parties herein and have no prejudice to any part herein if seen by this court.

3. The Respondent had not filed any response to the application by the time the matter was mentioned in court on 20.4.2021. Only the Applicant filed submissions which have been considered by the court. Essentially, the application is not opposed.

4. Prayer 1 of the application is spent. Section 78 of the Civil Procedure Act 2010 provides for the powers of the appellate court in appeals from subordinate courts to the High Court. It states as follows;

***(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;*
- e) *To Order a new trial.*

**(2) Subject as aforesaid, the appellate Court shall have the same Powers and shall perform as nearly as may be the same duties as are charged conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.**

5. Order 42 Rule 27 of the Civil Procedure Rules, 2010, provides for the production of additional evidence in appellate court. It states as follows;

**(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 reasons for its admission**

6. The Applicant has stated that he wishes to rely on the additional documents in this appeal because the trial court did not give him an opportunity to present them and if he did, they most likely would have changed the outcome of the case. Even though the law gives courts the discretion to allow additional evidence in appeals, the same should not be used to try their case afresh before an appellate court. The additional evidence should be used to fill in the gaps in an otherwise vague case. The Supreme Court in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 other (2018) eKLR** laid out further guidelines on the admission of additional evidence before Appellate Courts in Kenya. The guidelines were outlined 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 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 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) Whether 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;***
- (j) The Court must find the further evidence needful;***

*(k) A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.*

*(l) 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. The documents sought to be introduced are on pages 55 to 80 of the Record of Appeal which are;

- a. A Court Order dated 25.1.2021 issued in ELC Case no. 003 of 2021 at page 55
- b. Adjudication Register dated 28/2/66 at page 56
- c. A Land Adjudication Ordinance Receipt dated 21/10/66 at page 57 d. Land Register dated 8.11.65 at page 58
- e. Certificate of Official Search dated 5th June 2012 at page 59
- f. Pleadings in Succession Cause no. 1211 of 2018 at page 60-66, 76-80
- g. Pleadings in Miscellaneous Application no. 3 of 2019 at page 67-70, 73-74
- h. Pleadings in ELC Case no. 70 of 2015 at page 71-72
- i. Caveat in Succession Cause no. 1 of 2015 at page 75

8. The documents sought to be introduced are public documents and which are likely to be in possession of the Respondent. The perusal of the proceedings in the court below does show that the Appellant did not at any particular point of trial address the court requesting to introduce any documents. He has now pleaded that the documents he seeks to add to the Record of Appeal will help to shed some light on the suit so that the court will be able to make a just and fair determination on the appeal. Taking into consideration the fact that the Appellant was prosecuting the case by himself, he might have not known the weight of the said documents to the outcome of the suit. No one should be disadvantaged in his case just because they are not legally empowered with legal knowledge.

9. I have also perused the documents that the Appellant seeks to rely on and compared them to the guidelines set by the Supreme Court in **Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed & 3 others (2018) eKLR**. I am satisfied that the documents in the Record of Appeal from page 56 to page 80 sought to be relied will assist the Court to do justice in a fair manner. The documents are meant to shed light on how the dispute came to be between the parties and has direct bearing on the appeal before this court. The authenticity and veracity of the said documents has not been brought to question.

10. In conclusion, I find merit in the application and allow it in terms of prayer two (ii) of the application. The costs of the application shall abide the outcome of this appeal.

**DATED, SIGNED & DELIVERED ELECTRONICALLY THIS 18TH DAY OF MAY, 2021**

**A. OMOLLO**

**JUDGE**