



**Murey v Moi University & another (Civil Appeal E081 of 2024)
[2024] KEHC 12894 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12894 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E081 OF 2024
RN NYAKUNDI, J
OCTOBER 25, 2024**

BETWEEN

RAPHAEL KIBOR MUREY APPELLANT

AND

MOI UNIVERSITY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

RULING

Representation:

Wambua Kigamwa & Co. Advocates for the Applicant

Nyairo & Co. Advocates for the 1st Respondent

Hon. Attorney General for the 2nd Respondent

1. What is pending before me for determination is a Notice of Motion Application dated 18th July 2024 premised under Order 42 rules 27, 28 and 29 of the Civil Procedure Rules 2010 where the Applicant is seeking the following orders:
 - a. That the Appellant be granted lead to lead additional evidence by the production of the minutes of the Staff Disciplinary Committee meeting of the 16th June, 2023 held over the appellant's disciplinary case with regard to the allegations of cutting down trees and stealing by servant.
 - b. That directions be given as to the taking of the additional evidence.
 - c. That the costs of the application be provided for.
2. The application is based on the grounds on the face of it among others:



- a. That the evidence is directly relevant to the matter before the court and it is in the interest of justice.
 - b. That the evidence if given will influence or impact upon the result of the verdict although it not need be decisive.
 - c. That its admission is in the interest of justice.
3. The application is supported by the annexed affidavit dated 18th July 2024 sworn by Raphael Kibor Murey, the Appellant/Applicant herein where he avers as follows:
- a. That this appeal arises from Eldoret Chief Magistrate Court Civil Suit No. E062 of 2023- Raphael Kibor Murey Vs Moi University & Another in which I had impleaded the respondents over the tort of malicious prosecution and false imprisonment.
 - b. That the respondent as can be discerned from the plaint caused my arrest and prosecution for the offences of cutting down trees, stealing and with the alternative charge of handling stolen goods.
 - c. That the suit was heard and the court dismissed my suit in a judgement pronounced on the 5th April, 2024.
 - d. That being aggrieved I lodged this appeal and while it was pending I have come across evidence which was in possession of the 1st respondent which exculpates me from the offences in issue.
 - e. That the evidence relates to the deliberations of the 1st respondent's members of the Staff Disciplinary Committee held while I was yet to be led into the meeting room on 16th June, 2023.
 - f. That from the deliberations under the heading observed at page 3 of the minutes it is indicated;

“There was no link of the trees cut in the University and the ones found in his compound and therefore, the evidence against Mr. Murey was not conclusive.”
 - g. That the said information was not within my knowledge and I could not have been privy to the said discussions held amongst themselves as they were held in my absence.
 - h. That I only got to know of this information in the minutes when the 1st respondent filed a further affidavit in a suit in which I am a party on the 10th June, 2024 being Eldoret CM. ELRC. No. 127 of 2020- Raphael Kibor Murey Vs Moi University.
 - i. That the minutes also refer to the fact that there was no witness who saw me cutting the trees hence the charge of cutting trees had no basis.
 - j. That the additional evidence is directly relevant as it related to the discussions of the 1st respondent over my culpability and the quality of the evidence they held against me.



- k. That the evidence will impact on the verdict of the court as in the observations the 1st respondent also states that it is my children who are unnamed who brought the logs.
 - l. That it is repugnant to justice and morality for a parent to be held accountable for the crime if any of his children as the 1st respondent sought to do in this matter and which the minutes would show.
 - m. That the evidence would remove vagueness as expressed by the trial Magistrate in his judgement on the matter.
 - n. That the additional evidence is not bulky.
 - o. That evidence is credible in the sense that it is capable of belief being a record of the proceedings of the 1st respondent made in the ordinary course of business.
 - p. That the evidence will assist the court to reach a just determination in the matter.
4. The Application is opposed by the 1st Respondent vide its Replying Affidavit dated 15th August 2024 sworn by Petrolina C. Chepkwony in which she avers as follows:
- a. That the application is a non-starter, a mere afterthought, devoid of merit and ought to be out rightly dismissed.
 - b. That I state so because this matter proceeded with the full participation of all the parties in this matter and all the parties were presented with equal opportunity to present whatever evidence they had in support of their position.
 - c. That contrary to the allegations by the Appellant that he was only made aware of the minutes of the Staff Disciplinary Committee minutes on 10/6/2024, the Appellant not only participated in the said meeting, going by the minutes, but also wrote a letter dated 24/7/2023 responding to the decision made in the Staff Disciplinary Committee meeting held on 16/6/2023. As such, if at all he had any intention of using the said document in support of his case nothing would have been easier than for him to avail it before the lower court at the time of the hearing considering that the Appellant testified on 26/7/2023. In any event the Appellant has not demonstrated that he had any difficulty procuring the said document before the lower court matter was concluded.
 - d. That the document sought to be introduced was prepared well after the suit had been filed and can therefore not be said to have any impact or influence on the proceedings both in the lower court and before this court.
 - e. That it is clear that the Appellant is intent on presenting a fresh case on appeal which is a departure from what he presented before the lower court.
 - f. That in addition, the additional evidence is aimed at filling gaps in the Appellant's case which cannot be allowed at this stage.
 - g. That litigation must come to an end.



- h. That the 1st Respondent stands to be greatly prejudiced given that the document was prepared well after the Appellant filed suit and after the 1st Respondent had already determined the case it had to meet against the Appellant and crafted a defence in line with the case that had been presented. If the application is allowed, the 1st Respondent will not be in a position to counter the additional evidence by way of cross-examination or to call witnesses to testify on the said document and that will in effect jeopardize the 1st respondent's case on appeal.

Analysis and Determination

- 5. I have considered the application by the applicant/Appellant and the opposition by the Respondents as well as the submissions filed by the parties. The issue for determination herein is

Whether the court should grant leave to the applicant to adduce additional evidence.

- 6. Section 78 of the *Civil Procedure Act* and Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 are the legal basis for this application. Under Section 78 of the *Civil Procedure Act*:
 - (1) Subject to 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 conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
- 7. Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 provides that:

27

- (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. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

29. Where additional evidence is directed or allowed to be taken, the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.

8. The Supreme Court in *Mohammed Abdi Mohamud vs. Ahmed Abdulahi Mohamad & 3 Others* [2018] eKLR laid down the following principles for allowing additional evidence:

“79. ...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.”

9. The Court of Appeal added its voice on this subject in *Safe Cargo Limited vs. Embakasi Properties Limited & 2 Others* (2019) eKLR as follows:

“

- “12. This Court in discussing its power to admit additional evidence under Rule 29 (1) stated as follows in *Republic –v- Ali Babitu Kololo* (2017) eKLR
“It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal.”

Determination

10. From the foregone, I must now determine if the application attained the legal threshold. One of the key considerations is the availability of the intended evidence. According to the Applicant the evidence was not in its possession until after the delivery of the judgment. The position was strenuously opposed.
11. The intended evidence was annexed to the application. The manner in which the evidence was introduced was however challenged.
12. I note that the Applicant in his supporting Affidavit averred as follows: that the evidence relates to the deliberations of the 1st respondent’s members of the Staff Disciplinary Committee held while I was yet to be led into the meeting room on 16th June, 2023; that from the deliberations under the heading observed at page 3 of the minutes it is indicated;

“There was no link of the trees cut in the University and the ones found in his compound and therefore, the evidence against Mr. Murey was not conclusive.”

That the said information was not within my knowledge and I could not have been privy to the said discussions held amongst themselves as they were held in my absence and that I only got to know of this information in the minutes when the 1st respondent filed a further affidavit in a suit in which I am a party on the 10th June, 2024 being *Eldoret CM. ELRC. No. 127 of 2020- Raphael Kibor Murey Vs Moi University.*

13. I note that the 1st Respondent challenged these averments in its Replying Affidavit dated 15th August 2014 sworn by Petronila C. Chepkwony where she averred as follows: that I state so because this matter proceeded with the full participation of all the parties in this matter and all the parties were presented with equal opportunity to present whatever evidence they had in support of their position; that contrary to the allegations by the Appellant that he was only made aware of the minutes of the Staff Disciplinary Committee minutes on 10/6/2024, the Appellant not only participated in the said



meeting, going by the minutes, but also wrote a letter dated 24/7/2023 responding to the decision made in the Staff Disciplinary Committee meeting held on 16/6/2023; as such, if at all he had any intention of using the said document in support of his case nothing would have been easier than for him to avail it before the lower court at the time of the hearing considering that the Appellant testified on 26/7/2023. In any event the Appellant has not demonstrated that he had any difficulty procuring the said document before the lower court matter was concluded and that the document sought to be introduced was prepared well after the suit had been filed and can therefore not be said to have any impact or influence on the proceedings both in the lower court and before this court.

14. In my view, the additional evidence sought to be adduced is directly relevant to the matter before the court and it is in the interest of justice to have the same adduced.
15. Further, the adduction of such evidence will give the appellant the opportunity to rebut or respondent to the same hence no prejudice will be suffered by the respondents if the application herein is allowed. As there is no cross appeal, I do not find that the additional evidence is intended to fill the lacunae in the appellant's case.
16. I reiterate that the appellant will benefit more from the said additional evidence than if it was omitted, just in case this court finds that its counsel was served with the same but did not respond to the same, as the appellant has the opportunity of responding to or rebutting the said evidence during the hearing of this appeal, than if the evidence was omitted altogether. In my view, there is no prejudice and none was demonstrated, to be occasioned to the respondent if the application is allowed.
17. Accordingly, I am satisfied that substantially, the additional evidence sought to be adduced largely meets the criteria and guidelines laid out by the Supreme Court in the Mohamed Abdi Mohamad supra. I allow the application as prayed and direct the appellant/ applicant to file and serve a supplementary record of appeal comprising the additional evidence, within seven days of this ruling failure to which the leave granted shall lapse. The respondent shall have the opportunity to respond to the said evidence when filing the submissions for canvassing this appeal, for consideration by this court. The appellant to file and serve written submissions within 14 days of today upon which the respondents shall have 14 days of service to file and serve their written submissions. Mention on 2/11/2024. Each party to bear their own costs of the application. Orders accordingly.

DATED AND SIGNED AT ELDORET THIS 25TH DAY OF OCTOBER, 2024

In the Presence of:

Mr Adoyo for the Respondent

Wahome Advocate for the Appellant

.....

R. NYAKUNDI

JUDGE

