



REPUBLIC OF KENYA



Chege v Nganga (Civil Suit 68 of 2019) [2023] KEHC 2430 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2430 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MAKUENI
CIVIL SUIT 68 OF 2019
GMA DULU, J
MARCH 23, 2023**

BETWEEN

ANNAH NJOKI CHEGE APPLICANT

AND

BENARD KITUVA NGANGA RESPONDENT

RULING

1. Before me is an application dated September 28, 2021 by way of Notice of Motion filed by the Appellant/Applicant through Counsel EK Mutinda & Associates Advocates.
2. The application was filed under section 11A, 1B, 3A, 78(d) of the *Civil Procedure Act* (Cap 21) and order 42 rule 28 of the *Civil Procedure Rules 2010* as well as articles 10, 19, 20, 21, 22, 23, 27, 28, 47, 50(2) (c) and 2(d) and 159 (2)(d) of the *Constitution*, and seeks the following orders:-
 1. This court be pleased to allow the Appellant/Applicant to testify and adduce additional evidence.
 2. The court be pleased to allow the addition of additional evidence by way of affidavit and the same be filed as supplementary record of appeal.
 3. The court be pleased to allow the letter from the Chief to be admitted as additional evidence and the same be filed in the supplementary record of appeal.
 4. The court in the alternative does direct the subordinate court to record the additional evidence for the Appellant/Applicant and allow her to give her testimony and send it before this honourable court for consideration.
 5. The court be pleased to make such further order as are necessary for the ends of justice in the matter.
 6. The costs of this application be in the cause.



3. The application has grounds on the face of the Notice of Motion. The grounds are that on the April 3, 2019 when the case was heard in the Magistrate’s court an advocate with limited instructions held brief for the advocate on record for the Appellant/Applicant had asked for adjournment on grounds that parties were negotiating. That the court nonetheless ordered that the case do proceed to hearing. That though the Appellant was present in court, she was not given a chance to testify and produce evidence in support of her case.
4. That her testimony, defence, and documents were thus not considered by the court. That the Appellant’s Advocate made a mistake which should not be visited on the Appellant. That the Appellant wishes to produce additional evidence in the form of a letter from the Chief indicating that the Respondent had abandoned the premises and refused to pay rent which evidence was not in possession of the Appellant at the time of hearing of the case. That if the court grants the orders sought the Respondent does not stand to suffer prejudice.
5. The application was filed with a supporting affidavit sworn by the Appellant/Applicant Annah Njoki Chege which amplifies the grounds of the application.
6. The application is opposed through a replying affidavit sworn on December 8, 2021 by the Respondent Bernard Kivuva Nganga in which it is deponed that the application is without merit, that the Applicant is not keen to prosecute her appeal, that the Applicant has not attached copy of the Chief’s letter and that the application should be summarily dismissed.
7. The application was canvassed through written submissions. The Appellant’s/Applicant’s Counsel filed submissions on March 9, 2022. Though I do not see from record any leave granted by court to file further affidavit, the Appellant’s Counsel filed a further affidavit sworn on February 25, 2022 by the appellant/applicant on the same March 9, 2023, with the written submission.
8. The Respondents filed submissions in person on August 4, 2022 and supplementary submissions also in person, on September 21, 2022.
9. I have perused and considered the application and the other documents and the affidavits filed, as well as the written submissions filed on both sides. I have also seen and perused the Memorandum of Appeal.
10. This being an application asking for leave of the court to admit additional evidence on appeal, it is governed by Order 42 Rule 27(1) (2) of the *Civil Procedure Rules* which states:

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 ben 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 pronounce judgment or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document produced or witness to be examined.
 - (2) Whenever 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.
11. It follows that though as a general legal principle, parties to litigation are not allowed to produce or tender additional evidence on appeal, the Appellate Court may in certain justifiable circumstances



allow production or tendering of additional evidence. Courts have held that though the Appellate Court has discretion to allow additional evidence as per the above rule, the rule was not meant to assist a litigant to re-open the case or fill in gaps to build his or her case, but meant to assist a party to bring evidence that it could not have obtained at the trial to enable the appellate court arrive at a decision that is fair and in the interests of justice for all parties involved.

12. In this regard, I rely on the case of *Tar Mohamed & Another v Lakhmi & Company* (1958(EA) 567 wherein the Court of Appeal for Eastern Africa adopted the reasoning of Lord Denning in *Ladd v Marshall* (1954) 1 WLR 1489, and stated as follows:

‘except in cases where the application for additional evidence is based on fraud or surprise, to justify reception of additional 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; secondly, the evidence must be such that if given it would probably have an important influence on the results 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.’

13. In my view, the Appellant/Applicant herein has not shown or demonstrated that she was denied a right of hearing or production of evidence at the trial. Her blame on the advocate does not hold any water, as the advocate holding brief proceeded with the hearing and did not ask for adjournment in order to prepare for the defence case. In addition, the instructing counsel did not thereafter approach the trial court to ask for his client to be heard. The applicant who was also present in court and did not raise any issue until after judgment was delivered. It is further of note that the Appellant/Applicant has not listed any ground of appeal claiming denial or perceived to denial to hearing during trial. I find no denial or curtailment of the right to be heard.
14. With particular regard to the Chief’s letter which the appellant wants to produce, I have already observed that it was not annexed to this application dated September 28, 2021. It was filed later through a further affidavit sworn on February 25, 2022 and I do not see any record of this court granting leave for the appellant/applicant filing the further affidavit. Even assuming that the Chief’s letter is validly on record, in my view it cannot be admitted as further evidence because it was dated February 2, 2022 which was much later as I will demonstrate hereafter.
15. In my view, the Appellant/Applicant has not discharged her burden of explaining or showing the court why she was not able to obtain and produce that Chief’s letter in evidence during the trial in 2019. She also does not say that she was prevented by any circumstance from producing or relying on that letter or filing and serving it before or during trial as required under Rule 11 of the Civil Procedure Rules. For that reason there is no justification for admitting it as further evidence.
16. Secondly, the Chief’s letter is actually dated February 2, 2022 which is long after the case was finalised, and also long after the appeal was filed, and even long after the present application was filed in September, 2021. In my view, the Chief’s letter is an afterthought. This is another reason why the letter cannot be admitted as additional evidence. This court has thus not been persuaded that the Chief’s letter is genuine evidence in relation to this case, or appeal.
17. Lastly, with regard to the same Chief’s letter, the name of the Chief is not indicated in the letter and there is no witness statement filed by the Chief to adopt and explain how and when that letter was obtained. In my view therefore, it is highly unlikely that the production of the Chief’s letter will possibly change the result of the appeal, as the Chief’s letter has no evidential or probative value.



18. Consequently, I find no basis for allowing the application of the Appellant/Applicant herein, for production of additional evidence on appeal I dismiss the application. Costs of application will follow the determination of the appeal.

DATED, SIGNED AND DELIVERED THIS 23RD DAY OF MARCH, 2023 THROUGH VIRTUAL PROCEEDINGS AT VOI.

HON. GEORGE DULU

JUDGE

In the presence of: -

Nusura – Court Assistant

Mr. Mutinda for appellant/applicant

No appearance for respondent

