



Mativa v Makueni County Education Board & another (Civil Appeal E207 of 2020) [2023] KEHC 2734 (KLR) (Civ) (23 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E207 OF 2020

CW MEOLI, J

MARCH 23, 2023

BETWEEN

BONIFACE M. MATIVA APPLICANT

AND

MAKUENI COUNTY EDUCATION BOARD 1ST RESPONDENT

CATHOLIC DIOCESE OF MACHAKOS 2ND RESPONDENT

RULING

1. The events leading to the motion dated January 24, 2022 are as follows. The Appellant herein, Boniface M Mativa (hereafter Applicant) lodged the instant appeal from the decision of the Education Appeals Tribunal (hereafter the Tribunal) in Tribunal Appeal No 001 of 2020. Directions were taken for disposal of the appeal by way of written submissions. The matter was thereafter listed before this court on November 3, 2021 for purposes of confirming compliance and judgment was thus scheduled for May 5, 2022.
2. However, on January 24, 2022 the Applicant moved this court by his motion of even date seeking that the judgment scheduled for delivery on May 5, 2022 be stayed pending hearing and determination of the motion; and that the court be pleased to grant leave to the Applicant to adduce further evidence comprising the following documents. A certificate of registration for Basic Education Institutes: Nyunzu Elite Academy; certificate of registration for Basic Education Institutes: Kavutini Primary School; certificate of registration for Basic Education Institutes: St Joseph High School, Tutini and; a demand note to County Council of Makueni; miscellaneous income receipt; and application for transfer. The motion is expressed to be brought under Section 1A, 1B, 3, 3A & 78 (1) (d) of the *Civil Procedure Act*, Order 42 Rule 27 (1) (b) inter alia of the *Civil Procedure Rules* inter alia, and is premised on grounds on the face of the motion.



3. The grounds are amplified in the supporting affidavit sworn by Applicant. The gist thereof is that although written submissions have been filed in respect of the appeal, and judgment set for delivery on May 5, 2022, he has noted that the Respondents, namely, Makueni County Education Board and Catholic Dioceses of Machakos (hereafter 1st and 2nd Respondent/Respondents) by their submissions on the appeal, assert that the initials 'CCM' on the registration certificate dated May 14, 2013 of St. Mary's Itaava School stands for Consolata Catholic Mission. That no such evidence was tendered before the Tribunal and his contention being that the initials stand for 'County Council of Makueni' as Sponsor.
4. He further states that similar submissions in respect of the initials 'CCM' were made before the Tribunal but the certificates for registration for Basic Education Institutes that he now proposes to produce as further evidence, were at the material times not in his possession to enable him demonstrate his assertions that the initials 'CCM' on documents earlier tendered do not exclusively refer to Consolata Catholic Mission as the Sponsors of the school in question in this matter. That production of the proposed certificates in respect of other schools in Makueni County will assist the court to make a fair and just determination in the matter.
5. He asserts that the Tribunal would probably have arrived at a different conclusion had it considered the new and additional evidence. In conclusion, he deposes that it would be just and fair in the circumstances of this case to grant the prayers sought as the motion was made in good faith.
6. The motion was opposed through replying affidavits sworn by Gachungi J Murithi who describes himself as the County Director of Education, Makueni County and the secretary to Makueni County Education Board and by Rev Fr Francis Kioko Ngonyo who describes himself as the Diocesan Education Secretary, Catholic Diocese of Makueni, on behalf of the 1st and 2nd Respondent, respectively.
7. The affidavit of Gachungi J Murithi appears in certain aspects to canvass the substantive appeal. Nonetheless, he asserts that the proposed new evidence does not aid the court in arriving at a fair determination of the matter. Further that, the proposed certificates of registration annexed to the supporting affidavit do not aid the Applicant's cause because they neither contain the abbreviation CCM nor indicate that the abbreviation CCM stands for County Council of Makueni. Moreover, that the said certificates were issued between 2017-2019 yet pursuant to the promulgation of the new Constitution in 2010, local authorities transitioned from being County Councils to County Governments. Hence there would have been no basis for issuing certificates of registration with the abbreviation CCM being reference to the County Council of Makueni . He asserted that the abbreviation CCM stands for Consolata Catholic Mission.
8. Similarly, the affidavit of Rev Fr Francis Kioko Ngonyo in some respects addresses the substantive appeal and reiterates matters raised in the 1st Respondent's replying affidavit. He asserts that the abbreviation CCM on the Certificate of Registration for St. Mary's Itaava School (the school which is the subject of the appeal) stands for Consolata Catholic Mission which is an order of the Catholic Church Missionaries, which means that the Sponsor of the school was the Catholic Church. Finally, that the evidence adduced before the Tribunal demonstrated that St. Mary's Itaava School is sponsored by the Catholic Church.
9. The motion was canvassed by way of written submissions. Counsel for the Applicant reiterated the contents of the affidavit in support and asserted that the proposed evidence demonstrates that the registration certificates in respect of schools sponsored by religious entities bear the denominational



name of such sponsor as either Catholic or AIC as the case may be. That the registration certificate in respect of St. Mary's Itaava Secondary School bears the initials CCM rather than the term Catholic.

10. Placing reliance on the decisions in *Mohamed Abdi Mohamed v Ahmed Abdullabi Mohamed & 3 Others [2018] eKLR* and *EO v COO [2020] eKLR* counsel submitted that it is in the interest of justice that the motion be allowed to aid in the just and fair determination of the matter. That the proposed additional evidence relates to other Catholic Sponsored schools whose registration certificates do not bear the initials CCM in the section of the certificate reserved for the name of the Sponsor. Hence rebutting the Respondents' averments that the initials CCM in the certificate of registration of St. Mary's Itaava School stands for Consolata Catholic Mission. That the proposed additional evidence addresses the meaning of the initials CCM borne in the Certificate of Registration for St. Mary's Itaava School. And that the true meaning has a direct bearing on the outcome of this appeal.
11. Counsel also took issue with Respondents' affidavits for introducing extraneous averments and new facts that were not part of the evidence tendered before the Tribunal. That the Respondents do not dispute the fact that the additional evidence was not in the Applicant's possession prior to the hearing before the Tribunal. Ultimately therefore, the motion should be allowed.
12. On behalf of the Respondents, counsel equally restated the contents of the respective affidavit material filed in opposition to the motion. He further submitted that the Respondents, like the Applicant had equally adduced further evidence through their respective affidavit material that is vital for determination of the appeal. In addressing, the Applicant's proposed additional evidence attached to his affidavit, it was contended that the abbreviation CCM stands for Consolata Catholic Mission and not County Council of Makueni; that the certificates proposed to be tendered as additional evidence do not bear the abbreviation CCM and thus cannot be used to illustrate what the initials represent. Whereas other proposed additional evidence, namely, the demand note and application for transfer equally have no relevance to the instant appeal. The court was urged to decline the motion as sought.
13. The court has considered the material canvassed in respect of the motion. The motion is premised on the provisions of Section 78 (1) (d) of the *Civil Procedure Act* and Order 42 Rule 27 (1) (b) of the *Civil Procedure Rules*. Order 42 Rule 27 provides that:-
 - ' (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.'
14. Whereas Section 78 (1) of the *Civil Procedure Act* provides that;-
 - ' (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.'

15. In the case of Mohamed Abdi Mohamed (supra) the Supreme Court considered jurisprudence from various jurisdictions on the question of adduction of additional evidence on appeal before collating several applicable principles. The court delivered itself 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”.
16. The Supreme Court also underscored that determination of an application to adduce additional evidence on appeal involves exercise of judicial discretion.
 17. The annexure marked as Exhibit 1 in the Applicant’s supporting affidavit comprises inter alia the certificates of registration of other schools registered in Makueni County as is the case of St. Mary’s Itaava School. According to the Applicant, the said proposed additional evidence illustrates the fact that the abbreviation CCM does not stand for Consolata Catholic Mission but is rather an abbreviation of County Council of Makueni. And to support the Applicant’s contention that if St. Mary’s Itaava School was actually Catholic Sponsored as asserted by the Respondents, this would have been reflected in its registration certificate as is the case of the certificates of registration of other schools in “Exhibit 1”.
 18. In the court’s understanding of Order 42 Rule 27 (1) of the *Civil Procedure Rules*, it envisages three scenarios where an appellate court may allow the production of additional evidence at the appellate stage. Namely, where the court from whose decree the appeal was preferred had refused to admit evidence which ought to have been admitted before it; where the appellate court requires documents to be produced or any witness to be examined to enable it pronounce judgment; and for any other substantial cause.
 19. Based on the Applicant’s material, his application appears to be hinged upon the third scenario being other substantial cause. His primary ground, in addition to asserting relevance and probative value of the proposed additional evidence is that the additional evidence was not in his possession at the time of the hearing of the matter before the Tribunal.
 20. The appeal challenges the decision of the Education Appeals Tribunal on the following grounds as contained in the memorandum of appeal :-
 1. THAT the Honorable Tribunal misdirected itself and erred in failing to take into consideration qualifications/definition of sponsor under Section 8 the repealed Cap 211 and Section 2 of the *Basic Education Act* 2013 and ultimately fell into error in holding that St. Mary’s Itaava School is a Catholic sponsored school despite the fact that the evidence presented before the tribunal demonstrated that the 2nd Respondent neither qualifies as sponsor nor makes a significant contribution on the academic, financial, infrastructural and spiritual development of St. Mary’s Itaava Secondary School.
 2. THAT the Honorable Tribunal misdirected itself and failed to take into account the evidence presented by the Appellant and Respondents and misapprehended the evidence before the Tribunal thus fell into error in determining that St. Mary’s Itaava School is a Catholic sponsored school.



3. THAT the Honorable Tribunal erred in law and in fact in failing to appreciate that the process of appointment, revocation of appointment and replacement of a member of board of management who is under Section 56 of the Basic Education Act 2013 and appointment revoked replaced under the Fourth Schedule Part 1 Section 5 of the Basic Education Act 2013 and proceeded to order that the 1st Respondent to commence the process of reconstituting the board of management afresh, implying a dissolution of the current board.
 4. THAT the Honorable Tribunal misconstrued and misplaced the rationale and finding as set out in the case of Albert Ekirapa & 9 Others suing on behalf of themselves and Parents Association (School Committee) of Aga Khan Primary School Nairobi v Aga Khan Foundation & Another [2019] eKLR in dismissing the Appellant's case.
 5. THAT the Honorable Tribunal denied the Appellant a chance to demonstrate that the 2nd Respondent does not contribute significantly on the academic, financial, infrastructural and spiritual development of St. Mary's Itaava Secondary School by failing to visit the school despite making directions for the visit and proceeding to render a decision based on assumption thus infringing on the Appellant' right to be heard.' (sic)
21. First, from the above grounds of appeal, the Applicant substantially challenges the findings of the Tribunal on the designation of St. Mary's Itaava School as a Catholic School together with the corresponding qualification of the 2nd Respondent as a Sponsor of the school and its rights to appoint members of the school's board of management. These are issues far deeper than the purport of mere inscriptions of initials on registration certificates and their meanings. I cannot see the value or relevance of isolated certificates of registration relating to other schools not being Catholic Sponsored schools that are proposed to be produced merely to demonstrate that the initials 'CCM' in the certificate of registration of the material school in dispute herein do not mean Consolata Catholic Mission, but County Council of Makueni. This dispute goes beyond mere nomenclature.
 22. Secondly, a perfunctory review of the record of appeal herein reveals the voluminous documentary material relied on by the respective parties before the Tribunal. See; pages 3-39 (Applicants' material), and pages 60-117 & 118-147 (Respondents' material). In the Court's view, there is adequate documentary evidence for the purposes of arriving at a determination of the issues arising in the appeal.
 23. Third, from the record of appeal, the events culminating in the appeal to the Tribunal was the a meeting convened on October 5, 2019 by the Sub-County Director of Education of Makueni County in which he purported to select a chairperson of the Board of Management of St. Mary's Itaava School. At the said meeting, a pronouncement was made that the Catholic Dioceses of Machakos was the sponsor of St. Mary's Itaava School. Aggrieved by the pronouncement, which he viewed erroneous and contrary to his view that the school was not a Catholic Sponsored school, and or that the 2nd Respondent did not qualify as such sponsor, the Applicant lodged a complaint with the County Education Board on October 8, 2019. Eventually, he lodged an appeal to the Education Appeals Tribunal, which heard the parties to conclusion on March 12, 2020, and rendered its decision on August 25, 2020 prompting the instant appeal.
 24. In view of the crystallized issues in dispute between the parties from the start, and the outlined events, the court is of the considered view that had the Applicant exercised due diligence, he had ample time to obtain the proposed additional evidence and to present it before the Tribunal. The material seems to



constitute for the most part what appear to be public records and there is no assertion that any obstacle was placed in the way of the Applicant's pursuit to obtain them. Indeed, admittedly no such attempt was made by the Applicant prior to the hearing before the Tribunal or even prior to directions being given in this appeal.

25. He has not proffered any explanation as to why he did not obtain the documents prior to the hearing before the Tribunal. It is therefore disingenuous the Applicant to merely suggest that the additional evidence could not have been obtained without undue delay. In any event by the date of the scheduled hearing before the Tribunal, the Applicant was aware of the Respondent's position in the dispute. Paragraph 29 of the Respondents' submissions on the appeal which appears to be the basis of the Applicant's instant motion merely reiterated among other pieces of evidence tendered by the Respondents before the Tribunal, the meaning of the initials 'CCM' in demonstrating the subject school was a Catholic school.
26. The Applicant was aware of this, and other related pieces of evidence relied on by the Respondents at the Tribunal. If the proposed additional evidence was considered pertinent to the Applicant's case, counsel appearing for him ought to have sought an adjournment to present it. There is no evidence that the Applicant was compelled by the Tribunal to proceed with the matter on the appointed hearing date. In the circumstances, the Applicant cannot be heard to say before this court that the proposed additional evidence could not have been obtained with reasonable due diligence for the hearing before the Tribunal, and without undue delay.
27. The Court of Appeal in *Mount Elgon Beach Properties Limited v Harrison Shikaru Mwanongo & another [2019] eKLR* underscored the importance of the exercise of due diligence in an application of this nature, as follows:-

' The first question is whether the maps/report and photographs in question could have been obtained during trial with due diligence. The applicant has not told us why he did not instruct the surveyor to visit the site, draw the map and take photographs when the matter was still pending hearing. It could have done so and the said evidence could have been availed to the trial court before judgment was rendered. The application therefore fails the very first test. That in our view is a hurdle that an applicant in an application such as this one must overcome before even attempting to pass the rest of the requirements. The information was not new. It was always there, and all the applicant needed to do was to instruct the surveyor in good time, and the said evidence would have been placed on record before conclusion of the case.'

28. Thus, on all accounts, it seems to me that the present motion is an afterthought and intended to close gaps and to improve the Applicant's case before the Tribunal. Coming so late in the day when submissions on the appeal have been filed, the motion portends likely prejudice against the Respondents as apparent from the robust depositions in their replying affidavits, including material not canvassed before the Tribunal. Thus, allowing the instant motion could easily result in fresh litigation of an evolving dispute before the appellate court.
29. In *Kuwinda Rurinja Co. Ltd v Kuwinda Holdings Ltd and 13 Others, Civil Appeal (Application) No 8 of 2003 [2013] eKLR* the Court of Appeal cited the following passage from Mulla on The Code of Civil Procedure 13th Edn Vol 11 at page 1606 regarding the rule governing the taking of additional evidence at the appeal stage:

' This rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who was unsuccessful at the trial to patch up the weak points in



his case and fill omissions in the court of appeal. The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling 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 were used for the purpose of allowing the parties 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.'

See also *Wanje v AK Saikwa* [1984] eKLR.

30. The court is not satisfied that the proposed additional evidence is needful for the purpose of determining the appeal or that the Applicant has brought his case within the applicable principles. It appears that the Applicant is seeking a chance to improve his case which if allowed, would prompt the Respondents to act in like manner. The application is without merit and is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 23RD DAY OF MARCH 2023

C.MEOLI

JUDGE

In the presence of:

Mr Chenge for the Applicant

Mr. Ngumbi h/b for Mr. Munene for the 1st Respondent

For the 2nd Respondent: N/A

C/A: Carol

