



REPUBLIC OF KENYA



KENYA LAW
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**Mugo v Kang'ethe (Civil Appeal E016 of 2022)
[2023] KEHC 1933 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1933 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL E016 OF 2022
LM NJUGUNA, J
MARCH 15, 2023**

BETWEEN

DORCAS NJOKI MUGO APPELLANT

AND

CHRISPIN KIENYU KANG'ETHE RESPONDENT

RULING

1. Before this court is an application by the appellant/applicant dated December 19, 2022 wherein she seeks for prayers that:
 - i. Spent.
 - ii. Spent.
 - iii. That the honourable court be pleased to order the appellant's case be re-opened and heard for the purpose of adducing additional evidence.
 - iv. That the honourable court be pleased to grant leave to adduce additional evidence.
 - v. That costs of this application be provided for.
2. The application is premised on the grounds on its face and it's supported by the affidavit of the applicant.
3. The applicant has stated that it is imperative that the widow of the deceased be granted leave to testify on the beneficiaries of the estate and the distribution of the estate of her deceased's husband before judgment is delivered. That no prejudice shall be occasioned to the respondent if the order sought herein is granted as he will have the opportunity to cross examine the said Edwina Agola Njiru; the applicant thus urged this court to grant the prayers herein.
4. The respondent did not participate in the proceedings herein despite being served.



5. I have considered the application herein and I find that the main issue for determination is whether the same is merited.
6. Section 78(1) of the Civil Procedure Act affords an appellate court discretion to take additional evidence. This is what section provides:-

“(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;” (underlining mine)
7. Further, the Supreme Court in the case Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed & 3 Others (2018) eKLR set out the governing principles when considering an application for additional evidence as follows:-

“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 wilful 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.”
8. In the same breadth, in Civil Appeal (Application) 84/2012 *Attorney General vs Torino Enterprises Limited* [2019] eKLR the Court of Appeal on the question of whether or not an appellate court should allow an application for additional evidence, the superior court cited rule 29(1)(b) of its *Rules* and many other decisions and stated:

In *Dorothy Nelima Wafula vs Hellen Nekesa Nielsen and Paul Fredrick Nelson* [2017] eKLR, It was expressed that under that Under rule 29(1) (a), additional evidence will be introduced on appeal in the discretion of the court, “for sufficient reason.” The court further stated that:

“Though what constitutes “sufficient reason” is not explained in the rule, through judicial practice, the court has developed guidelines to be satisfied before it can exercise its discretion in favour of a party seeking to present additional evidence on appeal. Before this court can permit additional evidence under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible.”
9. From the above guidelines by the superior court, this court holds the view that its duty in the instant Notice of Motion is to determine:
 - a. Whether there is additional new evidence;
 - b. Whether that evidence could have been obtained by the applicant after reasonable diligence before and during the hearing;
 - c. If there is a probability that the additional evidence would have an important influence on the result of the case and
 - d. Based on the foregoing, is there sufficient reason to admit the additional evidence?
10. I have perused the file and out rightly apart from the applicant mentioning that the said Edwina Agolla Njiru would wish to reopen the case herein for the purpose of adducing additional evidence, the kind of evidence that the said widow is hoping to adduce before this court has not been annexed to the application herein. It therefore remains unknown to this court the kind of evidence to be adduced warranting the reopening of the case.



11. This court is cognizant of the holding in *Mzee Wanje and 93 Others vs AK Saikwa* (1982 – 88) 1 KAR 463 where the Court of Appeal, referring to rule 29 of the Court of Appeal Rule Similar to section 78 of *Civil Procedure Act* stated:

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 has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal.

12. There would be no end to litigation if the rule was used for the purpose of allowing 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. In *Raila Odinga and 5 Others s IEBC and 3 Others* [2013] eKLR, the Supreme Court added its voice on reception of additional evidence in the context of presidential election and Stated:

“The other issue the court must consider when exercising its discretion to allow a further affidavit, is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other Party is able to respond to it, than the court ought to be considerate, taking into account all aspects of the matter. However, if the evidence is such as to make it difficult or impossible for the other Party to respond effectively the court must act with abundant caution and care. In the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of addition evidence

13. Applying this principle, I find that this court cannot determine whether the additional evidence is indeed directly relevant to the appeal before the court and would influence the impact of this appeal or not and further guided by fact that one has a right to be informed in advance of the evidence before hand in order to challenge the same, allowing the application herein would be tantamount to trial by ambush and would be highly prejudicial to the respondent.

14. In the circumstances, therefore, I find that the application has no merit and it is dismissed with no order to costs.

15. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF MARCH, 2023.

L NJUGUNA

JUDGE

.....for the appellant

.....for the respondent

