



Mulei & another v Kirongo (Suing as legal representatives of the Estate of Mariko Odira Kirongo) (Civil Appeal E121 of 2021) [2023] KEHC 1996 (KLR) (9 March 2023) (Judgment)

Neutral citation: [2023] KEHC 1996 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E121 OF 2021**

KW KIARIE, J

MARCH 9, 2023

BETWEEN

WEYNE ASULA MULEI 1ST APPELLANT

CHARLES OUMA WANDERA 2ND APPELLANT

AND

MICHAEL ALUGO KIRONGO (SUING AS LEGAL REPRESENTATIVES OF THE ESTATE OF MARIKO ODIRA KIRONGO) RESPONDENT

(Being an Appeal from the ruling in Homa Bay Chief Magistrate's CMCC No. 52 of 2020 by Hon. J. Wesonga – Principal Magistrate)

JUDGMENT

1. Weyne Asula Mulei and Charles Ouma Wandera, the appellants herein, were aggrieved by the ruling of the trial court dated December 9, 2021. The respondents were seeking, by an application dated November 12, 2021, to be allowed to reopen their case in order to file a document that was inadvertently left out. The learned trial magistrate allowed the application.
2. The appellants were aggrieved and filed this appeal. They were represented by Peter Karanja, advocate. They raised grounds of appeal as follows:
 - a. The learned trial magistrate erred in law and in fact in finding that the respondent was entitled to file and produce documents after the hearing of the case had closed.
 - b. The learned trial magistrate erred in law and in fact in failing to address her mind properly to the principles applicable for the admission of additional evidence after the hearing of a case and thus came to the wrong conclusion.



- c. The learned trial magistrate erred in law and in fact in failing to hold that additional evidence could not be allowed where it was meant to fill in gaps in the respondent's case.
 - d. The learned trial magistrate erred in law and in fact in failing to hold that the failure to list and produce the said document at the trial was due to blatant and inexcusable negligence, lack of diligence and/or casualness or sloppiness, on the part of the respondents and their advocates which was not excusable or sufficiently explained, and thus made an erroneous decision.
 - e. That the learned trial magistrate erred in law and in fact in failing to hold that the respondents did not show that the document they sought to produce was not in their custody or power and could not have been obtained with reasonable diligence for use at the trial, or was not within the knowledge of the respondents, or could not have been produced at the time of the suit by them, and thus reached a wrong decision.
 - f. The learned trial magistrate erred in law and in fact in failing to realize that the application for additional evidence, having been made after the parties had closed their cases and filed submissions was likely to embarrass the fair hearing of the case and greatly prejudice the appellants.
 - g. The learned trial magistrate ignored and/or paid lip service to the appellants' submissions and especially the precedents cited therein on the law and facts, which she did not analyze or consider at all and thus came to an incorrect exercise of her discretion.
 - h. The learned magistrate erred in law and act in making a decision that was unfair and unjust and completely trashed all known principles in the circumstances thus prejudicing and embarrassing the appellant and rendering the trial unfair.
 - i. The learned trial magistrate failed to take into account all relevant considerations and principles in reaching an order allowing the respondents to file a further list of documents.
 - j. The learned trial magistrate exercised here discretion wrongly in all the circumstances in allowing the respondent's application dated 12/11/2021.
 - k. Other grounds as may be argued with the leave of the court.
3. The appeal was opposed by the respondents through the firm of Everlyne Kuke & Company Advocates. They raised the following grounds:
- a. That the application was brought without undue delay.
 - b. That the trial court exercised its discretion judiciously.
4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd* [1965] EA 123, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.



5. An application seeking the court to exercise its jurisdiction to allow the reopening of a case must be exercised judiciously. The court must be satisfied that the application was made without inordinate delay, that the intended evidence was not at the disposal of the party seeking to introduce and could not have been obtained even in the exercise of due diligence. Lastly, it will not be allowed if it is intended to fill gaps in evidence. In the case of *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR the court (Mary Kasango J) said:

"20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay."

6. Upon my perusal of the record, I find that the contested document i.e. a copy of motor vehicle record from NTSA was not listed among the intended documents to be relied upon. On further scrutiny of the copy of motor vehicle record, I find that it was prepared on November 12, 2021. The respondents filed their submissions on September 17, 2021. It was misleading for the respondents' advocate to claim that that she had been given the copy of records at the time of instructions but mistakenly forgot to include it as one of the documents to be relied upon by the respondents (plaintiffs).

7. The appellants have contended that they filed their submissions on November 2, 2021 and in the submissions pointed out that there was no proof of ownership of the vehicle as a search certificate was not produced. It was this submission that prompted the application to reopen the case.

8. I am persuaded to agree with the contention of the appellants. The record was prepared on November 12, 2021, after the submissions by the appellants had been filed and served. This was tantamount to filling gaps in evidence of the respondents' case.

9. The appeal is merited. The same is allowed and the ruling and order of the honorable trial magistrate allowing the respondents to file a further list of documents and or to adduce further evidence is set aside with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 9TH DAY OF MARCH, 2023

KIARIE WAWERU KIARIE

JUDGE

