



**Jonathan Wepukhulu t/a Gati Cleaning Agency Limited v Oduor & another
(Civil Appeal 82 of 2019) [2023] KEHC 18182 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL 82 OF 2019
DKN MAGARE, J
MAY 11, 2023**

BETWEEN

**JONATHAN WEPUKHULU T/A GATI CLEANING AGENCY
LIMITED APPELLANT**

AND

**JULIUS ODHIAMBO ODUOR 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT**

RULING

1. The applicant filed an application dated 7/3/2022, seeking the following orders: -
 - a. That an order be issued granting leave to the Appellant/Applicant to file undated preliminary report, investigation report dated 19/3/2021 and final investigation report dated 8/10/2021, as additional evidence and form part of the Appellant's record of Appeal and/or Supplementary record of Appeal.
 - b. Costs be provided for.
2. The Appellant filed submissions stating that the court ordered a report to be filed by the DCI Within 45 Days from 3/2/2020. The report was necessitated by various cases filed by the Respondent. Cases were filed claiming the Respondent lost teeth in the following cases Mombasa, SRMCC 4944, of 2004, 1750 of 2003, 1989 of 2019, 112 of 2015. The Respondent lost teeth no 38, 31 and 41 and 38. He sued for falling into a septic tank in Mombasa SRMCC 2005, 1989 of 2014, and 12 of 2015.
3. The issue was whether in the natural order of event, same person can lose over 15 teeth including teeth nos 38,40, 41 over a period of 20 years. How many teeth can one have.
4. The case herein involves the same dispute. The preliminary report has already been filed. The applicant is seeking to have additional evidence to complete the investigation.



5. They rely on the case of *Attorney General v Torino Enterprises Limited* [2019] eKLR. In note that they relied on another part of the authority. However, the same authority indicates as doth: -

“We are cognizant of the decision in *Mzee Wanje & 93 Others vs. A.K Saikwa* (1982-88) 1 KAR 462, where commenting on Rule 29 of the Rules of this Court it was 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. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in 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 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.

The 2nd Respondent’s Submissions

6. The 2nd Respondent filed submissions supporting the Application. They rely on section 78 of the *evidence act* and the authority *Fibre Link Limited v Star Television Production Limited* [2015] eKLR, where the court of Appeal held as follows: -

“The applicable law as regards the admission of additional evidence by an appellate court is Section 78 of the *Civil Procedure Act* which provides that: -

- (1) Subject to such condition 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.”

The procedural Rules that are hand maidens to Section 78 of the *Civil Procedure* above provide under Order 42 rule 27 of the *Civil Procedure Rules* 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 reasons for its admission.

7. *Tarmohamed & Another V Lakhani & Co* (1958) EA 567 where the Court of Appeal in adopting the Judgment of Lord Denning in *Ladd V Marshall* (1954) 1 WLR, 1489, the Court of Appeal for Eastern Africa stated that:

“except in cases where the application for additional evidence is based on fraud or surprise: “to justify reception of fresh 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 result 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.”

1st Respondent’s Submissions

8. The 1st Respondent, who stood to lose much, did not file did not file submissions.

Analysis

9. The application was a fairly straight forward one. Courts from the high court to the supreme court have handled this aspect. I will not re- invent the wheel given that the Application is virtually unopposed. In the case of *Fibre Link Limited v Star Television Production Limited* [2015] eKLR, the court stated as follows: -

“In *Wanjie & Others v Sakwa & Others* (1984) KLR 275 the Court of Appeal considered at length the rationale for the obvious restriction of reception of additional evidence in Rule 29 of the *Court of Appeal Rules*. Chesoni JA observed at page 280:

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. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in 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 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.”



Hancox JA as he then was in the same case above stated that the requirement for reasonable diligence is meant to discourage litigants from leaving until the appeal stage all sorts of material which should properly have been considered by the trial court.

10. In *Mohamed Abdi Mohamed Vs Ahmed Abdullabi Mohamed and 3 others* [2018] eKLR, the Supreme Court further laid out guidelines on getting additional evidence admitted at the Appellate level. Pursuant to Article 163 of the *Constitution* Courts in Kenya, the decision is binding on this court. In the said case, the court gave guidelines at paragraph 79 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 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 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) Whether 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;
- (j) The Court must find the further evidence needful;
- (k) A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.



- (l) 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.

[80] We must stress here that this Court even with the application of the above stated principles will only allow additional evidence on a case by case basis and even then sparingly, with abundant caution.”

11. In the case of *EO v COO* [2020] eKLR, the court, Justice A R.E. Aburili, stated as doth: -

“ 32. I observe that the clear guidelines issued by the Supreme Court directed at Appellate Courts, this Court included, are not conjunctive. However, an applicant must substantially comply with the guidelines. Whether the additional evidence will impact the result of the case is a matter to be determined on merit upon the evaluation of the additional evidence with all other evidence on record (see *Attorney General Versus Torino Enterprises Limited (Supra)* Paragraph 23. I note that the main contestation in the trial Court and which contest this Court is called upon on appeal to resolve is whether or not the Applicant/Respondent is the son of FS. And therefore, the grandson to MO (deceased owner of the property-land subject of the succession proceedings) and therefore whether the applicant/respondent is a bona fide beneficiary of the estate of the deceased MO.”

12. I therefore conclude that the test for adducing additional evidence is: -

- a. The order is based on the court’s discretion
- b. Even when all circumstance points towards allowing the adducing additional evidence should be admitted, the order should be given only in exceptional circumstances
- c. It is not issued to fill gaps left open or ramp up a weak case
- d. The evidence could not have been adduced at the time of hearing of the matter.

13. The application is for adduction to ensure there is a claim of a serial claim for loss of teeth. The Applicant is the Attorney General. The Attorney General is permitted under the *vexatious proceedings Act* to take steps to avoid vexatious proceedings. I do not want to commit on the veracity of the report. However, general the special nature of the allegations, where a party has filed multiple clams for the loss of teeth.

14. I had a chance to see the Respondent in the team’s platform. I did not see that many number of teeth being lost.

15. I therefore wish to expedite this matter and has the evidence adduced. I am satisfied that this applicant is merited. I allow the same.

16. In order to avoid predisposing the Respondent, he shall be examined by a doctor of his choice together with a dentist appointed by the Appellant on the number of teeth he has lost. This be done within 30 days and a supplementary record be filed, failing which thus court is rectified to make an advice reference.



17. The Application is thus merited and allowed. The record be filled within 21 days. The appeal shall be heard physically in the presence of the parties. Given that the application has been allowed on the basis of vexatious proceedings the Attorney General is put on notice.

Determination

18. The application is allowed in terms of the following orders: -
- a. Leave be granted to the Appellant/Applicant to file undated preliminary report, investigation report dated 19/3/2021 and final investigation report dated 8/10/2021, as additional evidence and form part of the Appellant's record of Appeal and/or Supplementary record of Appeal.
 - b. The Respondent to be examined on the number of teeth he has lost, damaged by the dentist appointed by the Respondent and the appellant.
 - c. The Attorney General is notified on complaint with *vexatious proceedings Act*
 - d. The parties to take a date for the appeal after the Ruling.
 - e. Costs be in the appeal.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 11TH DAY OF MAY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Okwako for the 1st Respondent

Mr. Makuto for the 2nd Respondent

Court Assistant - Brian

