



REPUBLIC OF KENYA



**Matolo & another (Suing as the Administrators of the Estate of Naomi Njeri Wangui - Deceased)
v Wambugu (Civil Appeal 90 of 2019) [2023] KEHC 20725 (KLR) (Civ) (25 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20725 (KLR)

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

CIVIL

CIVIL APPEAL 90 OF 2019

JN MULWA, J

JULY 25, 2023

BETWEEN

MARY WANGUI MATOLO 1ST APPELLANT

FLORENCE WANJIRU WANGUI 2ND APPELLANT

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF NAOMI NJERI
WANGUI - DECEASED**

AND

ELIJAH GATHOTHU WAMBUGU RESPONDENT

RULING

1. The Application for consideration is the Appellants' Notice of Motion dated May 18, 2022 brought pursuant to Sections 3A and 78(1) (d) of the *Civil Procedure Act* as well as Order 51 Rule 1 of the *Civil Procedure Rules*. The Appellants seek the following Orders:
 1. That this Honorable Court be pleased to grant leave to the Applicant to adduce further evidence in this Appeal.
 2. That this Honorable Court be pleased to admit the further evidence in the form of further documents and witness statements annexed to the Application herein during the hearing of the substantive Appeal.
 3. That the costs of this application be provided for.
2. The Application is based on the grounds set out on its face and supported by the Affidavit of Florence Wanjiru Wangui, an Administrator Ad litem of the Estate of Naomi Njeri Wangui (Deceased). She avers that a son of the deceased wishes to adduce additional evidence to prove that she had three (3)



- children who were all dependent on her. She contends that the evidence will assist this court to make a fair and just determination of the case as regards the correct dependency ratio.
3. The Respondent opposed the application through Grounds of Opposition dated May 25, 2022. He contended that the intended additional evidence is an afterthought and an attempt by the Appellants to patch up their case on Appeal to the detriment of the Respondent. He also averred that the Appellants have not satisfied the legal requirements for introduction of new evidence at the appellate stage.
 4. The Application was canvassed through written submissions which this court has duly considered. The only issue for determination is whether the Appellants have satisfied the requirements for admission of new evidence on appeal.
 5. Section 78 (1) (d) of the *Civil Procedure Act* empowers the High Court to take additional evidence when exercising its appellate jurisdiction. It stipulates that:
 - ' (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power: -
 - d) To take additional evidence or to require the evidence to be taken.'
 6. This is further supported by Order 42 Rule 27 of the Civil Procedure Rules which provides: -
 - ' (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'.
 7. From the above provisions of the law, it is clear that the decision as to whether or not to admit additional evidence on appeal is an exercise of judicial discretion which must be exercised judiciously and not capriciously. The only caveat is that in admitting further evidence, the court must record the reason for allowing such admission.
 8. The principles governing the admission of additional evidence were laid down by the Supreme Court of *Kenya in Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others [2018] eKLR* 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.'

9. In *Tarmohamed & Another v Lakhani & Company* [1958] EA 567, the Court of Appeal for Eastern Africa adopted the decision in *Ladd v Marshall* [1954] WLR 1489 where it was 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'.

10. In the instant case, the Appellants seek to adduce additional evidence in the form of fresh birth certificates to prove that the deceased had three children who were dependent on her. The lower court record shows that the Appellants witness adduced three birth certificates in evidence during trial. However, the Respondent adduced a document from the department of Immigration and Registration of Persons showing that the said certificates were not genuine as they were non-existent in their database. Consequently, the learned trial magistrate held that there was no proof that the



deceased had dependent children at the time she died and adopted a dependency ratio of 1/3, which the Appellants have now appealed against.

11. The court has examined the new birth certificates sought to be adduced in place of the rejected ones. The date and year of birth of the alleged dependants indicated in the new birth certificates are completely different from the ones in the rejected birth certificates yet the Appellants have not bothered to explain why or how they came into possession the falsified birth certificates, and or why they relied on such false documents in the trial court. Further, the Appellants have not shown that the fresh birth certificates could not have been obtained with reasonable diligence for use at the trial. Rather, they claim that the Respondent filed the document that challenged the earlier certificates after pre-trial yet there is nowhere on record where it is shown that the Appellants sought leave of court to file fresh genuine certificates despite being fully aware of the importance of that evidence in the determination of their claim. In the premises, the Court concurs with the Respondent that this application is an afterthought and indeed an attempt by unsuccessful litigants to make a fresh case on appeal, fill up omissions and patch up weak points in their case. The totality of the foregoing is that the application does not meet the threshold of the conditions for admission of additional evidence on appeal.
12. Consequently, the Appellants' Notice of Motion dated May 18, 2022 lacks merit and is hereby dismissed with costs to the Respondent.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN NAIROBI THIS 25TH DAY OF JULY 2023.

JANET MULWA

JUDGE

