



REPUBLIC OF KENYA



**Simiyu v Attorney General & 4 others (Civil Suit 2 of 1988)
[2023] KEHC 21072 (KLR) (1 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21072 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL SUIT 2 OF 1988
RN NYAKUNDI, J
AUGUST 1, 2023**

BETWEEN

GEORGE FRANCIS SIMIYU APPLICANT

AND

THE HON. ATTORNEY GENERAL OF KENYA 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

**THE INSPECTOR GENERAL OF NATIONAL POLICE
SERVICE 3RD RESPONDENT**

CHRISTOPHER WANJALA 4TH RESPONDENT

**THE PROTESTANT CHURCHES MEDICAL ASSOCIATION, CHRISTIAN
HEALTH ASSOCIATION OF KENYA 5TH RESPONDENT**

RULING

- 1 The applicant approached this court *vide* a notice of motion dated July 4, 2023 seeking the following orders;
 1. The honourable court be pleased to grant leave to the plaintiff to add and admit on record a certified copy of the proceedings in Nairobi Chief Magistrates Criminal Case No 2479 of 1981 as item No 14 of the supplementary list of documents dated May 10, 2023.
 2. The costs of this application be provided for.
- 2 The application is premised on the grounds set out therein and the contents of the supporting affidavit sworn by the applicant in support of the same.



Applicant's Case

- 3 The applicant's case is expressed to be supported by the following grounds:
1. That excerpt of the proceedings in Nairobi Chief Magistrates criminal case No 2479 of 1981 item no 6 on the 5th defendant's supplementary list of documents dated June 6, 2023.
 2. That on June 20, 2023 the plaintiff/applicant managed to obtain a certified copy of the said proceedings in Nairobi Chief Magistrates Criminal Case No 2479 of 1981.
 3. That there is a disparity in the excerpt of the proceedings in Nairobi Chief Magistrates Criminal Case No 2479 of 1981 availed by the 5th defendant and what was certified as a true copy of the same on June 20, 2023.
 4. That the excerpt of the proceedings in Nairobi Chief Magistrates Criminal Case No 2479 of 1981 has been doctored in favour of the 5th defendant
 5. That it is imperative for the honourable court to have a benefit of looking at both documents in order to arrive at a just and fair decision
 6. That the respondent will not be prejudiced by addition of this document as they will be granted an opportunity to cross examine the plaintiff over the said proceedings.
 7. That the excerpt of proceedings in Nairobi Chief Magistrates Criminal Case No 2479 of 1981 is already on record and therefore it is not a strange document to prejudice especially, the 5th defendant
 8. That it is the interest of justice that this application be allowed.
- 4 The applicant averred that it is imperative for the honourable court to have a benefit of looking at both documents in order to arrive at a just and fair decision. Further, that the respondents will not be prejudiced by addition of this document as they will be granted an opportunity to cross examine the applicant over the said proceedings.

Analysis & Determination

- 5 I find it imperative for the determination of the instant matter before me a review of some of the salient authorities that have dealt with the issue on additional evidence as this will guide me on how to determine the notice of motion at hand. Taking the cue from the Supreme Court in *Mohammed Abdi Mohamed v Ahmed Abdullahi Mohamed and 3 others* (2018) Eklr, the Supreme Court further laid out guidelines on admission of additional evidence before appellate court in Kenya. These guidelines were 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 daunt 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 ins an essential consideration to ensure fairness and due process
 - h. Whether 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 filing gaps in evidence
 - j. The court must find the further evidence needful
 - k. A party who has been successful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the omission 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
- 6 This flexibility or elasticity which has been adopted by the courts across Kenya on fresh and new evidence applications is necessary appropriate when the best interests of justice is at stake. The principles also ride on article 159 (2) (d) of the Constitution which provides as follows: “Justice shall be administered without undue regard to procedural technicalities”. The power conferred upon the court by the constitution and statute law on procedural justice is to exercise discretion to admit fresh or new evidence as a component of the right to fair administrative action in article 48 and a right to a fair hearing in article 50 of the Constitution. It is also critical on evaluation of the facts on a case to case basis a court to admit the fresh or new evidence in the interests of justice since otherwise the court’s decision may be regarded as resting on a misapprehension of the evidence. Further to ignore relevant, decisive, and credible new evidence affronts one sense of justice.
- 7 I note that the applicant has not served the respondents with the present application and therefore it is not clear if they are aware that the same is pending. In the premises, the application is *ex parte* and unopposed. I note the age of the matter and it is my considered view that it is imperative that the matter is concluded expeditiously as it has been pending for thirty-five years.
- 8 The applicant has undertaken to be cross examined on the proceedings but I do note that he is not the maker of the documents and therefore he is not in a position to properly answer as to the contents of the same. In the case at bar, the new evidence adverted to in the Chief Magistrate’s Criminal Case No 2479 of 1981 as admissible in the criteria outlined in section 34 of the Evidence Act. The decisive test regarding the above was also advanced in the persuasive case in R v St Cloud 2015 SCC 27 at para 137. Which put forward a realistic approach in the following extract: That “ the new evidence must be such that is reasonable to think, having regard to all the relevant circumstances, that it could have affected the balancing exercise engaged in by the justice.....the new evidence must be significant”



- 9 In sum, and whether the threshold has been met in the matter the *Mohammed case* (supra) condition have been adapted to the particular context of this application on admission of fresh and new evidence and do reiterate that there is merit in granting the application in favour of the applicant as asserted in the body of the notice of motion. The new evidence does not materially undermine or render nugatory the pending proceedings which are ongoing in this most appropriate forum. In this suit any arguments or opposition to the application outweighs the carefully circumscribed to principles in the above cited authorities. There is need to clarify that admission of new or fresh evidence is not a licence for a party to a litigation to seek leave of the court to be litigating by instalments or hire purchase under the guise of new evidence unrelated to the pleadings. The unique circumstances of a case by case basis is the hallmark of the process and inherent exercise discretion of the court. The focal point of this admission is not without conditions in the following terms: (a) The respondents be at liberty to file rejoinder interrogatories specific to the extract of the fresh and new evidence within 21 days from today's date. (b) The respondents are entitled to question any matters arising and gathered prior to any commencement of the criminal proceedings in the reference case before the Chief Magistrates Court.
- 10 The upshot of it in this notice of motion therefore, admitting the new/fresh evidence pleaded by the applicant is in the interest of justice and costs of this application shall abide the outcome of the suit.
- 11 It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 1ST DAY OF AUGUST 2023

In the presence of

M/s Lutta Advocate for the Defendant

.....

R. NYAKUNDI

JUDGE

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