



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIAYA

CIVIL APPEAL 43 “B” of 2019

EO.....APPELLANT

VERSUS

COO.....RESPONDENT

RULING

1. By an application brought **under Section 78 (1) (d) of the Civil Procedure Act, Order 51 of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Rule 49 of the Probate and Administration Rules** and all other enabling Laws, the Respondent herein COO who is also applying seeks from this Court the following Orders, in the application dated 27.2.2020:

(1) Spent.

(2) That the applicant be granted leave to file additional evidence in support of his case as espoused in paragraph six of the Supporting affidavit.

(3) That the appellant be condemned to bear the costs of this Application.

2. The application by way of Notice of Motion is predicated on the grounds that Judgment in the Lower Court was entered on 13.9.2019 and being aggrieved, the appellant lodged this appeal.

3. That the Respondent wishes to adduce additional evidence in support of his case which evidence will assist the court to make a fair and just determination of the case; that the applicant is the beneficiary to the estate of the deceased by virtue of being a grandson to the deceased in that the father to the applicant was a son of the deceased.

4. The applicant further claims that he was unable to adduce the attached documents for reasons that he did not have legal Counsel to assist him on the importance of the documents and the production thereof as exhibits.

5. Finally, that the applicant will suffer great loss if the application is not allowed as prayed.

6. In the Supporting Affidavit sworn by COO the applicant on 27.2.2020, the applicant reiterates his grounds, explaining further that he objected to the grant because he was the son to PSO who was the son to the deceased MN alias and that he had an interest in the latter's estate because his father who would have benefitted from the estate was also deceased as at the time of filing of the succession proceedings.

7. Further, that the applicant did not adduce some documents to prove his relation to PS during the hearing because he did not know the legal importance at that time as to the weight that they would add to his case because we did not have Legal representation then, and that he had now sought Legal Counsel.

8. The applicant annexed various documents that he intends to adduce urging the Court to allow his application in the interest of Justice.

9. The application for adduction of additional evidence by the Respondent/Applicant was opposed by the Appellant EO who filed grounds of opposition through his Counsel on 3.3.2020 contending that the application is misconceived, incompetent and bad in Law, that it is frivolous, vexatious and scandalous; that it lacks merit and is an abuse of Court process and that it amounts to conceding the Appellant's appeal since the Applicant through the said Application is equally admitting that the trial Court gave Judgment in his favour in the absence of sufficient or adequate evidence to support such as Judgment.

10. The application was argued orally by the respective Parties' Advocates on 30.9.2020 with Mr. Ariho Advocate representing the Applicant/Respondent. While Mr. Odhiambo Advocate represented the Respondent/Appellant.

11. Mr. Ariho adopted the grounds and Affidavit in Support of the application and cited 2 cases to augment his client's position: *Civil Appeal No. 13 of 2018 AINU SHAMSI HAULIERS LIMITED VERSUS ANASTACIA NDINDA MWANZIA (SUING AS ADMINISTRATOR OF THE ESTATE OF HARRISON MWENDWA KARILI [2018]e-KLR where C. KARIUKI – J., held that no Court of Law should be deprived of information which will assist it reach a fair and first determination of a case. Counsel also relied on C.A. 93 of 2016 (Court of Appeal at Mombasa between TANA AND ATHI RIVER DEVELOPMENT AUTHORITY VERSUS COUNTY GOVERNMENT OF TANA RIVER [2018] eKLR where the Court set out the threshold for allowing additional evidence and stated inter alia that in allowing additional evidence, the Court should not allow a fresh case but for the Court to arrive at a proper determination.*

12. Mr. Ariho submitted that in the instant case, the Applicant was not seeking for a fresh case but for a proper determination of the case.

13. Opposing the application, Mr. Odhiambo Counsel for the Respondent/Appellant submitted, relying wholly on the grounds of Opposition as reproduced hereinabove and relied on two decisions: *The Administrator of His Highness the Aga Khan Platinum Jubilee Hospital Versus Munyambu C.A. No.18 of 1983 where the Court of Appeal set two pre-condition for adducing additional evidence and held, inter alia: That the evidence sought to be adduced could not be obtained with reasonable diligence during the cause of the trial and that it will have an important influence and is credible enough.*

14. According to Mr. Odhiambo, all Evidence sought to be adduced in this appeal was available during the trial and that no reason has been advanced to explain why that evidence was not adduced at the trial.

15. In his opinion, the import of this application by the Respondent/applicant is that the Respondent ought to have adduced evidence at the trial but none was adduced. That having tendered only oral evidence, the Respondent cannot seek to adduce documentary evidence on appeal, as the purported evidence has been in his possession since 2009.

16. On credibility of the evidence and important influence it would have on the appeal, it was submitted that Annexure 1 is not dated and neither is it sworn as an Affidavit. Counsel reiterated that the Respondent having obtained judgment on insufficient evidence, he cannot come to this Court to allow him adduce more evidence. He urged this Court to dismiss the application by the Respondent/Applicant with costs.

17. In a rejoinder, Mr. Ariho counsel for the Applicant reiterated the reasons for non-production of the documentary evidence by the applicant before the lower Court, insisting that the evidence sought to be adduced is credible and that it will assist the Court make a fair final determination bearing in mind the fact that the nature of the dispute is succession among family members. Counsel urged this Court to allow the application.

DETERMINATION

18. I have considered the applicant's application, grounds, Supporting Affidavit and annexures and the grounds of Opposition. I have given equal consideration to the oral submissions and authorities cited by Counsel for both Parties. The issue for determination in this Notice of Motion is whether the Applicant/Respondent has made out a case for leave to be granted to adduce additional evidence on appeal.

19. The instant application is basically grounded on **Section 78 of the Civil Procedure Act Cap 21 Laws of Kenya** which provides for Powers of appellate Court in appeals from the subordinate Court to the High Court, and is similar to **Rule 29(1) (b) of the Court of Appeals Rules**. The 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;***
- 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 charged conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.

20. In **Civil Appeal (Application) 84/2012 Attorney General Vs Torino Enterprises Limited [2019] eKLR** which is one of the latest decisions from the Court of Appeal on the question of whether or not an appellate Court should allow an application for adduction of new evidence, the superior Court cited **Rule 29(1)(b) of its Rules** and many other decisions and stated:

“13. In Dorothy Nelima Wafula Versus 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.”

21. From the above guidelines set by the Court of Appeal, The duty of this Court 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?*

22. The Applicant/Respondent in the instant Notice of Motion annexed documents being the new evidence which he wishes to introduce on appeal. It is worth noting that in the trial Court, the Respondent/Applicant herein did not produce any Documentary evidence. He testified that he was the grandson of the deceased subject of the succession and that he was raised by his maternal grandmother after his mother divorced his father (the son to the deceased) hence he was beneficially entitled to the estate of the deceased).

23. The annexed documents are:

- (1) Affidavit for change of names (though not dated or signed with a year of 2010.*
- (2) Letter from Assistant Chief of Jina Sub-Location dated 18.12.2015 naming beneficiaries of the deceased MO showing Applicant as being the son to PS (deceased) and that CO is the grandson to MO (deceased).*
- (3) Baptismal Card from Roho Group Ministries dated 26.12.1980 belonging to CO, where father is named as PSO and Mother CA, and born on 15.2.1971.*
- (4) K.C.P.E. Certificate for SOC for 1988 K.C.P.E. Examination at Sinaga.*
- (5) Letter of Chief Yala Township Location dated 18.12.2018 stating that when EO the Appellant Petitioner approached the Chief for a letter of Introduction in respect of Succession cause No. 97 of 2018, of Land Parcel No. East Gem/Jina/** and after the chief had written such letter of Introduction, some family members including the applicant herein went to the Chief and objected to the Succession and that he summoned EO and recalled the Letter of Introduction and advised him to allow his other family members to be enjoined to the Succession proceedings but E defied the directive and went ahead to Petition having full knowledge that the other family members were opposed to the Succession. The letter is addressed to the Principal Magistrate, Siaya Law Courts.*
- (6) Letter from Assistant Chief to Principal Magistrate’s Court, Siaya dated 5.11.2019 stating that despite the Judgment of the trial Court of 13.9.2018. It had become impossible to enforce the judgment despite intervention by the Assistant-Chief.*
- (7) Certificate of death for PSO dated 30.4.209.*
- (8) Burial permit for PSO. Baptismal “Card for Odera (deceased) owner of the land subject of succession proceedings.*
- (9) Letter dated 1.12.2019 from Assistant Chief Jina Sub-Location to the Registration Officer, Yala in Respect of request for change of particulars for COO’s identity card as he took the guardian’s name O.*
- (10) Affidavit by the maternal uncle of CO one AWOO deposing that the Applicant’s last name on his identity card “O ” was taken after his maternal grandfather who raised him as guardian and that the deponent had no Objection if Cdropped the said name “O .”*

24. In explaining why he wants this Court to grant him the Orders sought to adduce additional evidence, the applicant who was unrepresented in the lower Court and who is now represented in this appeal by **Ms. Maxwell O. Ogonda and Associates Advocates**, he explains at Paragraphs 5 and 6 of his affidavit sworn on 27.2.2020 that he did not adduce some documents to prove that he was indeed a son to **PS** doing the hearing because he did not know their legal importance at that time as to the weight that they would add to his case because he did not have legal representation at that time. Further, that after seeking legal Counsel over the same, he now wishes to adduce additional evidence to prove that he is beneficially entitled to the estate of the deceased.

25. In vehemently opposing the application to adduce additional evidence, Counsel for the Appellant and contended that the evidence sought to be adduced was available at the time of hearing in the lower Court and that the said evidence especially the first document cool is not dated or even signed hence it is not credible evidence.

26. It was therefore contended that the application and therefore evidence sought to be adduced does not meet the threshold for adduction of additional evidence as stipulated in the cited decision of the Court of Appeal.

27. This Court is cognizant of the holding in **Mzee Wanje and 93 Others Versus A.K. 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 as 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.

28. That 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. In **Raila Odinga and 5 Others Versus I.E.B.C. 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”

29. The same Supreme Court in **I.E.B.C. Vs Robert K. Nyengi [2015] eKLR**, considered an application for leave to file a document out of time in the context of an election Petition and stated that it is essential for a Court in exercising its discretion to admit additional evidence to ensure no prejudice is occasioned to a party if the evidence is admitted.

30. In **John Kiplangat Barbaret and 8 Others Versus Isaiah Kiplangat Arap Cheloget [2016] eKLR**, the Court of Appeal allowed adduction of additional evidence in the form of a Survey Map for Land Registration Number **Narok/CIS-Mara/Limotio/54** showing a portion of the suit land occupied by the Appellants; and also admitted additional evidence of the Air Cartography Map of 1971 showing the Settlement status in Sagamian area.

31. In **Mohamed Abdi Mohamed Vs Ahmed Abdullahi Mohamed and 3 others [2018] eKLR**, the Supreme Court further laid out guidelines on admission of additional evidence before Appellate Courts in Kenya. These guidelines were stated 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 filing 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."

31. In the instant appeal and application by the Respondent/Applicant, I have evaluated and considered each of the items of additional evidence sought by the Applicant against the detailed guidelines and criteria laid down by the Supreme Court in **the Mohamed Abdi Mohamud Versus Ahmed Abdullahi Mohamed and 3 others [2018] case.**

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.

33. I am also alive to the fact that the Applicant/Respondent did not adduce any documentary evidence before the trial Court and further, I am cognizant of the fact that he was unrepresented and therefore being as layman he did not have the benefit of appreciating what kind of documentary evidence would have been necessary to back up to claim of being a beneficiary of the estate of the deceased MO.

34. I however note that annexure COO1 is an **'affidavit'** which is neither signed nor dated hence the Court would not place any reliance or probative value on it. Nonetheless, some of the exhibits listed are addressed to the Principal Magistrate's Court which heard the Objection proceedings and it is not clear why those letters from local administrators who are public servants were not received into Court.

35. There is no indication that the applicant was given originals to place before the Court or that the letters were sent to Court directly, the matter being a Succession Cause. Other documents are baptismal Cards, K.C.P.E. Certificate and death Certificates of the alleged father and grandfather of the Applicant.

36. Albeit the Appellant/Respondent in the application claims that the import of the application before Court is that the applicant was handed a judgment in a case where no sufficient evidence was adduced to proof his case hence he wants to forestall this appeal, this Court reiterates that the applicant was unrepresented. He is a layman in matters Law and evidence. In addition, the dispute is over beneficial rights of an estate of a deceased person and the applicant claims filial relations to the deceased MO by virtue of being a grandson.

37. In my humble view, the applicant is most likely to be disinherited if the evidence sought to be adduced is locked out. He will not get justice simply because of his ignorance in the lower Court, of the relevance of the documents that he now seeks with legal advice, to adduce to assist the Court in determining whether he is beneficially entitled to the estate of the deceased MO .

38. I am satisfied that the documents attached, other than COO1 which cannot be relied on by the Court on account of want of deposition; and sought to be admitted in evidence is likely to influence or impact on the result of the pending appeal before hand. The additional evidence which is documentary evidence, as the applicant only adduced oral evidence which the subordinate Court believed and handed him judgment, is relevant and is needful. It will, in my humble view, assist the Court to do justice and Justice in a fair manner.

39. The said additional evidence sought to be admitted is not voluminous as it comprises a few letters from the local administration, church Baptismal Card and Public documents, namely, a primary School Certificate and certificates of death for his alleged deceased father and grandfather subject of the succession proceedings. That being the case, the Appellant will have no difficulty responding to the same.

40. Furthermore, since the documents were filed in Court and served upon the appellant in February 2020, the appellant has had an opportunity to examine them and seek to challenge them in the event that they are not genuine documents. This Court sees no prejudice to the appellant in admitting the evidence sought to be adduced as the appellant can challenge such evidence.

41. On whether the documents sought to be adduced could have been adduced in the trial Court in exercise of due diligence, I have considered the Applicant's explanation in Paragraphs 5 and 6 of his affidavit in support of this application that as a layman who was unrepresented in the lower Court, he did not know the importance/weight to be placed on the said documents. I have also observed that some documents were addressed to the Magistrate's Court hearing the objection proceedings but there is no indication as to whether the letters were delivered to the Court as correspondence or whether the applicant took the originals to be produced in Court but due to ignorance, he failed to do so.

42. There is no evidence that the applicant is so educated beyond his K.C.P.E. Certificate level that he ought to have known that besides his oral testimony, he should have adduced documentary evidence to back up his oral testimony.

43. No person should be disadvantaged in his case simply because he is not literate or legally empowered with legal knowledge or is not represented by Counsel.

44. I am aware of the principle that ignorance of the Law is no defence but I am also alive to the fact that allowing the disputed evidence will not prejudice the appellant who is expected to be aware of some of the evidence sought to be adduced especially being a relative of MO and having had prior knowledge of the dispute of whether the applicant is a grandson of MO or not, vide a claim that he is the son to FS, the son to MO.

45. I am further satisfied that the additional evidence is credible as it consists of official public documents written, issued and received in the course of public duty and that they originate from public offices having proper custody thereof. Their authenticity and veracity has not been impugned.

46. In my humble view, the additional evidence is intended to remove any vagueness or doubt over the relationship between the applicant and the deceased MO whose estate is Undergoing Succession. The evidence has direct bearing on the main issue in this pending appeal which is whether the Respondent is beneficially entitled to benefit from the estate of the deceased MO.

47. In the end, I am satisfied that substantially, the additional evidence sought to be adduced largely meets the criteria and guidelines laid out by the Supreme Court in the **Mohamed Abdi Mohamad Versus Ahmed Abdullahi Mohamed and 3 others (supra)** case. Accordingly, the Notice of Motion dated 27.2.2020 is found to be meritorious and is hereby allowed on the following terms:

(1) Leave be and is hereby granted to the applicant to adduce and file additional evidence limited to C002 – C009 annexed to the Supporting affidavit sworn by COO.

(2) The additional evidence be adduced by way of affidavit and be filed and served as supplementary record of appeal within 14 days of the date of this Ruling unless extended by this court.

(3) The Appellant to file a Replying Affidavit, if any, to the Supplementary Record of appeal within 14 days of date of service.

(4) The Appellant is at liberty to cross-examine the Respondent on the said additional evidence.

(5) Costs of the application to be in the appeal.

48. Orders accordingly.

Dated, Signed and Delivered at Siaya this 7th day of October, 2020

R.E. ABURILI

JUDGE

Delivered in the Open Court in the absence of parties due to power outage.

CA: Brenda