



**In re Estate of Late Hassan Mohamed Jillo alias Mamo alias Hapicha (Deceased)
(Succession Cause E009 of 2023) [2024] KEKC 32 (KLR) (15 April 2024) (Ruling)**

Neutral citation: [2024] KEKC 32 (KLR)

**REPUBLIC OF KENYA
IN THE KADHIS COURT AT MOYALE
SUCCESSION CAUSE E009 OF 2023
A GALGALO, PK
APRIL 15, 2024**

**IN THE MATTER OF ESTATE OF LATE HASSAN MOHAMED JILLO ALIAS
HASSAN MAMO JILLO ALIAS HAPICHA MAMO JILLO – DECEASED**

BETWEEN

QURESHO HASSAN MAMO PETITIONER

AND

ADAN HASSAN MAMO APPLICANT

RULING

1. The notice of motion dated 8th March 2024, brought under certificate of urgency, seeking court’s order allowing the applicant who is also the respondent herein to file supplementary list of documents dated 7th March 2024, and be deemed to be properly on record, and cost of the application.
2. The applicant relied on affidavit sworn by him in support of his prayers herein above. According to him the document is filtered mpesa statements indicating the amount which Quresho Hassan Mamo (petitioner / respondent) and Rahima Hassan Mamo have collected from him which was duly issued to the applicant. He claimed that he failed to inform his advocate on record about the above document's existence till 7th March 2024, the time he was to testify before the court.
3. He further claims that the same documents are not bulky; four paged mpesa statements, thus no difficulty in pursuing such statements which does not intend to introduce new information, it is in respect to the amount was being received by the petitioner / respondent and her sister. He further contends that the document is meant to corroborate documentary evidence which was duly produced and marked as “DEXH-3”
4. On the other side, the respondent / the petitioner opposes introduction of the mpesa statements obtained on 30th August 2023, by the applicant late after the close of pleadings and the petitioner has already closed her hearing and the respondent has taken stand testifying for him to seek to introduce



- this new evidence. She avers that the applicant was in custody of these statements, one month and 7 days before the close of pleadings on 7th November 2023 but chooses not to file it at all.
5. She argued that she does not have an avenue to testify and controvert this document now being sought to be produced and allowing such document after the close of petitioner’s case would be highly prejudicial to her case. She relied on provision of order 3, 7 and 11 of the civil procedure Rules 2010 and Article 50(2)(j) of the Constitution of Kenya does not allow the applicant a chance to file new evidence after close of plaintiff’s case and which should have been informed to the petitioner in advance of the same. Lastly, she sought the documents should not be introduced and the application herein should be dismissed with cost to the petitioner.
 6. This court has considered the application, the supporting and the replying affidavits. Now the question for determination is whether the instant application is merited. What does the law say on the introduction of new evidence after the closing of pleadings? Whether the said mpesa statements will mean to introduce information of new evidence to the pleadings, or whether it mean to corroborate the documentary evidence produced there before and which has been duly marked as “DEXH-3”?
 7. In supporting affidavit sworn by the applicant, he averred that he seeks to introduce mpesa statements of money he shared with the petitioner Quresho Hassan Mamo and her sister Rahima Hassan Mamo from the proceeds of the estate. He deposed that he erroneously failed to inform his advocate on record over the existence of the said mpesa statements till 7th March when he is to testify for his case. He further states that the Mpesa statements is meant to corroborate the documentary evidence which has been duly produced and marked as “DEXH-3” and does intend to introduce new evidence. He further said that the mpesa statement is not bulky and there will be no difficulty in pursuing it.
 8. In the reply, the affidavit by the respondent in opposition to the application herein, he deposed that the mpesa statements should not be introduced as evidence and application should be dismissed with cost to the petitioner who is also the respondent in the current application. she averred that the mpesa statements obtained on 30th August 2023, one month and 7 days before the close of the pleadings on 7th November 2023. She deposes that she does not have an avenue to testify and controvert such document hence allowing it after the close of petitioner’s case would be highly prejudicial to her case.
 9. She relied on provision of order 3, 7 and 11 of the civil procedure Rules 2010 does not give the applicant an avenue of filing new evidence after the closing of plaintiff’s / petitioner’s case.
 10. Article 50(2) (j) of the Constitution of Kenya requires that a party be informed in advance of the evidence that is intended to be used against them and have reasonable access to that evidence. She adds that she will have no opportunity to speak to the evidence sought to be produced this late into the proceedings considering they have closed their case, and the applicant has already taken the stand.
 11. It is noted that the application before this court was filed after the close of pleadings and after the petitioner has closed her case and respondent (the applicant) was to testify for his case. In determining this application, this court must find out why the said mpesa statements were not availed before the close of pleadings. It must be demonstrated that failure to avail this evidence was not deliberate. Considering this, this court can grant or decline to grant an order allowing introduction of this evidence.
 12. As to the contention of the applicant, the reason as why he failed to avail this evidence at the right time, was to his reason was an error from his part, as he failed to inform his advocate on record of the existence of such mpesa statements with him. He said that he has presented his own statements of money he shared with the petitioner Quresho Hassan Mamo and her sister Rahima Hassan Mamo, which the same they have already received.



13. He deponed that he only forgets to include the said mpesa statements to corroborate his filed statements on the same. He further said that he was to introduce the said mpesa statements at the hearing for his case to support his documentary evidence which he had already filed and marked for as “DEXH-3” before the close of pleadings but could not get the said mpesa statements on record.
14. As per the arguments of the opponent, the said mpesa was in custody of the applicant since 30th August 2023, and during the petitioner’s case hearing, thus she concludes that the respondent / applicant has choose not to file.
15. Apart from this sentiment she has not proved further on how he deliberately chose not to file the said evidence. While the applicant argues that he erroneously failed to inform his advocate on record, which failure was on his part may be due to lack of his knowledge or forgetfulness.
16. To the most considerate observation of this court the applicant has failed to introduce the said evidence at the required time, but on which intention of whether it was deliberate as contends by the petitioner or as claim by as not deliberate.
17. The contention of the petitioner is not yet satisfactorily demonstrated to this court. It is just an assumption based on the length of period stayed without bringing to be introduce into the record. Getting into the heart of someone and knowing his intention of doing certain things is not achievable.
18. It is only God who understand what is in the heart of someone, because he is the one who created the heart and the person, hence can know every intention of human being before he or she intend to do anything, but us human being we look to the action and saying of a man.
19. Although in most practice, people judge someone by his or her actions, despite every human being having the habit of being forgetful or lacking knowledge on a certain thing or even to his own thing of crucial importance. Therefore, giving benefits of human nature to the applicant case herein may be the applicant due to lack of his knowledge or being forgetful to inform his advocate on record about the introduction of the said mpesa evidence to be on record at the right time.
20. While at the same time on the other side the petitioner will have an opportunity to cross-examine the respondent / applicant on his evidence and even to seek further verification of the same for the purpose of fairness and justice pursuant to section 146(4) of the *Evidence Act* Cap 80 Laws of Kenya.
21. Section 44 of the *Kadhis’ Courts (Procedure and Practice) Rules* on amendments of pleadings, “The Court may at any stage of the proceedings, allow the parties to amend their pleadings as may be just and in the interest of a fair hearing. 2. An application for amendment may also be orally.”
22. Also, section 79 of the same *rules* stipulates conditions on which a matter may be reconsidered even after judgement or ruling, or order is issued. These conditions are;
23. Section 79, Reconsideration of a matter
 1. A person who is aggrieved by a judgment, ruling or an order from which an appeal is allowed but from which no appeal is preferred, may within reasonable time, apply for a reconsideration of the judgement, ruling or order; -
 - a) if there is discovery of new evidence, which after of due diligence, was not within the knowledge of that person or could be produced by that person at the time when judgement, ruling or order was made;
 - b) on account of some mistake or error apparent on the face of record;



- c) if the judgement, ruling or order requires clarification; or
- d) for any other sufficient reason.

24. Section 146(4) of the [Evidence Act](#) provides as hereunder: -

The court may in all cases permit a witness to be recalled either for further examination – in – chief or for further cross-examination, and if it does so, the parties have the right of further cross-examination and re-examination respectively.”

25. Likewise, Order 18 Rule 10 of [Civil Procedure Rules](#) provides that; -

The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the Court thinks fit.”

26. Article 50(1) of the [Constitution](#) guarantees every person the right to access a court of law for determination of dispute. In addition, Article 159(2) of the same [constitution](#), also mandates the court to administer justice without undue regard to procedural technicalities.

27. It is evident that the document sought to be introduced as evidence was obtained one month before the close of pleadings. There is no law that bars a party from obtaining evidence after a suit is filed in court. It is so because some evidence comes to the attention or knowledge or possession of parties even after the hearing of suit and it is on that ground that law under section 78 of [CPA](#) admits that additional evidence which can be adduced even on appeal. See [Hangover Kaakwacha Hotel Ltd v Philip Adundo & Leonard Adundo t/a Hangover Kaakwacha Hotel](#) [2022] eKLR.

28. About whether the petitioner / respondent would be prejudiced if the said evidence is admitted, she further does not demonstrate what prejudice would suffer if the said document were admitted. And if there is any such prejudice which is not demonstrated, this court has power to grant leave to respondent to file additional documents in her possession that may counter the document intended to be admitted in favour of the applicant.

29. In [Raila Odinga & others v IEBC & others Supreme Court of Kenya Presidential Petition No. 3, 4 and 5/2013](#) [2013] eKLR, the Supreme Court set principles applicable when deciding on application like this one, which states;

The parties have a duty to ensure they comply with their respective time – lines, and the Court must adhere to its own. There must be a fair and level playing field so that no party or the Court loses the time that he/she/it is entitled to, and no extra burden should be imposed on any party, or the Court, as a result of omissions, or inadvertences which were foreseeable or could have been avoided.

30. 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 or limited so that the other party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter. However, if the new material is so substantial involving not only a further affidavit but massive additional evidence, so 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 additional evidence.”



31. It is the responsibility of this court to accord all parties full opportunity to be heard and to ventilate their grievances and in this regard, to file the document that they intend to rely on during the hearing, unless it is demonstrated that the request is intended to delay the just and determination of the suit.
32. In this case, the applicant intends to introduce the mpesa statements as evidence in support of his documentary that was already filed. There is no evidence of intention to delay or frustrate the just determination as the document is four paged, no difficulty in pursuing and or responding to such or neither there is trial by ambush as the petitioner is aware of the specific claim over sharing them with the proceeds of the estate from the beginning of the suit. Further, should the applicant be allowed to file the instant document, it is still subjected to the rules of evidence.
33. For the above reasons, I hereby exercise discretion and invoke the overriding objective of the law in civil cases as stipulated in Sections 1A and 1B of the Civil Procedure Act and allow the applicant to introduce the mpesa statements as corroborative evidence on record and served on the petitioner and deemed as filed and form part of the documents rely on. Hearing of the suit to continue as scheduled on before on 18th April 2024. Each party bears their own cost.

DATED, DELIVERED AND SIGNED ON THIS COURT ON 15TH MARCH 2024.

HON. GALGALO ADAN

PRINCIPAL KADHI

In the absence of all parties.

