

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL APPEAL NO. E069 OF 2024

SAMUEL OUMA OLUOCH.....APPELLANT

-VERSUS-

QUINTER AYO O OMULO.....1ST RESPONDENT

KENYA INDUSTRIAL ESTATES LIMITED.....2ND RESPONDENT

RULING

1. The applicant has moved this Honourable Court for orders for introduction of additional evidence at this appellate stage of the proceedings that were initially initiated in the lower court. The prayers for these orders have been couched as follows:

“1.That this Honourable Court be pleased to grant leave to the Appellant to adduce the following documents as additional evidence in his appeal herein:

(i) A copy of the Statement of one JOSLINE FLORENCE ALUOCH made to the Police in relation to Police Case No. 343 of 2023 dated 01/04/23.

(ii) Directorate of Criminal Investigations Forensic Document Examiner's Report dated 23/05/2023.

(iii) Director of Public Prosecutions letter to the CCIO, Mombasa, dated 29th July, 2023.

(iv) A copy of Director of Public Prosecutions letter to Ag. Senior Assistant Director of Public Prosecutions, Coast, dated 27th August, 2024.

2. That this Honourable Court be pleased to admit the additional evidence by way of affidavit and the same be filed as a Supplementary Record of Appeal.”

2. The application is brought under sections 78 (1) (d), 1A, 18 and 3A of the Civil Procedure Act, Cap. 21; and, order 42, rule 27 and order 51, Rule 1 of the Civil Procedure Rules.
3. The appellant has sworn, in an affidavit in support of the application, that he has lately obtained documents, namely, criminal investigation documents emanating from the police, the Directorate of Criminal Investigations and the Director of Public Prosecution, relating to his case at the trial court and also this appeal.
4. According to the appellant, these documents, which are listed in his application “*were not ready and or available during the course of the hearing of the suit before the trial court or even after delivery, on 15th September, 2022, of the judgment being appealed from herein*”.
5. As a result, the applicant could not have obtained the new or additional evidence, with reasonable diligence, for presentation before the trial court. The applicant believes that the proposed new or additional evidence is directly relevant and material to the appeal before this

Honourable Court and may directly influence the outcome of his appeal.

He has sworn that the documents are credible and capable of verification.

6. Charity Ndeke, the 2nd respondent's manager for legal services, swore a replying affidavit opposing the application and stated that as much as the court has the discretion to admit documentary evidence at this appellate stage of the proceedings, the appellant has not met the threshold for the admission of fresh evidence.
7. According to the 2nd respondent, the documents in issue were obtained after the conclusion of the trial and, therefore, could not have influenced the outcome of the suit.
8. The 2nd respondent also contends that no explanation has been given why the documents were not included in the record of appeal yet they were in the appellant's possession when the appellant filed his appeal. In any case, the documents are said to relate to a criminal case in Mombasa Chief Magistrates Court Criminal Case No. 759 of 2019.
9. It has been sworn on behalf of the 2nd respondent that allowing the application would prejudice the 2nd respondent which prosecuted its defence based on the available evidence. The appellant's application, it is urged, is an attempt at piecemeal litigation, to cure the evidentiary shortcomings of the applicant's case.

10. Under section 78 (1)(d) of the Civil Procedure Act, cap. 21, this Honourable Court can take additional evidence in exercise of its appellate jurisdiction. This provision reads as follows:

78. Powers of appellate court

(1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power—

(a)...

(b)...

(c) ...

(d) to take additional evidence or to require the evidence to be taken;

(e) ...

11. Order 42 rule 27 also makes provision for production of additional evidence in an appellate court in limited circumstances. It states as follows:

27. Production of additional evidence in appellate court

(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.

12. Against this legal background, it is not in doubt that additional evidence can be admitted in the appellate court. However, the admission of additional evidence at this level is subject to two conditions; first, if the trial court declined to admit the evidence that ought to have been admitted in the first place; and, second, if the evidence is necessary for the appellate court to make a conclusive determination of the appeal or for “*any other substantial reason*”. What amounts to “*substantial reason*” will, of course, depend on the circumstances of each particular case.

13. These conditions imply that it is not in every case this Honourable Court will, in exercise of its appellate jurisdiction, admit additional evidence. The principles guiding admission of additional evidence were set out in **Ladd v. Marshall, [1954] 3 All ER 745 (Nov 29, 1954)** where the House of Lords held as follows:

“In order to justify the 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: second, 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.”

14. Speaking of the same principles, the same court in **Braddock v Tillotsons Newspapers Ltd - [1949] 2 All ER 306** held that:

“It has been the invariable practice of this court to confine the admission of fresh evidence in circumstances such as this to evidence which could not reasonably have been discovered before the trial and to evidence which, if believed, either would be conclusive or, as has been said by some judges, would lead to the reasonable probability that the verdict would have been different.”

15. And in **Brown v. Dean (1910 Appeal Cases at page 375, Lord Loreburn** said:

"When a litigant has obtained a judgment in a court of justice, whether it be a county court or one of the High Courts, he is by law entitled not to be deprived of that judgment without very solid grounds; and where (as in this case) the ground is the alleged discovery of new evidence, it must at least be such as is presumably to be believed, and if believed would be conclusive".

16. The rationale behind the restriction of fresh evidence at the appellate level was explained in *Braddock v Tillotsons Newspapers Ltd* (supra) in the following terms:

"There are two conflicting principles always operating in these matters. One is that everything should be done to ascertain the truth; the other is that there should be some finality in litigation, and, so far as possible, a reasonable limitation of costs. It is to achieve the latter result that it is necessary for the court to impose some limit to the re-opening of decided issues, even at the risk that injustice may result or that there is a possibility of injustice resulting."

17. Turning back to the appellant's application, it is made against the background of an alleged fraudulent execution by the 1st respondent of loan instruments, charging the applicant's property. To be precise, and according to the pleadings and affidavits filed in the lower court, the 1st respondent is said to have charged a property he owned, either jointly

owned or in equal shares, with the applicant for a loan of Kshs. 5,000,000/= borrowed from the 2nd respondent. According to the appellant, this transaction was executed behind his back with the 1st respondent forging the appellant's signature on the charge instruments, among other documents, submitted to the 2nd respondent for the processing of the loan.

18. The 1st respondent defaulted in the payment of the loan and, in exercise of its statutory power of sale, the 2nd respondent sought to auction the property to recover its loan. It is at this point that it dawned on the applicant that their property, which was described in the pleadings as Plot No. Mombasa/ MN/Block 2/596, had all along been charged. The applicant, therefore, filed a suit in the lower court seeking the following orders:

“a) A Declaration that the purported charge of the suit parcel of land known as Plot No. Mombasa/MN/Block 2/596, by the 1st Respondent to the 2nd is null and void ab-initio.

b) A declaration that the 1st defendant is only entitled to half share of the suit land known as Plot No. Mombasa/MN/Block 2/596 and other four bedroomed maisonette erected thereon.

c) A declaration that any sale, transfer, alienation of the suit parcel of land known as Plot No. Mombasa/MN/Block 2/596 pursuant to the charge above is null and void ab-initio.

d) The Registrar of Titles, Mombasa and the Provincial Surveyor Coast Region be ordered to cancel the title in respect of the suit land known as Plot No. Mombasa/MN/Block 2/596 and to resurvey the said parcel of land and curve out the plaintiff's half portion and have it registered in the plaintiff's name.

e) A permanent injunction restraining the defendants their agents, servants and/or any other person acting on their behalf from auctioning, selling, transferring and disposing off and or dealing in any manner with the suit parcel of land known as Plot No. Mombasa/MN/Block 2/596, Miritini Mombasa.”

The appellant also asked for costs of the suit.

19. The 2nd respondent disputed the appellant's claim and in her judgment, the learned magistrate agreed with the respondent and dismissed the appellant's suit. In dismissing the suit, the learned magistrate held, *inter alia*, as follows:

“The plaintiffs concern seems to be that the whole transaction was marred with secrecy and illegalities to the extent that although he did not sign anywhere to signify his consent, his signatures appear on the vital documents and an individual also appeared, misrepresenting herself as his wife.

Whereas he may be correct in his argument of non-involvement. the issue of fraud as raised need specific proof of each particular

involved. The plaintiff failed to call a handwriting examiner who would have unravelled the misty(sic) of another person signing the vital document as an impositor”.

The judgment was delivered on 1 September 2022.

20. According to an exhibit form (a copy of which is exhibited to the applicant’s affidavit in support of the instant application) from a government document examiner forwarding his report to the police on the examination of the handwriting on the charge documents, the appellant made a complaint of forgery to the police on 29 October 2022.

The exhibit memo read, in part, as follows:

“Precise of offences: It was reported by SAMUEL OUMA OLUOCH vide Ob. No. 11/29/10/2022 that his personal documents including his signature were forged and used to procure a loan from Kenya Industrial Estates Limited by his neighbor, madam QUINTER AYO O OMOLLO. He learned of the development when his house was about to be auctioned. Quinter also forged her house maid documents and used them as a wife to Mr. Samuel Ouma without her knowledge.”

21. The document examiner was to ascertain whether the signature on the charge documents was the appellant’s signature. According to her forensic report, the appellant did not sign the purported instruments and based on this information, the Director of Public Prosecutions directed

that the 1st respondent be charged with the offence of forgery contrary to section 340 of the Penal Code, cap. 63; uttering false document contrary to section 353 of the Penal Code; and, making a document without authority contrary to section 357 (a) of the Penal Code. The 1st respondent was eventually charged in Mombasa Chief Magistrates Criminal Case No. E1359 of 2024.

22. Apparently buoyed by this information, the applicant has sought to introduce, in this appeal, the evidence gathered after his complaint to the police and, crucially, after the judgment in his claim in the lower court has been delivered.

23. No doubt, as clearly pointed out in the learned magistrate's judgment, a document examiner's expert evidence on the veracity of the signature on the charge documents would have been critical to the outcome of the appellant's case if all that the appellant's claim was hinged upon was whether the charge documents were validly executed. In the words of the House of Lords in *Ladd v. Marshall*, (*supra*) this piece of evidence was "*such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive*" and, of course, subject to being tested by way of cross-examination, the evidence could be believed as credible.

24. The threshold that the appellant seems to have fallen short is failure to obtain the evidence when he could possibly obtain it; that is, based on the

material before court, this evidence could have been obtained before the trial or at least before the appellant's case was concluded. I say so because, as early as May 2019, before the suit in the magistrate's court was filed, the appellant was aware that his signature had been forged and that the 1st respondent had used forged documents to acquire a loan from the 2nd respondent. In an affidavit sworn by the applicant in support of an application for, *inter alia*, injunctive orders, the applicant stated as follows:

“14. That all these happenings were kept secret from me and I only became aware of them on 21st May 2019 when a notice of a public auction was given to a neighbour called Peter Malowa, who handed over the same to me and that is when became aware of the transaction and accosted the 1st respondent for answers which were not forthcoming.”

25. Yet it is only on 29 October 2022, more than three years down the line, after the judgment in the appellant's case had been delivered, that the applicant made a report to the police about the alleged fraud. In these circumstances, the applicant cannot be heard to say that the evidence he wishes to introduce at this appellate stage *“could not have been obtained with reasonable diligence for use at the trial.”* The applicant had the facts necessary to call for a document examiner's expert opinion on the signature or signatures of the charge instruments prior to or even after he

had instituted his suit. Failure to engage the document examiner at that early stage can only be attributed to the appellant's lack of reasonable diligence. If he had exercised such diligence, the appellant would have obtained the evidence he seeks to introduce in this appeal long before the trial of his suit in the trial court commenced. Certainly, the applicant did not have to wait for the judgment of the lower court for him to seek for the evidence necessary to prove his claim against the respondents.

26. For the reasons I have given, I find no merit in the applicant's application. The application is dismissed. Costs will abide the outcome of the appeal. Orders accordingly.

Signed, dated and delivered on 15 May 2026

Ngaah Jairus
JUDGE