



**Chege v Chege (Civil Appeal (Application) 198 of 2019)
[2024] KECA 241 (KLR) (8 March 2024) (Ruling)**

Neutral citation: [2024] KECA 241 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL (APPLICATION) 198 OF 2019
MSA MAKHANDIA, M NGUGI & PM GACHOKA, JJA
MARCH 8, 2024**

BETWEEN

EVANS MUTHEMBA CHEGE APPLICANT

AND

MARY WAITHERA CHEGE RESPONDENT

*(An application to adduce additional evidence in the pending appeal
against the Judgment and decree of the High Court of Kenya at Milimani
(Muchelule, J.) dated 24th January 2017) in Succession Cause No. 923 of 2012)*

RULING

1. The applicant seeks leave of court to file additional documentary evidence and such evidence be deemed to have been part of the evidence in the High Court so that the said evidence is taken into account in the determination of this appeal. The application is by way of a Notice of Motion dated 27th August 2019, filed pursuant to rule 29 (1)(b), (now rule 31 (1) (b)) of the [Court of Appeal Rules](#), and supported by an affidavit sworn on the same date by Evans Muthemba Chege, the applicant.
2. The grounds in support of the application are that the said documentary evidence was not adduced in the trial court through human error and was not admitted by the trial court, although it was referred to. As such, it was not considered by the trial court when rendering its determination, yet it was very crucial for the fair and just determination of the suit on merit. Similarly, the said evidence will assist this Court in properly determining the appeal. The reason for not adducing the evidence was due to human error as the documents were handed over to the applicant's advocate, but the said advocate failed to include the same in the bundle of documents presented in the trial court. That in the circumstances, the mistake of Counsel should not be visited on the applicant. The applicant further states that he discovered that the documents had not been produced as evidence while preparing the record of this appeal through a different advocate. The applicant avers that the evidence is of relevance to the issues in the appeal and the respondent will have no difficulty in responding to the same, and there will be no



injustice or prejudice caused by its admission. On the contrary, the applicant will suffer great prejudice if it is not admitted.

3. The applicant further states that in the proceedings, he referred to the said documents whilst testifying in court, though the trial court failed to ensure that the documents were properly admitted. He annexed copies of the documents he seeks to be admitted in the application, which are various applications for consent of Land Control Boards, certificate of official search dated 8th of August 2000, a copy of a letter of consent dated 7th September 2000, an application form to be registered as the proprietor by transmission for parcel number Kabete/L. Kabete 1998 dated 11th July 2011, copy of the green card for the said parcel of land, an application form to be registered as the proprietor by transmission for parcel numbers Kabete/L. Kabete 2003, 2004, 2005, 2006, 2007, 2008, 2022, 2123, 2127, 2650, and 2656 dated 11th July 2011 and its equivalent green card and lastly, a mutation form dated 15th May 2000.
4. The respondent filed a replying affidavit sworn by Irene Nguhi Chege, the co-administrator for the estate of Rachael Wambui Chege deceased dated 7th November 2023. She deposed that the decision of the High Court was that the properties in dispute namely Lower Kabete/2007 and Kabete/Lower Kabete/2008 be distributed equally to the beneficiaries. Further, the documents that the applicant wishes to adduce were always in his possession even during the trial and there was no reason why he did not ask his previous advocates to produce the documents once he realized that they had not been produced in the trial court. The respondent states that having changed his advocate whom he blames for failure to produce the documents, he nonetheless proceeded to file the appeal without raising the issue of the evidence that was not adduced immediately. Thus, the application was an afterthought intended to fill the gaps in his evidence in the trial court, and her interests will be affected if the application was to be allowed.
5. The applicant relied on his written submissions dated 3rd November 2023 in which he stated that he had satisfied the principles set out in section 29(1)(b) of this Court's Rules, and the guiding principles laid out by the Supreme Court in the case of *Hon. Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed and 3 Others* [2018] eKLR as regards adduction of fresh evidence. Further, the applicant relied on the case of Phyllis *Kariuki Njagi vs. Jane Waguama Njagi & Another* [2018] eKLR for the proposition that where there is sufficient explanation as to the commission of a mistake, the wrong should be excused by the court and a party be given an opportunity to adduce additional evidence. It would appear that the respondent did not file written submissions as none were on record.
6. The application is grounded on rule 29 of the *Court of Appeal Rules* which provides as follows:
 1. On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power –
 - a. to re-appraise the evidence and to draw inferences of fact; and
 - b. in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.
 2. When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the cross-examination of any deponent.
 3. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the Court, without any such statements of opinion.



4. The parties to the appeal shall be entitled to be present when such additional evidence is taken.
7. In the case of *Attorney General vs. Torino Enterprises Limited* [2019] eKLR, the court stated:

“13. In *Dorothy Nelima Wafula vs. Hellen Nekesa Nielsen and Paul Fredrick Nelson* [2017] eKLR, it was expressed 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.”

The Supreme Court of Kenya in *Hon. Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamed and 3 Others* (*supra*), reiterated the above principles and emphasized and stressed that additional evidence at the appellate level should be allowed on a case-by-case basis and even then sparingly and with abundant caution.

8. We have considered the additional evidence sought to be adduced by the applicant and note that it consists of correspondence and documents relating to the subdivisions and transfer of the aforesaid parcels of land from the parties’ deceased mother to the children, among them, the applicant. The documents the applicant agreed were always available and in his possession at the time of the filing of the suit and its prosecution, hence they were not new. They were even referred to during the hearing of the cause, though not formally tendered in evidence. Had the applicant exercised due diligence as required, he would have been able to tender the evidence during the hearing of the case. Further, the issue of transfers of the properties was never an issue before the trial court. We do not think, therefore, that the evidence being presented would have changed the decision of the trial court. The documents do not show any title that had been issued in respect of the disputed parcels even during the lifetime of their deceased mother when some documents were signed. Some of the documents sought to be adduced as additional evidence were signed by the deceased, raising doubt as to their authenticity.
9. The totality of this analysis is that there has been no demonstration of sufficient reason to warrant the grant of the application before us. In our view, no exceptional circumstances have been demonstrated to warrant the grant of the orders sought, and we, therefore, find no merit in the application. It is accordingly dismissed. Costs shall abide the outcome of the main appeal.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH 2024.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

MUMBI NGUGI



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JUDGE OF APPEAL

M. GACHOKA CIArb., FCIArb.

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JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR

