



REPUBLIC OF KENYA



KENYA LAW
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**Chege v Serwin & 4 others (Civil Application E068 of 2023)
[2024] KECA 365 (KLR) (12 April 2024) (Ruling)**

Neutral citation: [2024] KECA 365 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E068 OF 2023
DK MUSINGA, K M'INOTI & M NGUGI, JJA
APRIL 12, 2024**

BETWEEN

STEPHEN GITHAE CHEGE APPLICANT

AND

LEPEYOK SERWIN 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

COUNTY GOVERNMENT OF NAIROBI 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

ROCKLIGHT VENTURES LTD 5TH RESPONDENT

*(Application for leave to adduce further evidence in an appeal from the
Judgment and Decree of the Environment and Land Court at Nairobi,
(Wabwoto, J.) dated 20th December 2022 in ELCC No. 030 of 2021 (OS))*

RULING

1. In the motion on notice before us dated 3rd April 2023, the applicant, Stephen Chege Githae, seeks leave to adduce further evidence in an appeal pending for hearing before the Court. For reasons that are not clear to us, the application is purportedly taken out under rule 29 of the [Court of Appeal Rules, 2010](#). The 2010 Rules are no longer in force, having been superseded by the current [Court of Appeal Rules, 2022](#), which have been in force since 8th July 2022. Since none of the respondents raised any issue in that regard, however, we shall treat the application as made under rule 31 of the [Court of Appeal Rules 2022](#).
2. The short background to the application is as follows. On 9th August 2021, the applicant filed against the respondents in the Environment and Land Court at Nairobi an originating summons, which was



amended on 12th October 2021, seeking a declaration that he was entitled, through adverse possession, to be registered as the owner of the property known as LR No. 209/2389/145 (the suit property). The applicant also prayed for an order of injunction to restrain the respondents from transferring or otherwise interfering with his occupation of the suit property. He averred that he had been in exclusive and peaceful possession of the suit property since 1993. In a replying affidavit sworn on 10th December 2021, Pulli Serwin, one of the administrators of the estate of the 1st respondent (Lepeyok Serwin, deceased), deposed that the 1st respondent died on 2nd March 1991 in the current Trans Nzoia County and that he and another obtained a grant of letters of administration of the estate of the deceased, which grant was confirmed on 29th August 2017. He added that the suit property formed part of the estate of the deceased and on it were constructed residential apartments, which were leased out to rent-paying tenants. He further averred that the applicant, who was a stranger to him, could not have been in occupation of the suit property, which in any event, no longer formed part of the estate of the deceased, having been sold and transferred to the 5th respondent, Rocklight Ventures Ltd. on 26th July 2019.

3. The 3rd respondent, the County Government of Nairobi, filed grounds of opposition dated 10th September 2021 contending that the applicant's suit did not disclose any cause of action against it. Similarly, the 2nd respondent (the Land Registrar) and the 4th respondent (the Attorney General) opposed the summons vide a replying affidavit sworn by C. K. Ng'etich, Land Registrar, on 14th December 2021. These respondents maintained that the applicant's suit did not disclose any cause of action against them. The Land Registrar averred that the suit property was initially registered in the name of the deceased but upon his demise, the same was registered in the names of the administrators of his estate, who sold and transferred the same to the 5th respondent.
4. Lastly, the 5th respondent opposed the summons vide a replying affidavit sworn on 10th December 2021 by one of its directors, Mr. Rajan Rajnikant Dhanani, who confirmed that the suit property was indeed transferred to the 5th respondent and that on it were residential apartments occupied by tenants. Further, he deposed that the tenants received notices to vacate the suit property, which was eventually sold with vacant possession. He added that the applicant was a stranger to the 5th respondent and was not in possession or occupation of the suit property.
5. The applicant was the only witness in support of his case. The substance of his evidence was that the deceased employed him as a gardener on the suit property in 1993. In 1997, the deceased left the suit property and was never heard of again. In the meantime, the applicant and his family continued in peaceful and interrupted occupation of the suit property and he was neither aware of the death of the deceased nor of any sale and transfer of the suit property.
6. In a judgment dated 20th December 2022, the trial court found that from the death certificate produced in evidence, the deceased died on 2nd March 1991 and that the applicant had failed to adduce evidence of the person he purported to deal with in 1993. The court found that the applicant's case was unbelievable because he could not have dealt in 1993 with a person who had died two years previously. Further, the court found that if it was to somehow accept that the applicant entered the suit property in 1993, he was there as an employee. Accordingly, the court dismissed the applicant's suit but directed each party to bear their own costs.
7. The applicant was aggrieved and lodged an appeal, followed by the application now before us for leave to adduce further evidence. As far as we can surmise, the further evidence that the applicant wishes to adduce is correspondence that he contends cast doubt on the authenticity of the deceased's death certificate. In his submissions, the applicant argued that the intended evidence is crucial and was never produced in the trial court. To shut out that evidence would be prejudicial to him, while allowing the same to be adduced would not be prejudicial to the respondents. It was in the interest of justice to admit



the additional evidence to assist the Court to establish the truth. It was the applicant's contention that he did not have the additional evidence at the time of the hearing before the trial court because the court file on the deceased's succession cause was missing from the registry. He added that the deceased's death certificate was produced as an annexure to submissions and that he did not have an opportunity to verify its authenticity. Asked by the Court whether it was his case that the deceased was not dead, the applicant replied that the death of the deceased was not contested.

8. The 1st and 5th respondents filed written submissions dated 16th June 2023 and 14th June 2023, respectively. Those submissions raise the same issues, namely, that the applicant had failed to identify with clarity the additional evidence that he wished to adduce.
9. These respondents also contended that the applicant had not shown any exceptional circumstances or sufficient cause to justify reception of new evidence at the appellate stage. They contended that, with due diligence, the applicant could easily have obtained information about the deceased's death certificate because the trial court ordered production of the death certificate on 2nd June 2022 and the same was produced by the 4th respondent with leave of the court. Equally, they contended, the succession file regarding the deceased's estate was available in the High Court. Lastly, it was contended that the applicant had failed to show that the new evidence would have important influence on the outcome of the case, having admitted that he was on the suit property as an employee of the deceased.
10. The 2nd and 4th respondents relied on submissions dated 6th December 2023. It was contended that the main issue before the trial court was adverse possession rather than the death of the deceased and that the applicant was not diligent because he had sufficient time to conduct whatever investigations he deemed necessary. The 3rd respondent neither filed submissions nor appeared for the hearing, although its counsel was duly served with the hearing notice.
11. We have carefully considered this application. Rule 31(1)(b) of the [Court of Appeal Rules, 2022](#), permits this Court, at its discretion and for sufficient reason, to admit additional evidence when hearing an appeal from a decision of a superior court acting in the exercise of its original jurisdiction. In [Dorothy Nelima Wafula v. Hellen Nekesa Nielsen & Another](#), CA (Application) No. 50 of 2016, the Court explained the rationale of the rule as follows:

“Although under the provisions of Article 164(3) of [the Constitution](#) and section 3(1) of the [Appellate Jurisdiction Act](#) this Court's powers are limited to hearing of appeals, because, in the scheme of our law and procedure, parties are expected to present their evidence before the trial courts, rule 29 (1) (b) aforesaid, however recognises that situations may arise making it imperative for a party to introduce new evidence even at an appeal stage.”

12. However, in [Wanje & Others v. Saikwa](#) [1984] KLR 275 Chesoni, JA. (as he then was) sounded the following caution as regards adducing further evidence in the appellate court:

“This rule is not intended to enable a 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. The rule does not authorise the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the 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.”

13. In *Mobamed Abdi Mohamud v. Ahmed Abdullahi Mohamad & 3 Others* [2018] eKLR, the Supreme Court emphasised that additional evidence is to be allowed sparingly, in exceptional circumstances, and on a case-by-case basis. The Supreme Court laid down the following principles to guide applications for adducing further evidence:
- a. the additional evidence must be directly relevant to the matter before the court and be in the interests 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 must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial, was not 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. it must be capable of removing any vagueness or doubt over the case and have a 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;
 - h. if the evidence discloses a strong prima facie case of willful deception of the Court;
 - i. the evidence must be needful and should not be for the purposes of removing lacunae and filling gaps in evidence.
 - j. the evidence is not intended to enable an unsuccessful party at the trial to make a fresh case on appeal, fill up omissions or patch up the weak points in his or her case.
 - k. 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.
14. We agree with the 1st and 5th respondents that the applicant has not precisely identified the evidence he wishes to adduce as additional evidence. Presumably the evidence is the copies of correspondence annexed to the affidavit in support of the application, namely, letters from the applicant’s advocates and replies thereto. There is a letter dated 19th January 2023 addressed to the Deputy Registrar, High Court, inquiring about the certificate of confirmation of grant. There is also a letter dated 6th February 2023 addressed to the Registrar of Births and Deaths inquiring about the deceased’s death certificate. The State Department for Interior and Citizen Services responded to that letter on 13th February 2023 and advised the applicant to make inquiries in the District. On 24th February 2023, the applicant made the inquiry at the District and on the same day the County Civil Registrar, Trans Nzoia, replied and indicated that he was not able to trace the records. Presumably that is the evidence that the applicant wishes to adduce.
15. What is evidently clear is that the applicant made effort to obtain the evidence two months or so after the trial court delivered its judgment. Although the applicant claims that the deceased’s succession cause file was missing from the registry, he has not disclosed when he got that information or any efforts



that he made to get the file during the pendency of the matter before the trial court. There is no iota of evidence from the Deputy Registrar confirming that the file was ever missing. On the contrary, when the applicant made inquiries from the Deputy Registrar on 6th February 2023, he obtained a prompt response, suggesting that the file was readily available.

16. From the record, the 1st respondent deponed to the death of the deceased and succession to his estate in the replying affidavit sworn on 10th December 2021. In that affidavit, the 1st respondent also stated the date when the deceased died and when the grant was confirmed. All along, the applicant was therefore aware of the death of the deceased and the existence of the succession cause. With due diligence, he could have easily obtained all the relevant information and presented it before the trial court. Instead, he waited until after the judgment to look for the evidence. We are persuaded that what is before us is a classic case of a desperate attempt to patch up a case and fill gaps after judgment. That is not a legitimate use of rule 31.
17. We also seriously doubt the value of the evidence that the applicant wishes to adduce. In none of the 15 grounds of appeal in his memorandum of appeal does the applicant challenge the decision of the trial court as regards the death of the deceased or the date of that death. Indeed, when asked by the Court, he answered that the death of the deceased is not contested. But more importantly, the letters from the County Civil Registrar and the State Department of Interior and Citizen Services merely state that the records cannot be traced in their offices. They do not question the authenticity of the deceased's death certificate. In our view, the records could be missing for a myriad of legitimate reasons.
18. From the foregoing, we reach the inevitable conclusion that the existence of the evidence that the applicant seeks to adduce was well within his knowledge; that the evidence was available and could have been obtained by reasonable diligence for use at the trial court; that
19. the evidence is however, not directly relevant and will not advance the appellant's appeal on adverse possession as framed in the memorandum of appeal; and that the evidence in question does not point to any willful deception of the Court on the part of the respondents.
20. Accordingly, this application has no merit and the same is hereby dismissed with costs to the 1st, 2nd, 4th and 5th respondents. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL, 2024.

D. K. MUSINGA, (P).

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

