



REPUBLIC OF KENYA



KENYA LAW
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**Mutungi v Fep Sacco Society Limited & 2 others (Civil Application
E109 of 2021) [2023] KECA 4 (KLR) (20 January 2023) (Ruling)**

Neutral citation: [2023] KECA 4 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E109 OF 2021**

**JW LESSIT, JA
JANUARY 20, 2023**

BETWEEN

CLAUDIA MUENI MUTUNGI APPLICANT

AND

FEP SACCO SOCIETY LIMITED 1ST RESPONDENT

SUSAN KIAMBATI 2ND RESPONDENT

SACCO SOCIETIES REGULATORY AUTHORITY 3RD RESPONDENT

(An application to introduce additional evidence in the pending appeal and to file a supplementary record of appeal from the ruling and the ensuing orders of the High Court at Mombasa (Njoki Mwangi, J) given on 19th March, 2021 in HC Civil Case No. 52 of 2020)

RULING

1. This is an application by Claudia Mueni Mutungi, the applicant, seeking leave pursuant to Rule 31 (1)(b) and Rule 31 (2) of the [Rules](#) of this Court, 2022. She seeks two substantive prayers:
 1. That the appellant be granted leave to introduce additional evidence in this appeal being Forensic ocument Examination Report dated 29th January 2021 and Exhibit Memo Form dated 9th December 2020.
 2. That upon being granting prayer (1) hereinabove, the Forensic Document Examination Report dated 29th January 2021 and Exhibit Memo Form dated 9th December 2020 be admitted by way of an affidavit and be filed in the pending appeal as a Supplementary Record of Appeal.
 3. That the Supplementary Record of Appeal be deemed as duly filed upon payment of the requisite filing fees or as the Court of Appeal shall direct.
 4. Costs of this application abide the result of the substantive appeal.



2. The background of this application is that the applicant filed a suit by way of a plaint before the High Court, seeking inter alia declaration that the applicant was not a member of the 1st respondent. In response to the suit, the 1st and 2nd respondents attached Membership Application Forms dated 2nd December 2019 as proof the appellant applied to be a member of the 1st respondent. The appellant filed a supplementary affidavit contesting ever making the application or signing the Membership Application Forms dated 2nd December 2019.

A Preliminary point was taken on the issue of the appellant's Membership to the 1st respondent in an application before the High Court. The High Court delivered a ruling on that preliminary point on 19th March 2021, finding that the appellant was a member of the 1st respondent relying on the Membership Application Forms adduced by the 1st respondent.

3. In the meantime, the Director of Criminal Investigations in conjunction with the Banking Fraud Investigations Unit, at Mombasa completed the forensic examination of the Membership Application Forms dated 2nd December, 2020 and concluded it through a Forensic Document Examination Report, in which it found that the appellant neither authored nor signed the Membership Application Forms dated 2nd December 2019. That is the basis of the instant application, for leave to adduce additional evidence in the form of the Forensic Document Examination Report and the Exhibit Memo Form.

4. The application came up for virtual hearing before me on the 6th December 2022. In attendance was learned counsel Mr. Omondi Okothe, who was also ready to argue his application. Also present was learned counsel Mr. Jeremiah Were for the 3rd respondent. Mr. Chimei, learned counsel for the 1st and 2nd respondents was dully served with the hearing notice on the 21st November 2022 but did not attend.

5. Mr. Were in a short address submitted that the 3rd respondent had not filed any documents; and that it was leaving it to the Court to decide.

6. Mr. Omondi relied on his filed written submissions dated 29th November 2022, his list and bundle of documents. He urged that the application was unopposed and urged the Court to allow it. As a basis of his application, Mr. Omondi submitted that the question as to whether the appellant was a member of the 1st respondent was in dispute. He relied on the Supreme Court Case of *Mohamed Abdi Mahamud vs. Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR on the principles for introducing additional evidence in appellate Courts in Kenya. Counsel urged that the High Court determined the Preliminary point of the appellant's membership to the 1st respondent before the Forensic Report was concluded; that had the Report been presented to the High Court it could have come to a different conclusion.

7. I have considered the application, the documents filed therein together with the Report relied on and submissions of Mr. Omondi. The application is unopposed. The Supreme Court of Kenya case the appellant referred to of *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamed & 3 Others* (2018) eKLR set down the principles applicable to an application seeking to adduce additional evidence before an appellate court thus:

- “(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 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) Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has 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;
- (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) where 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 filling gaps in evidence. The Court must find the further evidence needful.
- (j) A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/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.”

- 8. I have considered the application and the evidence that has supported this application and I am satisfied that the additional evidence is directly relevant to the matter before the court and is in the interest of justice;
- 9. I am also satisfied that the evidence is such that, if given, it impact upon the result of the verdict. The appellant has demonstrated that she could not have obtained the additional evidence, more particularly the Forensic Report, sought to be adduced with reasonable diligence for use at the trial as the Report had not been concluded and so could not have been produced at the time of the suit or petition by the appellant.
- 10. The appellant has shown that the additional evidence sought to be adduced will remove any vagueness or doubt over the case and has a direct bearing on the main issue in the suit. The evidence is a Forensic Report by a government agency and therefore I am satisfied that the evidence is credible and is capable of belief. The additional evidence is a Report on a single form and is therefore not so voluminous as to make it difficult or impossible for the other party to respond effectively.
- 11. The appellant has shown that the additional evidence sought to be produced was is a Report that was concluded on 29th January 2021, while the proceedings that are the subject matter of the appeal were completed on 19th January 2020 and ruling delivered on 19th March 2021. It is clear that the appellant



could not 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.

12. Having considered the supporting evidence, I am satisfied that the additional evidence will not be utilized for the purpose of removing lacunae and filling gaps in evidence but in its very nature it is needful for the court purpose.
13. I have examined the additional evidence intended to be adduced and am satisfied that the appellant who has been unsuccessful at the trial is not not seeking to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in her case.
14. Finally, even though this application was not contested, nevertheless I considered the proportionality and prejudice of allowing the additional evidence. I find that from its very nature, having the evidence adduced at the appeal will not cause any prejudice to any party. As shown herein the additional evidence is a Report prepared by a government agency. Additionally, at the hearing of the Preliminary application at the High Court, the appellant disclosed that she had referred the matter of the Membership Application Form to the police. However, the Court proceeded to hear the matter without waiting for the Report. In that regard, the respondents were put on notice that there was such a Report in the offing. In the circumstances, I find that in regard to proportionality it tilts in favour of the application sought being granted. As to the prejudice, it is the appellant who will be unfairly prejudiced if the additional evidence is not allowed, for the reasons stated above.
15. The result is that the application dated 15th August 2022 is merited and is allowed in the following terms:
 1. That the appellant be and is hereby granted leave to introduce additional evidence in this appeal being Forensic Document Examination Report dated 29th January 2021 and Exhibit Memo Form dated 9th December 2020.
 2. That the Forensic Document Examination Report dated 29th January 2021 and Exhibit Memo Form dated 9th December 2020 be and are hereby admitted by way of an affidavit and be filed in the pending appeal as a Supplementary Record of Appeal.
 3. That the Supplementary Record of Appeal be deemed as duly filed upon payment of the requisite filing fees, and in any event be filled within 30 days from the date of this ruling, and served upon the respondents within 14 days from the date of filing of the Supplementary Record of Appeal.
 4. Costs of this application abide the result of the substantive appeal.

DATED AND DELIVERED AT MOMBASA THIS 20TH DAY OF JANUARY, 2023.

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

