



**Vinayak v Singh & 2 others (Civil Appeal (Application)
175 of 2017) [2023] KECA 74 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 74 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 175 OF 2017
HA OMONDI, KI LAIBUTA & PM GACHOKA, JJA
FEBRUARY 3, 2023**

BETWEEN

SUNIL VINAYAK APPLICANT

AND

SANTOKH SINGH MOOL SINGH 1ST RESPONDENT

MANRANJAN SINGH SANTOKH SINGH 2ND RESPONDENT

SARAVPAL SINGH SANTOKH SINGH 3RD RESPONDENT

(Being an application for admission of additional evidence in an appeal from the Judgment of the Environment and Land Court of Kenya at Nairobi (Mary M. Gitumbi, J.) delivered on 7th April 2017 in E.L.C Case No. 32 Of 2014)

RULING

1. The applicant, Dr Sunil Vinayak, moved this Court by way of a notice of motion dated July 6, 2017 under Rules 29 and 47, now Rules 31 and 49 of the [Court of Appeal Rules](#), 2022 praying that he be allowed to submit additional evidence for consideration in the appeal.
2. The additional evidence sought to be adduced in the appeal is a complaint raised by the respondents against the Hon Lady Justice M Gitumbi during the trial in Nairobi ELC No 32 of 2014 in which the learned Judge delivered the impugned judgment.
3. The applicant's Motion is supported by his annexed affidavit sworn on July 6, 2017, and is made on 7 grounds set out on the face of the Motion, but which we need not replicate here. Suffice it to state in summary: that he lodged the appeal from the judgment/order of the ELC at Nairobi by Lady Justice Mary M Gitumbi dated April 7, 2017 in ELC No 32 of 2014; that he subsequently discovered that the respondents had lodged a formal complaint against the trial Judge during the trial; that he had no notice of the complaint during the trial or at any time thereafter; that the Hon. Judge's conduct since



the time the complaint was made appeared to the applicant to be biased in the manner in which she conducted the applicant's case; that the facts and circumstances of his case required impartiality and transparency by the court; and that the applicant wishes to have the additional evidence admitted and considered during the appeal. He asks us to allow his application as prayed.

4. The applicant's Motion is opposed by the respondents *vide* the 3rd respondent's replying affidavit sworn on September 5, 2019. According to the 3rd respondent, Saravpal Singh Santokh Singh: the applicant has not stated the exact nature of the evidence sought to be adduced; the applicant relies on conjecture to impute bias on the part of the judiciary; the complaint in issue and the internal correspondence with the judiciary are part of the court record, which have no bearing on the appeal; the applicant has not demonstrated that the additional evidence sought to be adduced is fresh, or that such evidence would have an impact on the determination of the appeal; and that, in any event, the appeal has been overtaken by events in that the applicant has been evicted from the suit property of which he is neither the owner nor a claimant in that regard. He prays that the application be dismissed with costs to the respondents.

5. Rule 31 of this Court's Rules reads in part:

- “ 31. Power to re-appraise evidence and to take additional evidence
1. On an 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 and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court”

6. Taking into mind the principles applicable to our exercise of the discretion to allow or decline leave to adduce additional evidence on appeal, we take note of the following facts: that the applicant had all along made no complaint about the conduct of the learned Judge; that the formal complaint alluded to was made by the respondents during the trial; that the applicant participated in the trial until its conclusion and delivery of judgment; that the complaint alluded to came to his notice long after he had lodged his appeal herein; and that the Judge's conduct complained of was not the subject matter of the dispute at the trial or in the appeal herein, save for the respondents' complaint that the suit had taken far too long to determine.

7. In *Mohamed Abdi Mohamed vs Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR, the Supreme Court laid out the guidelines on admission of additional evidence. The Court stated as follows:

“Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, in exceptional circumstances and on a case by case basis exercise our discretion and call for and allow additional evidence to be adduced before us. We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

- 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 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 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. whether 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;
 - j. the Court must find the further evidence needful;
 - k. A Party who has been unsuccessful at the trial must not seek to adduce additional evidence to make a fresh case on appeal, fill up the Omissions or patch up the weak points in his/her case.”
8. In every case, 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. It is also instructive that, even with the application of the foregoing principles, the Court would only allow additional evidence on a case-by-case basis and, even then, sparingly, with abundant caution.
9. There isn’t much to say of the evidence sought to be adduced by the applicant in support of his allegations of bias on the part of the trial Judge. Suffice it to observe that the formal complaint alluded to was neither in issue at the trial nor a ground of appeal; that the complaint is not directly relevant to the matter before the Court; that it is not in the interest of justice that the conduct of a Judge be the subject of trial on appeal; that even if the complaint in issue were to be canvassed on appeal, it would not influence or impact upon the result of the verdict; that, in any event, the formal complaint comprised part of the record of the trial court and could have been obtained with reasonable diligence or raised at the trial; and that the evidence of the complaint against the trial Judge has no bearing on the main issue in the appeal. Put differently, it is of no significance to the appeal.
10. In conclusion, we find that the appellant’s Motion fails and is hereby dismissed with costs to the respondents.

Dated and Delivered at Nairobi this 3rd day of February, 2023.

H. A. OMONDI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA – CI Arb, FCIARB

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

