



**EO & 2 others v JOSY (Civil Appeal (Application) E027 of 2020)
[2023] KECA 254 (KLR) (17 March 2023) (Ruling)**

Neutral citation: [2023] KECA 254 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E027 OF 2020
GV ODUNGA, JA
MARCH 17, 2023**

BETWEEN

**EO 1ST APPELLANT
JZO 2ND APPELLANT
TO 3RD APPELLANT**

AND

JOSY RESPONDENT

(Appeal against the whole Judgement/Ruling and Decree arising from the Judgement/Ruling of the High Court at Mombasa by Hon. Lady Justice M. Thande delivered virtually on the 9th Day of October, 2020 in HCCC No. 2 of 2014)

RULING

1. By a Motion on Notice dated July 8, 2022, the Applicants herein, who are the Appellants, in the main appeal seek an order that this Court be pleased to admit an additional evidence (ie, a certified copy of Entry of marriage No MXJ 3xxxxx8 from the General Register office issued on December 9, 2021 England and Wales in respect of the Respondent's marriage) during the hearing and determination of the Appeal.
2. According to the applicants, the trial court in its Ruling/Judgement delivered on October 9, 2020, which the subject of this appeal, found that there was a presumption of marriage between the Respondent herein and RO (Deceased) and in so doing deduced that the Respondent had capacity to marry at that time.
3. However, the Appellants, upon conducting their investigations, discovered through Certified copy of Entry of Marriage MXJ 3xxxxx8 dated December 2021 in the District of Hackney the General Registrar's office in England and Wales that the Respondent contracted a marriage in 1982 which



was solemnised as St. Paul's Church with one THR (the third party). It was therefore the Applicants' case that it is in the interest of justice that this application be allowed as the said presumption is now being relied upon by the Respondent as the basis for laying claim to the Estate of the deceased. The Applicants averred that though the presumption of marriage did not form part of the prayers before the trial court, the same was determined and is now part of the record.

4. In response to the application, the Respondent who opposed the same, while admitting that he celebrated a marriage ceremony and was issued with the certificate of marriage relied upon by the Applicants, averred that the said marriage was dissolved sometimes in 1984 or 1985 and that this fact would be demonstrated at the hearing of the appeal should the Applicants be allowed to adduce the new evidence.
5. At the virtual hearing of this application Learned Counsel, Mr Charles Onyango appeared with Mr Magani for the Applicants while Mr Odhiambo appeared for the Respondent. Both parties filed written submissions which they highlighted. According to Mr Onyango the new evidence will show that at the time the Respondent was found to have been married to the deceased, the Respondent was married to a third party hence lacked the capacity to be presumed to have been married to the deceased herein. That issue, he submitted, may have tremendous impact on the direction of the case. To learned counsel, the issue of the authenticity of the alleged certificate of dissolution of the marriage between the Respondent and the said third party can only be resolved at the hearing.
6. On his part, Mr Odhiambo submitted that the said evidence will not be helpful as the Respondent has rebutted of the marriage as the same was dissolved. It was his case that the said evidence could have been obtained had the Applicants been diligent.

Determination

7. I have considered the application, the affidavits in support of and in opposition to the application, the submissions made and the authorities relied upon.
8. Under Rule 29 of the *Court of Appeal Rules, 2010* (now Rule 31 of the 2022 edition of the said *Rules*), this Court has the power in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court. Such additional evidence if by this Court, may be taken orally or by affidavit and the Court may allow the cross examination of any deponent. Where the said evidence is to be taken by the trial court, that court shall certify such evidence to this Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence. Where, however, the evidence is taken by a commissioner, the commissioner shall certify the evidence to the Court, without any such statements of opinion. The provision provides that each party to the appeal shall be entitled to be present when the additional evidence is taken.
9. The section, however does not provide for the grounds upon which the court ought to exercise its discretion in allowing additional evidence to be taken. This has, however, is now well established by judicial pronouncements. In *Aga Khan Hospital v Busan Munyambu* KAR 378; [1976-1985] EA 3; [1985] KLR 127 this held that:

“On any appeal from the decision of a Superior Court sitting in the exercise of its original jurisdiction, the Court of Appeal has the power, in its discretion, for sufficient reason, to take additional evidence. There must be an affidavit in support of the application attesting that the evidence sought to be called was not available at the trial, is relevant to the issue in appeal, is credible, in the sense that it is capable of belief and, in all the circumstances, in the interest of justice the application should be allowed. In a civil appeal, except on grounds of fraud or surprise, generally leave will only be granted if the evidence could not,



with reasonable diligence, have been obtained for use at the trial, if it will probably have an important influence on the result of the appeal, and is apparently credible, though it need not be uncontroversial. It will be admitted if some assumption basic to both sides has been clearly falsified by subsequent events and to refuse the application would affront common sense or a sense of justice.”

10. In *GM Combined (U) Ltd v AK Detergent Ltd & others* [1999] 1 EA 84, it was held that:

“Justice must be administered according to the law and it is well settled that additional evidence is taken on appeal in exceptional circumstances and the exceptional circumstances are usually that the evidence was not available at the time of the trial or could not have been obtained using reasonable diligence and that the evidence is credible and likely to influence that result of the case.”

11. In *Joginder Auto Services Ltd v Shaffique & another* [2001] KLR 97 this court held that:

“The power of the Court and more particularly the Court of Appeal, to receive further evidence is discretionary, which discretion is exercised on the broad principles, namely:

1. The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial
2. The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and
3. The evidence must be apparently credible, although it need not be incontrovertible.

These are general principles but are not the only ones since the relevant rule authorising the adduction of additional evidence uses a general phrase, namely, “sufficient reason”. Surprise or fraud are grounds upon which further evidence may be admitted. Fraud is a false representation by means of a statement or conduct made knowingly or recklessly in order to gain a material advantage. What is reasonable depends on the facts and circumstances of each case as the Court, in cases of this nature, is exercising discretionary jurisdiction. The discretion has to be exercised bearing in mind, where applicable as here, that a party who has been shown to have acted in such a way as to take advantage over another should as far as possible not be allowed to take full benefit of his wrong.”

12. According to Chesoni, AJA in *Mzee Wanje & 93 Others v AK Saikwa* (*supra*) the rule:

“...gives the court power on any appeal from a decision of a Superior Court acting in the exercise of its original jurisdiction, in its discretion, for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court. The rule requires the applicant to establish sufficient reason for receipt of such further evidence, and the court can exercise the discretion to receive further evidence only after sufficient reason has been shown. The principles that guide the court in deciding whether or not to receive additional evidence are (i) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial (ii) 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 (iii) 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...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. The Supreme Court summarised the said grounds in *Kanyuira v Kenya Airports Authority* (Petition 7 of 2017) [2021] KESC 7 (KLR) (Civ) (8 October 2021) (Ruling) where the Court expressed itself, *inter alia*, as follows:

“In paragraph 79 of our Ruling in the Mohamed Abdi Mahamud case (*supra*), the court declared the circumstances under which additional evidence may be admitted, expanding three-part test in *Ladd v Marshall* [*supra*] as follows;

“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 would 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 made aware of and procured the further evidence in the course of the 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 the 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 the 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.’

The court also stressed that, in exercise of its absolute discretion, it will only allow additional evidence sparingly and with abundant caution on a case-by-case basis.”

14. I will therefore determine this application based on the above tests. On whether the additional evidence is directly relevant to the matter before the court and is in the interest of justice, the issue of presumption of marriage is clearly relevant to this case since there was no direct evidence of marriage between the Respondent and the deceased. Accordingly, any evidence going towards the negation of the Respondent’s capacity to contract a marriage with the deceased is relevant. Regarding the issue whether the evidence sought to be adduced is such that, if given, would influence or impact upon the result of the verdict, although it need not be decisive, I find that a finding as to the legal capacity of the Respondent to enter into a marriage with the deceased may well impact on the outcome of the appeal. As for the issue the intended 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, it is contended that the issue of presumption of marriage was not one of the reliefs sought. If that be the position, then it is my view that there is no way the Applicants would have known that it would come up in the proceedings in order to enable them prepare and deal with the same.
15. As to whether 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, the matter in issue is whether or not the deceased and the Respondent were married. The learned trial judge found that there was a presumption of marriage based on long cohabitation. I find that a decision going to prove the legal capacity or otherwise of the Respondent would hopefully clear the cloud surrounding the relationship between the Respondent and the deceased. On whether the evidence is credible in the sense that it is capable of belief, the evidence that is intended to be adduced is a document emanating from a registry of the State. If found that the same is genuine by the trial court, then it may well be believed. In fact, the Respondent confirms that the document in question is genuine. As regards the size of the additional evidence, the document in question is simply a one page document and cannot be said to be voluminous and in fact according to the Respondent he has an adequate response to it.
16. On veracity, on the face of it, the additional evidence discloses a strong prima facie case since the Respondent, though aware of the fact of his earlier marriage did not disclose the same at the hearing. There is no evidence upon which I can find that the additional evidence is sought to be introduced for the purpose of removing the lacunae and filling gaps in evidence. Since the Respondent has indicated that he intends to prove at the hearing, should the additional evidence be allowed, that the same is not helpful as the said marriage was dissolved, I find that considering the proportionality and prejudice of allowing the additional evidence, it is in the interest of all parties that the matter be resolved considering all the issues in controversy.
17. Having considered the issues placed before me in this application, I find the Motion dated July 8, 2022 merited. Accordingly, since the issue of the additional evidence is likely to be contested, I direct, pursuant to Rule 31 of the *Rules* of this Court, that the High Court, Mombasa proceeds to take the said additional evidence and certifies to this Court such evidence as well as its opinion on the credibility of the witnesses giving the additional evidence as provided in Rule 31 of the *Court of Appeal Rules, 2022*.
18. The costs of this application will be in the appeal.



19. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF MARCH, 2023.

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

