



**Sketty v Shah & 3 others (Civil Appeal (Application)
E005 of 2023) [2023] KECA 815 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KECA 815 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E005 OF 2023**

JW LESSIT, JA

JULY 7, 2023

BETWEEN

MUNIR MOHAMED SKETTY APPELLANT

AND

JANENDEAH RAICHAND SHAH & 3 OTHERS RESPONDENT

(Being an application brought under Rule 29 (1) (b) of the Court of Appeal Rules 2010 to adduce additional evidence in the pending appeal against the judgment of the Environment and Land Court in Mombasa delivered by Yano, J. dated 9th March 2021 in ELC Suit No. 233 of 2009)

RULING

1. Before the court is a notice of motion application dated February 1, 2023 brought by Munir Mohamed Sketty, the appellant/applicant, herein after the applicant, pursuant to Rule 29 (1) (b) of the [Court of Appeal Rules](#) 2010, (now Rule 31 of the 2022 Rules)(hereinafter the Rules). He seeks the following orders:
 - i. That the applicant be granted leave by this honourable court to adduce as further evidence in this appeal by allowing the applicant to produce a copy of the Power of Attorney dated April 6, 2002 donated by Ravji Ramji Manji to Janendeah Raichand Shah to act generally, in the case in court, in HCC No. 346 of 1993.
 - ii. That the applicant be granted leave by this hon. court to adduce as further evidence in this appeal by allowing the applicant to produce and file a document intended to be an application for Land Board Consent between Muhamed Ali Nahdy and Ramji Manji Arjan.
 - iii. That the applicant be granted leave by this hon. court to adduce as further evidence in this appeal by allowing the applicant to produce the death certificate of Muhamed Ali Nahdy,
 - iv. That the costs of this application be provided for.



2. The application premised on grounds on the face of the application and in the supporting affidavit sworn by the Applicant dated February 1, 2023. It is deposed that the evidence sought to be adduced was neither in the applicant's possession nor was it capable of being obtained with due diligence during the hearing of the suit, the subject matter of the appeal. It is deposed that the evidence was contained in a court file and proceedings in HCC No. 346 of 1993, which was difficult for the Applicant to trace.
3. That the evidence will have an important influence on the result of the case as it will show that contrary to the 1st respondent's claim before court, he was fully aware about the case and also took part in it as he had the power of attorney donated to him by the 3rd respondent to represent him in the case. The applicant deposed that he discovered, upon perusal of the aforesaid file, that the 1st respondent produced the power of attorney as exhibit A in his supporting affidavit, and the same challenged by Mr. Pandya, advocate for the plaintiff in the suit, Nassor Mohamed Nahdy, now deceased. That the power of attorney will show that the 1st respondent unlawfully took action against the property by way of sub-division of plot no. MN/111.809 on December 8, 2012.
4. The application was opposed by the 1st respondent in his replying affidavit. the 1st respondent deposed that the applicant has not annexed any correspondence as proof of the difficulty he encountered in tracing the file in which the power of attorney was found.

Further that the applicant did not sufficiently explain why he could not otherwise obtain the power of attorney, and that if he exercised due diligence he could have obtained it. That the applicant's delay was flagrant, inexcusable and inordinate and an affront to the overriding objective under sections 3 and 3A of the *Appellate Jurisdiction Act*.

5. The application was heard through this court's virtual platform on the February 27, 2023. Learned Counsel (Retired) Judge Andrew Hayanga, now deceased, was present for the applicant while learned counsel Mr. Kibara was present holding brief for Ms. Langat for the respondent. Mr. Hayanga relied on the supporting affidavit of the applicant and his written submissions, which he highlighted. Mr. Kibara relied on the replying affidavit, the digest of cases and the written submissions all dated February 23, 2021 the latter which he highlighted.
6. I have considered the application before me. I also considered the submissions of counsel, the cases referred to, the affidavits filed for and against and the annexures therein. The issue for determination is:

Whether the Applicant should be allowed to adduce the additional evidence by producing the Power of Attorney, the Land Board Consent and the death certificate.

7. The Rule 29 of the Rules 2010, which is identical to Rule 31 of the 2022 Rules provide 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.
8. The principles that should guide the court were In the exercise of the court’s discretion under Rule 29 were summarized by Chesoni, Ag. JA. (as he then was) in *Mzee Wanjie and 93 others v A K Saikwa and others* [1982-88] 1 KAR 462 as follows:
- “The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:
- “1. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- (b) 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;
- (c) 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.”
9. What the Applicant needed to show is one that the evidence he seeks to introduce he could not obtain with reasonable diligence for use at the trial. Two, that 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. Three, that the evidence must be apparently credible, though it need not be incontrovertible.
10. Mr. Hayanga in his submissions urged that the evidence sought to be adduced was neither in the possession nor was it capable of being obtained with due diligence during the pendency of the suit. He relied on the case of *Dinkirrai Ramkrishan Pandya v Rep* [1957] 1EA 336 for the proposition that in criminal cases leave is given in exceptional cases where the evidence is available, is relevant to the issues and must be capable of belief. He also relied on *The Administrator, Aga Khan Platinum Jubilee Hospital v Munyambu* [1985] KLE 127 for the proposition that the principle rule in the admission of additional evidence is there must be exceptional circumstances to constitute sufficient reason for receiving fresh evidence at the appellate stage. He also relied on *Mzee Wange & others v A.K. Saikwa*, supra.
11. In regards to the issue whether the evidence if admitted could influence the result of the case, counsel urged that the Power of Attorney was proof that the 1st respondent participated in the suit, HCC No 346 of 1993. He urged that the Land Board Consent and death certificate would prove the 2nd respondent deceived the court by producing a fake Consent which purported that they were signed by Muhamed Ali Nahdy in 1974, while he had died two years before.
12. The 1st respondent through his counsel, Ms. Langat, while placing reliance on the case of *Kenya Marine and Fisheries Research Institute v Okemwa* Civil Appeal (Application) No. 109 of 2019 urged that the applicant has not sufficiently explained why he did not otherwise obtain the alleged Power of Attorney before or during the pendency of the matter. Counsel urged that the applicant had not shown that the evidence would have any influence on the result of the case. That in any event the evidence sought to be adduced does not constitute new evidence; that the application has been made two years late and the delay was flagrant, inexcusable and a hindrance to the overriding objective of this Court that would be best served if the application were dismissed.



13. The applicant has the duty to satisfy the court that he is deserving of the exercise of its discretion in his favour. The applicant has described the three documents he seeks to adduce as new evidence in this appeal, a Power of Attorney, a death certificate and a Land Board Consent. While it is claimed that the Power of Attorney was found in the record of proceedings in HCC No. 346 of 1993. There is no explanation given to show where the Consent and the death certificate were obtained. The most important aspect of the application was for the applicant to show the due diligence he undertook in trying to obtain the three documents and the challenges he experienced. The applicant did not place any such evidence before court.

14. Even though the court has discretionary power to admit additional evidence, that power must be exercised with caution. For this caution I will rely on the Supreme Court of Kenya decision where it has also set out guidelines for the admission of additional evidence before appellate courts in *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 others; Ahmed Ali Muktar (Interested Party)* [2019] eKLR;

“(79)We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:

(a) to (h).....

(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.”

15. I am not satisfied that the applicant has sufficiently demonstrated the due diligence he exercised to obtain the documents he seeks to adduce in his appeal. There is no demonstration where he obtained some of the documents from, as stated above. It is not clear, given the submission by the 1st respondent that the application is two years old, which submission did not receive any response, whether the application is not an afterthought.

16. I am not convinced that the applicant is deserving of the orders sought for the reasons given herein. In the result, the application dated February 1, 2023 is dismissed with costs to the 1st Respondent.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

J. LESIIT

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JUDGE OF APPEAL

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



Signed

DEPUTY REGISTRAR

