



REPUBLIC OF KENYA



KENYA LAW
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**Onsomu & another v Registrar of Companies (Civil Application
103 of 2019) [2023] KECA 1112 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KECA 1112 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPLICATION 103 OF 2019
M NGUGI, F TUIYOTT & JM NGUGI, JJA
SEPTEMBER 22, 2023**

BETWEEN

MARTHA KERUBO ONSOMU 1ST APPLICANT

CASMIL LUCAS NYANGAU 2ND APPLICANT

AND

REGISTRAR OF COMPANIES RESPONDENT

(Being an application for leave to the Court of Appeal to revisit the evidence and reappraise the same pursuant to rule 29 (I) of the Court of Appeal for the appeal arising from the judgment of the High Court of Kenya at Kisii (Majanja J.) dated 9th May 2019 in Kisii H.C. Petition No. 7 of 2017)

RULING

1. The application before us is somewhat baffling, but essentially it seems to seek three orders:
 - i. Leave to withdraw a notice of appeal to the Supreme Court from the judgment of this Court in Civil Appeal No. 103 a of 2019;
 - ii. Leave to withdraw an application for certification that the applicants' appeal raises issues of general public importance pursuant to Article 163(4) of the Constitution;
 - iii. An order that this Court 'revisits the evidence and reappraise(s) the same' pursuant to rule 29 (I) of the Court of Appeal Rules in the appeal from the judgment of the High Court of Kenya at Kisii dated 9th May 2019.
2. These prayers are contained in an application brought by way of Notice of Motion dated 4th July, 2022. The application is expressed to be brought pursuant to the provisions of Order 51 Rule 1 of the Civil Procedure Rules 2010, Rule 1(2) 29(1)(b) 42, Rule 24(1)(a)(b)(2), 43, 78(1)(2), 82(1) and 83 of the



Court of Appeal Rules, section 3A, 3B and 63(e) of the Civil Procedure Act Cap 21 Laws of Kenya and all enabling provisions of the law.

3. The application is supported by an affidavit sworn on 4th July, 2022 by Martha Kerubo Onsomu setting out the grounds on which the application is premised. These grounds are also set out on the face of the application. We note from the judgment of the High Court and of this Court that the 1st applicant, Martha Kerubo Onsomu, who filed and presented this application, was not a party either in the High Court or in the Court of Appeal. The 1st petitioner in the High Court, who was also the 1st appellant before this Court, was one Sylvester Barake Maina.
4. We can deal at the outset with the application for withdrawal of the notice of appeal and the application for certification to the Supreme Court dated 15th July 2021. At the hearing of this application, learned counsel for the respondent, Mr. Odhiambo, indicated that the respondent had no objection to the withdrawal. This Court accordingly allows the application for withdrawal of the notice of appeal and for certification of the appeal as raising issues of general public importance.
5. This Court is then left with the application for leave to introduce additional evidence, and for the Court to review its judgment and take witness evidence. The applicants filed submissions in support of their application dated 4th July, 2022 which the 1st applicant, appearing for herself and her co-applicant, indicated they would rely on entirely. The applicants contend that in their determinations, both the trial court and this Court failed to look into the documents containing the important evidence that the applicants had placed before the court.
6. The evidence that the applicants wish to adduce before this Court include, *inter alia*, the company file C20/82 consisting of a copy of the name search from the Registrar of Companies, a copy of an official receipt for Kshs. 1,300 being payment for filing returns for the years 1988 to 1996, copies of annual returns by the directors of Gusii Mwalimu Investment Company Limited, a letter to the Registrar of Companies requesting for liquidation of Gusii Mwalimu Investment Company Limited, a certified copy of the original copy (sic) of the certificate of registration of the company file C20/82 and the index page of company file C20/82.
7. The applicants contend that the trial court declined to admit the company file and denied them a chance to cross-examine the Registrar of Companies. They cite the case of Mohammed Abdi Mohamud v Ahmed Abdulabi Mohammad & 3 others [2018] eKLR and Safe Cargo Limited v Embakasi Properties Limited & 2 others (2019) eKLR with respect to the applicable principles on an application to adduce additional evidence.
8. A key argument in their submissions, though not contained in their affidavit in support of the application, is that the judgment on their appeal to this Court, which they had been informed would be delivered on 7th April 2021, was never delivered. They submit that sometime in June 2021, “some clerk from Nairobi sent to the counsel for the appellants a copy of what was thought to be a judgment of the court that was undated and unsigned.”
9. In his oral submissions in reply, learned counsel for the respondent, Mr. Odhiambo, submitted that the application to adduce additional evidence is a misinterpretation of the law as judgment in the applicant’s appeal before this Court had been delivered on 7th April 2021. He submitted further that the judgment was duly sent to the parties by the Deputy Registrar and there is no application before the Court to set aside or appeal against that judgment. His submission therefore was that the judgment is undisturbed and there would therefore be no basis for an application to introduce new evidence.
10. Mr. Odhiambo observed that what the applicants were seeking was a review of the decision of the Court of Appeal. Such an application, he submitted, should be considered with a lot of



circumspection, reliance for this submission being sought in the case of *Benjob Amalgamated Limited v Kenya Commercial Bank Ltd* (2014) eKLR. Mr. Odhiambo submitted that the applicants recognized that a decision was delivered by this Court, which then informed their decision to file the notice of appeal and the application for certification of the matter to the Supreme Court.

11. We take into account the fact that the applicants in this matter are acting in person, and their application may therefore fall below the level of clarity that one would hope for. However, what they appear to seek from this Court is an order to review a judgment of this Court and for leave to adduce additional evidence. The prayer to adduce additional evidence while at the same time seeking an order to review the judgment of the Court is somewhat complicated by their argument that no judgment was delivered in their appeal. Their arguments are complicated further by their contention that they were sent a judgment by the Deputy Registrar, though they contend that it was not signed or dated.

12. We consider, briefly, the circumstances under which this Court can grant leave to a party to adduce additional evidence. Rule 31 of the Rules of this Court provides that:

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.

(Emphasis added)

13. In its decision in *PGM v AWM* [2020] eKLR this Court stated as follows with regard to the exercise of the discretion to allow a party to adduce additional evidence under Rule 29 (now Rule 31) of its Rules:

“8. Rule 29 has been subjected to interpretation by this Court before and certain principles that guide the Court have emerged. To begin with this is a discretionary power which is exercised within certain parameters as summarized by Cheson Ag. JA (as he then was) in *Mzee Wanje and 93 others v A K Saikwa and others* (1982-88) 1 KAR 462 where he stated: -

“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:

a. 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.”



14. The above guidelines are also succinctly captured in the decision of the Supreme Court in Hon. *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamed and 3 others* (2018) eKLR relied on by the applicants.
15. Having considered the guidelines set out in the cases above against the averments and submissions before us, we take the view that several facts militate against the grant of the orders that the applicants seek. First, there is no appeal pending before this Court, a prerequisite for the exercise of the Court's discretion under Rule 31. The applicants would need to show the Court that the additional evidence they wish to adduce was not available to them at the time of the trial before the superior court, and that its admission would affect the outcome of their appeal. They did not make the application during the pendency of their appeal. Contrary to their submissions, a decision on their appeal was rendered by this Court on 18th June 2021, not on 7th April 2021 as submitted before us by counsel for the respondent. It is too late in the day for the applicants to seek leave to adduce additional evidence.
16. The second fact is that the evidence the applicants seek to adduce is not 'new' evidence. From their application and averments, they seek to adduce evidence aimed at establishing that their company was never dissolved. However, as emerges from their grounds in support of the application, the said evidence was tendered before the trial court. They state at ground 10 and 11, which we cite verbatim, that:
 10. That the evidence in the documents being sought to be introduced would have an impact upon the result of the verdict as the trial court despite allowing its introduction the court, and admitted the same it refused to refer to it or allow cross-examination of the witnesses who brought the document into court.
 11. That the document sought to be adduced is the company file C20/82 is lean and would not prejudice the appellant as the same is her document which must be part of the court of appeal's (*sic*) record supplied by the deputy registrar of the high court (*sic*)..."
17. The third fact is the nature of the applicants' complaint, which ought to have been made a ground of appeal in their appeal before this Court: that despite this evidence being placed before it, the trial court declined to admit the company file, declined to allow them to cross-examine the Registrar of Companies, and only relied on his affidavit evidence. The document(s) sought to be introduced having been before the trial court and this Court, and the applicants' appeal having been heard and determined by the judgment dated 18th June 2021, there is no basis for the Court to exercise its discretion under Rule 31.
18. Finally, as noted earlier in this ruling, the 1st applicant, who appears to be the prime mover of this application, was not a party in the petition before the High Court or in the appeal, which puts to question the competence of the present application. Indeed, it is not clear from the pleadings before us whether the parties to the High Court petition or the appeal before this Court ever sought to appeal to the Supreme Court, or it was the 1st applicant in this application, Martha Kerubo Onsomu, who sought to revive the dispute relating to the dissolution of Gusii Mwalimu Investment Company Limited. In any event, the petition before the High Court was dismissed on the basis that the claim against the dissolution of the company was time barred. There was no basis for consideration of the documents that the applicants now claim they want to adduce as additional evidence, and they do not in any event qualify as 'additional evidence' as they were already before the High Court and this Court.
19. We accordingly find no merit in the application dated 4th July 2022 and it is hereby dismissed, but with an order that the parties bear their own costs of the application.



DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

