



REPUBLIC OF KENYA



Ochieng v Ahmed & Gargar (Being Administrators of the Estate of the Late Mohamed Ahmed Nooh) & another (Environment and Land Appeal E071 of 2023) [2024] KEELC 3779 (KLR) (30 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E071 OF 2023**

J OMANGE, J

APRIL 30, 2024

BETWEEN

EDWIN CEPHAS OCHIENG APPELLANT

AND

JOSEPH ABUODHA ONG'ETE 1ST RESPONDENT

SALAADO MOHAMED AHMED & MAHAD ADAN GARGAR (BEING ADMINISTRATORS OF THE ESTATE OF THE LATE MOHAMED AHMED NOOH) 2ND RESPONDENT

RULING

1. Vide Notice of Motion, application dated 1st November 2023 the 2nd Respondent/applicant seeks the following orders:
 - a. Spent
 - b. That prior to the hearing of this appeal the court be pleased to admit the replying affidavit of the 2nd respondent dated 14th September 2023 as additional evidence necessary for the just and fair disposal of the appeal.
2. The Applicant, through his supporting affidavit states that he was not notified neither served with the pleadings by the Appellant in the lower court matter COMMSU E719 OF 2021 subject of this appeal and was therefore not able to file his responses. He asks the court to allow him to file a Replying Affidavit and the annexures hereto to form part of the record of appeal.
3. That it will be in the interest of justice for this court to allow him admit his evidence as it will be crucial in the just and fair disposal of the appeal.



4. The Applicant submitted that the court should allow the additional evidence he seeks to produce. He relies on the case *Mohamed Abdi Mabamud vs. Ahmed Abdullabi Mohamad & 3 others* [2018] eKLR which laid down the governing principles in allowing additional evidence in an appellate court. Counsel for the 2nd Respondent submitted that the evidence in question is directly relevant to the appeal; could not have been availed at trial; would aid the court in arriving at a just decision and that it accorded the appellant a chance to respond to the same.
5. The 2nd Respondent further argued that, he has the right to a fair trial as envisaged by the provisions of Article 50(2) of the *Constitution* which right was not accorded to him in the lower court by the deliberate act of the appellant. The applicant also highlighted the provision of Order 42 rule 27 of the *Civil Procedure Rules* which set out circumstances when additional evidence can be produced at an Appellate court.
6. The 1st Respondent filed a Replying Affidavit dated 7th November 2023 in support of the 2nd Respondent's application. It was the contention of the 1st Respondent that the 2nd respondent's testimony would be crucial in the just determination of the appeal hence should be allowed.
7. The Appellant filed a Replying affidavit dated 4th February 2024 opposing the application. He averred that, the 2nd respondent had not met the threshold laid down in the case of *Mohamed Abdi Mabamud vs. Ahmed Abdullabi Mohamad & 3 others* [2018] eKLR to warrant the court entertain this application grounds that;
 - i. His claim of not being served with any pleadings is yet to be subjected to trial hence cannot be relied upon
 - ii. The counterclaim which gave rise to the Judgement subject of this appeal was by the 1st Respondent and the responsibility of serving the same was on the 1st Respondent and not himself
 - iii. The additional evidence that form part of the replying affidavit was at time of trial in possession of both Respondents and should have been presented then.
 - iv. The evidence is yet to be subjected to trial hence questionable
8. He averred that, allowing of the additional evidence on record would be prejudicial to his case as it has a direct bearing on the main issue in the appeal.
9. Having looked at the application, submissions and case law all parties, it is not in dispute that the Applicant did not testify in the lower court matter that gave rise to the Judgement subject of this appeal.
10. The Judgement entered on 23rd July 2023 was in favour of the 1st Respondent who had filed a counterclaim dated 5th April 2022. The court found that the 2nd Respondent has failed to testify to authenticate the sale agreement that the Appellant was relying on and hence the Appellant had failed to prove his case on a balance of probability.
11. The issue for determination in this Notice of Motion is whether the 2nd Respondent has made a case to justify being allowed to adduce additional evidence on appeal.
12. From the above guidelines set by the Court of Appeal, the duty of this Court in this application is to determine: -
 - a. Whether there is additional new evidence;



- b. If there is a probability that the additional evidence would have an important influence on the result of the case and
 - c. Based on the foregoing, is there sufficient reason to admit the additional evidence
13. The 2nd respondent in the instant Notice of Motion has filed a replying affidavit that has annexures being the new evidence which he wishes to introduce on appeal. The annexed documents are a sale agreement as between the 1st Respondent and the 2nd respondent signed on the 12th June 2012 and an affidavit dated 10th January 2022 sworn by the Applicant indicating the 1st Respondent is the rightful owner of the suit property.
14. The applicant explains that the Appellant never served him with any pleadings to enable him participate in the lower court matter before Judgement was delivered. Further, that after learning of this appeal he now wishes to adduce additional evidence to help the court determine the Appeal.
15. Counsel for the Appellant vehemently opposed the application and contended that the evidence sought to be adduced was available at the time of hearing in the lower Court and that the said evidence especially the affidavit had not been subjected to trial and would therefore prejudice the Appellant.
16. The instant application is brought under Section 78 of the *Civil Procedure Act* Cap 21 Laws of Kenya which provides for powers of the appellate Court in appeals from the subordinate Court to the High Court, and is similar to Rule 29(1) (b) of the *Court of Appeals Rules*. The said section reads;
- (1) Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have power: -
 - a) To determine a case finally;
 - b) To remand a case;
 - c) To frame issues and refer them for trial;
 - d) To take additional evidence or to require the evidence to be taken;
 - e) To Order a new trial.
 - (2) Subject as aforesaid, the appellate Court shall have the same Powers and shall perform as nearly as may be the same duties as are charged conferred and imposed by this Act on Courts of Original Jurisdiction in respect of suits instituted therein.
17. In the Court of Appeal case of Civil Appeal (Application) 84/2012 *Attorney General v Torino Enterprises Limited* [2019] eKLR, the court stated;
- “In *Dorothy Nelima Wafula v Hellen Nekesa Nielsen and Paul Fredrick Nelson* [2017] eKLR, it was expressed that under rule 29(1) (a), additional evidence will be introduced on appeal in the discretion of the Court, “for sufficient reason.” The Court further stated that:
- “Though what constitutes “Sufficient reason” is not explained in the rule, through Judicial practice, the Court has developed guidelines to be satisfied before it can exercise its discretion in favour of a Party seeking to present additional evidence on appeal. Before this Court can permit additional evidence Under rule 29, it must be shown, one, that such evidence could not have been obtained by reasonable diligence before and during the hearing, two, the new evidence would probably have had an important influence on the result of the case if it was available at the



time of the trial, and finally, that the evidence sought to be adduced is credible, though it need not incontrovertible.”

18. These sentiments are echoed in the case of *Raila Odinga and 5 Others v I.E.B.C. and 3 Others* [2013] eKLR, in which the Supreme Court added its voice on acceptance of additional evidence in the context of Presidential election and Stated:

“The other issue the Court must consider when exercising its discretion to allow a further affidavit, is the nature, context and extent of the new material intended to be produced and relied upon. If it is small and limited so that the other Party is able to respond to it, then the Court ought to be considerate, taking into account all aspects of the matter.

However, if the evidence is such as to make it difficult or impossible for the other Party to respond effectively the Court must act with abundant caution and care. In the exercise of its discretion to grant leave for the filing of further affidavits and/or admission of additional evidence

19. In the case of *Mohamed Abdi Mohamed v Ahmed Abdullahi Mohamed and 3 others* [2018] eKLR, relied on by both the Appellant and the 2nd Respondent, the Supreme Court further laid out guidelines on admission of additional evidence before Appellate Courts in Kenya. These guidelines were stated 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 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.
- (l) 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.

We must stress here that this Court even with the application of the above stated principles will only allow additional evidence on a case by case basis and even then sparingly, with abundant caution.”

- 20. My humble interpretation of the above guidelines is that, taking into account such of the guidelines that are relevant a court is required to exercise discretion on a case by case basis aimed at ensuring that ends of justice are met. The first step in exercise of this discretion is in my view a consideration of the reasons given for failure to adduce the evidence in the lower court.
- 21. The applicant states he was not served with pleadings and this has not been controverted by the appellant as he has not been able to give any evidence as to service of summons to the 2nd respondent. However, in the proceedings on 8th December 2022, the advocate for the 1st Respondent spoke on behalf of the 2nd Respondent and indicated that he had travelled out of the country and could not take part in the hearing process. The Appellants counsel also confirmed that he had seen the documents confirming this position. This is a clear indication the 2nd Respondent was aware of the proceedings.

I also note that the lower court the 2nd Respondent was said to have travelled out of the country but in the affidavit in support of this application he alleges he was unwell in Homa Bay. He does not produce any documents to confirm this.
- 22. The 2nd Respondent seeks to produce an affidavit by the advocate who prepared the agreement between the two Respondents. It is not clear why the 1st Respondent did not produce this affidavit when giving evidence as a party in the lower court since he too had a copy of the same.
- 23. Litigation would have no end if parties were to be allowed to adduce evidence they should correctly have adduced in the lower court on appeal. Considering the circumstances of this case I find that the application is not merited and as such the application is dismissed with costs.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS ON 30TH APRIL, 2024.

JUDY OMANGE

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JUDGE

I certify that this is a true copy of the Original

Signed

DEPUTY REGISTRAR

In the Presence of:



Mary Wanjiku for the 1st Respondent-Lokol for the 2nd Respondent

No Appearance for the Appellant

Court Clerk: Steve

