



**Oganga v Were (Environment and Land Appeal E010 of 2023)
[2024] KEELC 3400 (KLR) (25 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

AY KOROSS, J

APRIL 25, 2024

BETWEEN

JOHN OJWANG’ OGANGA APPELLANT

AND

JAMES ODIPO WERE RESPONDENT

RULING

Appellant’s Case

1. In the notice of motion that is the subject of this court’s resolution filed by the appellant who acts in person dated 24/11/2023, the appellant has sought leave to file additional evidence on appeal.
2. The motion is predicated on grounds thereon and it is supported by an affidavit sworn on the same date by the appellant John Ojwang’ Oganga.
3. The grounds thereon are replicated in the supporting affidavit and in summary, the appellant avers the additional evidence which are composed of his primary school certificate and birth certificate which ostensibly had been misplaced, could not be produced before the trial court.
4. The appellant avers that when he obtained the documents, he sought leave before the trial court to produce them but it was declined on grounds that pre-trial directions had already been taken.
5. He contends the respondent will not be prejudiced and the documents were pertinent to the just determination of the dispute and serves the interests of justice. The appellant filed a further affidavit deposed on 29/01/2023 without leave and this court has disregarded it.

Respondent’s case

6. The respondent who acts in person filed a document titled “respondent’s objection to the applicant’s application of 24/11/2023”. Considering Order 19 Rule 7 of the Civil Procedure Rules which implores



this court to disregard procedural technicalities and further in view of the contents of the document, this court perceives this document is a replying affidavit.

7. In the replying affidavit, the respondent avers the birth certificate is fraudulent and the primary school certificate could attest to this since the appellant was born in 1956 and not 1961. He states he and the appellant are siblings from one mother but different fathers- their mother having been inherited by the appellant's father.
8. The motion is canvassed by written submissions and both parties who are self-represented filed their respective submissions.

Appellant's submissions

9. The appellant filed his written submissions dated 8/02/2024 and relies on Section 78 of the [Civil Procedure Act](#), Order 42 Rule 22 (1) of the [Civil Procedure Rules](#) and the Supreme Court of Kenya's decision of [Mohamed Abdi Mabamud v Ahmed Abdullabi Mohamad & 3 others](#) [2018] eKLR. The appellant submits he has met conditions to warrant the grant of the orders sought.

Respondent's submissions

11. In submissions dated 19/02/2024, the respondent submits the appellant is keen to reopen his case and allowance of admission of the documents would be akin to conducting a retrial and urges this court to confer to the record. To buttress his argument, the respondent relies on the case of [Mohamed Abdi Mabamud](#) (Ibid).

Issues for determination, Analysis and Determination

12. This court has considered the motion as well as parties' rival submissions together with the provisions of law cited and authorities relied upon and the singular issue that arises for determination is whether the appellant should be granted leave to adduce additional evidence.
13. The legal basis for the motion is founded in Section 78 of the [Civil Procedure Act](#) and Order 42 Rules 27, 28 and 29 of the [Civil Procedure Rules](#) and it is on the basis of these provisions that this court is empowered to grant the relief sought by the appellant. Section 78 of the [Civil Procedure Act](#) states: -

- “(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.”

14. Whilst the procedural aspect which underpins this Section 78 is found in Order 42 Rules 27, 28 and 29 of the [Civil Procedure Rules](#) which provides: -

- “27(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if—



- (a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or
 - (b) the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.
- (2) Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred the court shall record the reason for its admission.
28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.
29. Where additional evidence is directed or allowed to be taken the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.”
15. However, it is not in every instance that leave is granted to adduce additional and it is usually granted in exceptional circumstances, with abundant caution and on a case by case basis.
16. In the case of *Mohamed Abdi Mahamud* (Supra), the Supreme Court of Kenya comprehensively and authoritatively laid out the principles to be considered in determining whether an appellate court should accept the adduction of additional evidence.
17. It must be noted the principles outlined in *Mohamed Abdi Mahamud* (Supra) are not conjunctive but an applicant in this case the appellant has to substantially meet the criteria thereon. The court laid out the following guiding principles when an appellate court is exercising its discretion in allowing additional evidence: -
- “ ... 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 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 aware of and procured the further evidence in the course of 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 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.”

18. I have scrutinized the lower court and it is apparent the appellant is hell bent to mislead this court and this court has not taken his conduct kindly. At no given point in time did he ever seek leave to adduce additional documents before the trial court either before or after pretrial directions.
19. In addition, I have evaluated and considered the documents the appellant intends to adduce as additional evidence vis a vis the criteria outlined by the Supreme Court in the case of *Mohamed Abdi Mabamud* (Supra).
20. The appellant’s case before the trial court was hinged on customary trust and he and the respondent share one mother but different fathers and I am not satisfied with the relevance of the intended evidence to the outcome of the appeal or how it will impact the case. This is so since it emerged that during 1st registration, both parties were registered as proprietors of various parcels of land.
21. The additional documents he contends he intends to adduce are documents that are very personal to him, were well within his knowledge and as evidenced from the birth certificate annexed to his affidavit, he is a senior citizen. With due diligence, these are documents that he could have produced before the trial court or would have had certified copies thereof obtained from public offices.
20. It appears the appellant as an unsuccessful party, wants to make a fresh case on appeal and in allowing him to so do, this court will be committing a travesty of justice. Therefore, I conclude the application is intended to fill gaps or patch up weak points in the appellant’s case. Consequently, I find and hold that the appellant is not deserving of the orders sought.
21. For the foregoing reasons, I ultimately find the notice of motion dated 24/11/2023 is unmerited and it is hereby dismissed with costs to the respondent.
24. Accordingly and considering the record of appeal has been filed, this matter shall be mentioned for directions with a view of determining the main appeal on 28/5/2024.

It is so ordered.



DELIVERED AND DATED AT SIAYA THIS 25TH DAY OF APRIL 2024.

HON. A. Y. KOROSS

JUDGE

25/4/2024

Ruling delivered virtually through Microsoft Teams Video Conferencing platform in the Presence of:

Appellant- acting in person

Respondent- acting in person

Court assistant: Ishmael Orwa

