



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: M'INOTI, MURGOR & KANTAI J.J.A)**

**CIVIL APPEAL (APPLICATION) NO. 259 OF 2002**

**BETWEEN**

**1. SIMON NGURE GITHINJI**

**2. CHARLES MWANGI GITUNDU.....APPLICANTS**

**AND**

**CHARLES WANJOHI WATHUKU.....RESPONDENT**

*(Being an application to adduce additional evidence in the appeal from the ruling of the High Court of Kenya at Nyeri (Hon. J.V.O. Juma) dated 18<sup>th</sup> October 2001*

*in*

*HCSC No. 60 of 1997*

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**RULING OF THE COURT**

***“The story behind this case is the stuff for novels. It is quite a thriller and at the same time it is a serious matter for determination. Those connected with the story and have since died could be turning in their grave in anticipation of the outcome, and those living to a second coming so that the truth can declare itself.”***

These words which aptly capture the intrigues of this case are to be found in this Court’s ruling of 10<sup>th</sup> December 2010 where **the applicants, Simon Ngure Githinji** and **Charles Mwangi Gitundu** had similarly applied to adduce additional evidence in the appeal, provides the backdrop against which the Notice of Motion before us dated 24<sup>th</sup> January 2020 is brought.

In the motion before us, the applicants seek to adduce additional documentary evidence in the appeal through a Supplementary Record of Appeal, which evidence includes; a) a letter dated 22<sup>nd</sup> January, 2020 from the County Civil Registrar, Nyeri Central; b) a copy of Register of Birth, Serial No. [...], dated 24<sup>th</sup> November, 2006; c) a copy of Register of Birth, Serial No. [...], dated 28<sup>th</sup> December, 1965; d) a Certificate of Birth, No. [...], dated 14<sup>th</sup> January, 2020; e) a Certificate of Birth, No. [...], dated 14<sup>th</sup> January, 2020; f) a letter dated 10<sup>th</sup> January, 2020 addressed to the County Civil Registrar; and g) a letter from National Registration Bureau confirming the birth details of Peter Muriithi Chomba.

The appeal to which the application relates arises from a decision of the Succession Court where **the respondent, Charles Wanjohi Wathuku** had petitioned the court for grant of letters of administration of the estate of **Wathuku Ngure (deceased)** for the reason that he was the deceased’s son. The 1<sup>st</sup> and 2<sup>nd</sup> applicants who were a brother and cousin of the deceased objected to the respondent’s application, asserting that he was not the deceased’s son, and that they were the rightful persons to be issued with the letters of administration. After numerous hurdles in the proceedings were overcome, and the conduct of a full hearing, a ruling was finally rendered by the High Court (*J.V Juma, J*) wherein the court determined that the respondent was the son and dependent of the deceased, and that the applicants had not in any way demonstrated their dependency on the deceased.

The appellants were aggrieved by the decision and appealed to this Court which appeal has yet to be heard owing to several applications, including one for an order for DNA testing to be conducted and another for retrial following the decision of a Tribunal that recommended removal of the trial judge. Those applications having been determined, the applicants now bring this motion premised on grounds that they

have discovered new evidence which could not have been obtained with reasonable diligence before and during the trial at the High Court; that the weight of the evidence would affect the outcome of the appeal; that the evidence was genuine and credible and that in all fairness and the interests of justice, the application ought to be allowed. The application is supported by an affidavit of the 2<sup>nd</sup> applicant sworn on 24<sup>th</sup> January 2020 on his own behalf and on behalf of the 1<sup>st</sup> applicant to the effect that following a search at the Nairobi National Registration Bureau, the Nyeri Civil Registrar's Office, the Nyeri Central Civil Registry and Kiini East Civil Registry revealed that the person named Charles Wanjohi, (the respondent) had two birth registration records captured in the Births and Deaths Registry where, one showed that Charles Wanjohi was born on 6<sup>th</sup> December 1968, and the birth was registered as a late registration on 24<sup>th</sup> November 2006; and another showing the same Charles Wanjohi as having been born on 26<sup>th</sup> December 1965 at the Nyeri Provincial Hospital, which birth was registered at the hospital on 28<sup>th</sup> December 1965 under the name 'Wanjohi'.

Furthermore, that under the registration of 28<sup>th</sup> December 1965, the child was born to a single mother while in the late registration the child's father was indicated as Wathuku Ngure, and therefore, the person Wanjohi who was born on 26<sup>th</sup> December 1965 at Nyeri Provincial Hospital must be the same person who applied for late registration under the name Charles Wanjohi with different parentage, date and place of birth. The applicants also deponed that, the birth records of 28<sup>th</sup> December 1965 indicated that the respondent's mother had a plural birth, with the respondent being the first twin, and the respondent's late brother Peter Muriithi Chomba who was personally known to the applicants, and who has since died, also being born on 26<sup>th</sup> December 1965.

The applicants averred that the revelation of the double registration of the respondent's birth only became apparent after the births and deaths records were digitized, which exercise commenced in 2013, long after the trial in the High Court was concluded and the judgment appealed against delivered.

In the written submissions filed on the applicants' behalf by Amuga and Company Advocates, it was submitted that the applicant's application complied with the principles set out in the Supreme Court case of Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamed & 3 others [2018] eKLR, and Kibos Sugar & Allied Industries Limited & Another vs Benson Ambuti Adege & Others [2019] eKLR in that: i) it must be demonstrated that the additional evidence is directly relevant to the appeal; ii) it could not have been obtained with diligence in the course of the trial and iii) it should be credible. It was submitted that the additional evidence showed that the respondent was not the son of the deceased and his mother Lydia Wanjiru Muriithi from a relationship they had between 1967 and 1968 since the respondent was actually born as Wanjohi to a single mother on 26<sup>th</sup> December 1965 at the Nyeri Provincial Hospital; that the evidence was credible because it comprised public documents that were capable of being verified by the Nyeri County Civil Registry, and that the evidence would not have been obtained were it not for the digitization of the birth records in 2013 which information was promptly lodged in this Court on 24<sup>th</sup> January 2020.

On their part, the respondent and his brother Peter Muriithi Chomba filed replying affidavits. In his affidavit the respondent deponed that his brother Peter Muriithi Chomba was born on 26<sup>th</sup> December 1965 within Nyeri Central District to Josiah Chomba Karoki and Lydia Wanjira, and he (the respondent) could not have been born in 1965 and in 1968, or, for that matter, for himself and his brother to be one and the same person; that the applicants' application was therefore a hoax and a waste of the court's time. It was further deponed that the applicants have not shown when they visited the National Registration Bureau or the documents they submitted in order to obtain the documents sought to be adduced, and neither had they produced any receipts in support of the request for such information.

Peter Muriithi Chomba, deponed that he was the respondent's older brother by the same mother and was the person referred to in the applicants' documents, as his date of birth was 26<sup>th</sup> December 1965. He produced a copy of his Identity Card No. 8869105 showing his date of birth as 26<sup>th</sup> December 1965, a copy of a birth certificate and passport all displaying the same date of birth.

Relying on similar cases cited by the applicants in written submissions filed by Mwenesi and Company Advocates on the respondent's behalf, it was contended that this Court should decline to grant the orders sought as the application did not meet the threshold criteria set out. This was for the reasons that, firstly, the evidence was not additional to the evidence before the trial court, but effectively contradicted it, and there was nothing in the documents which demonstrated how they influenced the appeal; that secondly, it lacked credibility, as there was no evidence of their visit to the registry, and neither were the particulars upon which they relied to obtain the documents produced; that thirdly, the documents to ascertain the respondent's birth could have been obtained with reasonable diligence at any time from the Births and Deaths Registry at the time of the trial in the High Court, and the excuse that digitization made retrieving the documents sought to be adduced possible, was untenable.

Finally, it was submitted, Peter Muriithi Chomba indicated in his affidavit that it was his date of birth that is 26<sup>th</sup> December 1965 that the applicants were referring to, and not the respondent's, and that therefore the applicants were wrong to conclude that the respondent was born on the same day.

We have considered the application, the affidavits of the parties, as well as the submissions. The application is brought under **rule 29 (1) (b)** of this Court's rules which essentially provides that this Court shall have power, "...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."

This Court has variously pronounced itself on the matters that should be taken into account in exercising its discretion under the above rule. In Mzee Wanjue and 93 others vs A.K. Saikwa, & 3 others (1982 – 88) 1 KAR 462 at p. 465 this Court set out the principles as follows:

**(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.”**

These principles were further expounded in the case of ***The Administrator, HH The Aga Khan Platinum Jubilee Hospital vs Munyambu [1985] KLR 127*** thus;

**“The Court will generally give such leave if the evidences sought to be adduced could not, with reasonable diligence, have been obtained for use at the trial, if it will probably have a significant influence on the result of the appeal and is apparently credible though it need not be incontrovertible. Such evidence will be admitted if some assumption basic to both sides has been falsified by subsequent events”.**

Applying the principles to the instant application, we begin with whether the evidence could not have been obtained with reasonable diligence for use at the trial in the High Court. The applicants allege that the information only became available to them with the digitization of the Births and Deaths records in 2013. That may be so, however, our view is that, such information was always in existence and available whether or not the registry was digitized. After all, searches at the Births and Deaths Registry are not *novelle* or unheard of. With sufficient diligence on their part, the information could have been obtained during the trial.

As to whether the evidence would have an important influence on the appeal, we would very much doubt that. This is for the reason that the documents seek to raise more questions rather than to provide answers. It is apparent to us that the documents would require to be probed further, which exercise this Court is ill equipped to conduct, this being a Court of record. Such questions as, who was the maker of the documents? How authentic is the documentation? Is the “Wanjohi” referred to in the copy of the attached birth certificate the respondent, or is it possible that the name could be with reference to someone else? What documentation was used as the basis for arrival at the documents in question? And, given that the trial commenced in the year 2000 in the High Court, how possible would it be to test this evidence 20 years later, when many of the witnesses may not be alive today or cannot be traced?

Finally, how credible is the evidence? The applicants claim that the additional documents clarify the issue of whether the respondent was the deceased’s biological son, and that the evidence is relevant because it shows that the respondent was born to Lydia Wanjiru Muriithi as ‘Wanjohi’ on 26<sup>th</sup> December 1965 at Nyeri Provincial Hospital and not on 6<sup>th</sup> December 1968 as alleged. Already, there are doubts as to whether the birth certificate for ‘Wanjohi’ indicating 26<sup>th</sup> December 1965 as his date of birth belonged to the respondent, as, his brother, Peter Muriithi Chomba who was born on 26<sup>th</sup> December 1965 has claimed ownership of the impugned birth certificate, meaning that if it belonged to Peter, then it could not at the same time belong to the respondent. If that indeed be the case, of what benefit would it be to the appeal to adduce evidence concerning Peter Muriithi Chomba?

In our view, the evidence that the applicants seek to adduce falls far short of the threshold criteria necessary for the exercise of this Court’s discretion in favour of the applicants’ motion. It was in their interest to carry out a diligent search at the Birth and Deaths Registry to retrieve the information which the applicants did not do at the time. The passage of 20 years since the trial was completed is an inordinately long time to seek to introduce such documents, and this appeal has been pending since 2002. In the interest of justice to the parties and all concerned, our view is that it is exigent that the appeal be determined *poste haste* so that these matters of yesteryears can be finally laid to rest.

Owing to the above considerations, the application is not merited and is dismissed with costs to the respondent.

***It is so ordered.***

***Dated and delivered at Nairobi this 24<sup>th</sup> day of July, 2020.***

**K. M’INOTI**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

*I certify that this is a true*

*copy of the original*

*Signed*

**DEPUTY REGISTRAR**