



REPUBLIC OF KENYA



Kenya Electricity Transmission Company Limited v Onsongo & another (Environment and Land Appeal E028 of 2022) [2024] KEELC 4871 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4871 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E028 OF 2022**

**M SILA, J
JUNE 20, 2024**

BETWEEN

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ... APPELLANT

AND

ESTER MORAA ONSONGO 1ST RESPONDENT

ESTER GESARE 2ND RESPONDENT

(Application to adduce additional evidence on appeal; principles to be considered; appellant seeking to adduce a document not produced at the hearing before the Magistrate; apparent that the document was in possession of the appellant during trial and was thus capable of being adduced; application failing the test that additional evidence on appeal only permissible if it was not capable of being produced during trial; application dismissed)

RULING

1. Before me is an application dated 30 January 2024 filed by the appellant. It seeks the following orders which I copy verbatim :
 1. That this application be certified urgent and be heard ex parte and service thereof be dispensed with in the first instance.
 2. That leave be granted to the appellant/applicant to adduce and file additional documentary evidence identified in the applicant's/appellant's supporting affidavit as annexure 1 marked as 'DOO-1' annexed to the supporting affidavit sworn by Davis Owiti Obare on 15th January 2024.
 3. That this Honourable Court be pleased to order that the 2nd respondent Esther Gesare Onsongo be summoned to appear and be compelled to produce bank statement in respect to



Kenya Commercial Bank Account number 117XXX (redacted) in the name of Esther Gesare Nyanyiemi held at KCB Kisii Branch.

4. That the additional evidence adduced be filed and served as a supplementary Record of Appeal within Fourteen (14) days of the date of the order of the court or as may be directed by this Honourable Court.
 5. That the respondents be at liberty to file a replying affidavit if only to the supplementary record of appeal and submissions on the said additional evidence.
 6. That costs of this application be provided for.
2. The application is supported by the affidavit of Davis Owiti Obare and is opposed by the 1st respondent in this appeal.
 3. To put matters into context, the appeal herein emanates from a judgment of the Magistrates' Court in the suit Kisii CMCC No. 504 of 2019 delivered on 7 November 2023. The plaintiff in that suit was Esther Moraa Onsongo, the 1st respondent in this appeal, and the defendants were respectively Esther Gesare Onsongo (the 2nd respondent in this appeal) and Kenya Electricity Transmission Company Limited, the appellant herein. In the plaint, the 1st respondent pleaded to be the beneficial owner of the land parcel Bassi/Bogetaorio II/984B registered in the name of Nyakundi Maiko. She pleaded that the appellant acquired part of the suit land measuring approximately 0.3 acres for purposes of a way leave for a power transmission line with an undertaking to pay a consideration of Kshs. 231, 285.60/=. She pleaded that the appellant requested for her bank and identification details so as to make payment which she duly submitted but no money was deposited. She averred that she followed up on the matter and was informed by staff members of the appellant that the money was paid to the 2nd respondent. She averred that she wrote to the appellant asking for documentation supporting the payment to the 2nd respondent but none was forthcoming. In the suit she sought orders for payment of the sum of Kshs. 231, 285.60/=, interest and costs.
 4. The appellant filed defence where she pleaded that the 1st respondent executed an authority directing that payment be made to the 2nd respondent on her behalf.
 5. At the hearing of the suit, the 1st respondent produced a letter dated 1 February 2016 whereby the appellant appears to have affirmed to the 1st respondent that they would pay her Kshs. 231, 285.60/= for the plot Bassi/Bogetaorio II/984A. This letter indeed formed the basis of her claim for compensation. On her part, the appellant produced a letter also dated 1 February 2016 addressed to Gesare Esta Nyanyiemi, stating that she would pay her Kshs. 231, 285.60/= for the plot Bassi/Bogetaorio II/984B. The appellant also produced an easement instrument registered against the land parcel Bassi/Bogetaorio II/984, executed by the 1st respondent and the appellant, which shows that the amount of Kshs. 462,571.20/= was to be paid. She further produced a document, titled 'Authority to pay Easement Compensation' allegedly executed by the 1st respondent stating that the amount of Kshs. 231,285.60/= be paid to Gesare Esta Nyanyiemi through account No. 117 XXX (redacted), KCB. There was also an email, dated 30 April 2019, being a reply to the 1st respondent's demand letter, which email advised counsel for the 1st respondent that they had paid the sum of Kshs. 462,571.20/= for both parcels Bassi/Bogetaorio II/984 A and B to Gesare Esta Nyanyiemi, and that the 1st respondent should seek her share from the said Gesare Esta Nyanyiemi.
 6. The 2nd respondent did not enter appearance nor participate in the proceedings.



7. The suit proceeded for hearing with the 1st respondent testifying and relying on her documents and the appellant calling one witness. I do observe that when cross-examined, the appellant's witness inter alia stated as follows :

“I cannot confirm whether payment was done or not. Esther Moraa gave authority to Gesare Onsongo. Gesare did not signify acceptance to receive payment for Esther Moraa. I do not know their relationship. It was necessary for both to sign authority. It was one party authorising payment. I have no document to show that Esther Gesare received any payment.”

8. Parties filed their respective submissions, and as I have earlier mentioned, judgment was delivered on 7 November 2022. In his judgment, the trial court found that the appellant and the 1st respondent had a valid contract wherein it was agreed that the 1st respondent would be paid the sum of Kshs. 231,285/= for the wayleave over the suit land. He was of opinion that the evidence of the 1st respondent, that she was never compensated and she never authorized anybody to receive payment on her behalf, was not dislodged. He found that the 1st respondent had proved her case on a balance of probabilities and entered judgment for her in the sum of Kshs. 231,286.60/= together with interest. He added that if the appellant paid the 2nd respondent, ostensibly on behalf of the 1st respondent, the appellant was at liberty to institute recovery proceedings.

9. Aggrieved, the appellant filed this appeal. Among the grounds are that the trial Magistrate erred in failing to appreciate that the appellant acted on the 1st respondent's authorization to pay the entire compensation amount to the 2nd respondent.

10. On 30 October 2023, I admitted the appeal and gave directions for the appellant to file and serve her written submissions in 30 days, and thereafter counsel for the 1st respondent to file his submissions within the following 30 days. I listed the appeal for hearing on 8 February 2024. No submissions were filed by counsel for the appellant within the 30 days given but nevertheless counsel for the 1st respondent proceeded to file his submissions on 26 January 2024. This application was filed thereafter on 30 January 2024. On 8 February 2024 when the appeal was to be heard, learned counsel for the appellant pointed out that her client had filed the subject application and asked that it first be heard. I allowed the adjournment of the appeal but subject to payment of costs of the day which I assessed.

11. In his affidavit in support of the application, Mr. Davis Owiti Obare, who described himself as the appellant's Legal Officer, deposed that the appellant has discovered that there is a crucial document that she seeks to rely on at the hearing of the appeal which is in possession of the 2nd respondent. He has annexed the said evidence which he marked as 'DOO-1' and I see that it is titled “ (not clear)... Land Compensation.” That document has a list of 24 people including the name of one Gesare Esta Nyaiemi indicating compensation of Kshs. 462,571/- and showing the account number 117XXX KCB-Kisii. He has continued to depose, rather curiously, that “the additional evidence adduced be filed and served as a supplementary record of appeal within fourteen (14) days of the date of the order or as this honourable court may direct” and that the appellant “be granted leave to file submissions with respect to the additional evidence seeking to be adduced herein.” He has continued to depose that the annexure 'DOO-1' is a payment voucher and that the bank statement showing that the sum of Kshs. 462,571.20/= was transferred to the 2nd respondent is in possession of the 2nd respondent. He has deposed that the bank statement and payment vouchers “were not reasonably available at the time of hearing of the suit and could not have been reasonably produced at that time...”. He believes that the evidence sought to be adduced meets the threshold for allowing admission of additional evidence in order for this court to arrive at a just and conclusive decision. He has added that the appellant is bound



to suffer irreparable damage and loss if the appeal proceeds for hearing without this court considering the evidence sought to be adduced.

12. The 1st respondent has sworn a replying affidavit to oppose the motion. She has deposed that the appellant had sought her bank account details which she submitted. She avers that the appellant now seeks to introduce new documents intending to show that the money meant to compensate her was sent to the 2nd respondent's account and not her account as had been agreed. She avers that the documents do not bring on board any new issue since transmitting of money to the 2nd respondent without her authority was already dealt with by the trial court. She adds that the purported documents, especially the payment voucher, sought to be introduced, has always been in possession of the applicant and could have been obtained had reasonable diligence been done. She contends that the documents are not new documents and were produced before the trial court as exhibits during the hearing of the case. She also contends that they are inconsequential in terms of evidentiary value. She avers that either way the new evidence suggested will not be subject to cross-examination in the normal manner of a trial and this is an abuse of the appellate jurisdiction of this court. She asserts that the intended additional evidence is an afterthought and an attempt by the appellant to patch up its case on appeal. She wants the application dismissed.

13. I directed counsel to file submissions towards the application and I have taken note of the submissions filed before arriving at my decision.

I start with addressing the application as drawn and the orders that are sought. Prayer (1) is spent as it is merely a call for certification of urgency. Prayer (2) is for leave to adduce additional evidence which is what was annexure 'DOO-1' in the supporting affidavit and which was said by the deponent to be a payment voucher. Prayer (3) seeks an order for this court to summon Esther Gesare to appear and be compelled to produce bank statements for the account No. 117XXX KCB, Kisii Branch. Prayer (4) seeks that the additional evidence be filed and served as a supplementary record of appeal. Prayer (5) seeks orders for the respondents to file a supplementary affidavit to the 'supplementary record of appeal' and submissions on the additional evidence. Prayer (6) is for costs.

14. Starting with prayer (3), I see no place for it. Esther Gesare is the 2nd respondent in this appeal and was 1st defendant at the original suit. I am not persuaded that this court can compel a party to appear and produce certain evidence at the hearing of an appeal. When one is sued as a defendant, it is that person's prerogative to either appear at the trial or not. In this instance, Esther Gesare chose not to appear at the trial court; that was fully within her rights, for a person sued has the right to remain silent. If the appellant thought that she was a compellable witness at trial then the appellant ought to have lodged an application to compel her attendance to testify during trial but no such application was made. I am at a loss on what basis, this court, as an appellate court, can now compel her to come to court to testify. I have gone through the submissions of counsel for the applicant and nowhere has she mentioned any law or authority that would compel this court to summon the 2nd respondent in order to testify during an appeal. I am afraid that I cannot grant prayer (3) of the application.

15. Let me now turn to prayer (2) of the application which appears to be a prayer seeking to present additional evidence within an appeal. Ordinarily an appellate court does not take evidence as that is for the trial court. The duty of an appellate court is to re-evaluate the evidence adduced at trial and determine for itself whether the trial court came to a correct finding. Nevertheless, Section 78 (1) (d) of the *Civil Procedure Act*, Cap 21, Laws of Kenya, does empower an appellate court to take additional evidence or require the evidence to be taken. The whole of Section 78 is drawn as follows :

78. Powers of appellate court



- (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 conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.

Order 42 Rules 27 - 29 elaborate the power given by Section 78 (1) (d) and outline the manner of exercise of this discretion. The rules provide as follows :-

Rule 27: Production of additional evidence in appellate court

- (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.

Rule 28: Mode of taking additional evidence

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.

Rule 29: Limits to be defined and recorded

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.

16. Rule 27 above first affirms the general rule that parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary. It then outlines the exceptions that may permit the appellate court to admit additional evidence. They are actually two. The first is where the trial court refused to admit the evidence which ought to have been admitted (Rule 27 (1) (a)). The second is where the appellate court requires the evidence to enable it pronounce judgment or for any other substantial cause (Rule 27 (1) (b)). The court, where it is moved to admit such evidence, must record the reasons for its admissions (Rule 27 (2)). In my opinion, so as to comply with Rule 27 (2), the court



needs to state whether it is allowing the evidence under Rule 27 (1) (a) or under Rule 27 (1) (b), that is, elaborate whether it is admitting the evidence because the trial court refused to admit it but it ought to have been admitted, or whether it is admitting the evidence to enable it pronounce judgment or for other substantial cause. It is clear in my mind, that in our instance, the evidence sought to be adduced does not fall within the purview of Rule 27 (1) (a) because it is not evidence that was sought to be adduced at the trial court and refused. It can therefore only fall under Rule 27 (1) (b).

17. The manner in which Rule 27 (1) (b) is drawn infers that the court, on its own motion, can call for additional evidence so as to enable it pronounce judgment. Alternatively, again on its own motion, or on being moved by a party, the court can call for additional evidence where substantial cause is shown. Substantial cause is however not defined in the rules.
18. We can nevertheless draw parallels from the interpretation of the current Rule 31 of the Court of Appeal Rules, which allows the Court of Appeal to receive additional evidence where ‘sufficient cause’ is shown. The Court of Appeal had occasion to interpret this rule in the case of *Wanje v Saikwa* (1984) KLR 275 where Chesoni Ag JA laid down the following principles for additional evidence to be taken
 - 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.

Chesoni Ag JA further elaborated that “...this rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the rule were used for the purpose of allowing the parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence.”

19. The above dicta speaks for itself. The rule, permitting additional evidence on appeal, is a rule that should be exercised very sparingly. The rule is not aimed at aiding a party to adduce evidence which such party could have obtained and produced with reasonable diligence at the trial. Neither is the rule intended to help an unsuccessful party to patch up the weak points of his case and fill in gaps in evidence.
20. The above was asserted by the Supreme Court in the case of *Mohamed Abdi Mohamud vs Ahmed Abdullahi Mohamed & 3 Others*, Supreme Court of Kenya, Petition No. 7 of 2018 Consolidated with Petition No. 9 of 2018, ruling of 28 September 2018 (2018) eKLR. The Supreme Court 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 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;
- (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.

[80] 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.”

21. Looking at the above principles, one issue stands out for me, that is, whether it has been demonstrated that this evidence could not have been obtained with reasonable diligence for use at the trial, or was not within the knowledge of the applicant and she could not produce it at the hearing of the case. I am not persuaded that the applicant has met this test.
22. The additional evidence is said to be a payment voucher which I can see was prepared by the applicant herself. Although it was urged by the 1st respondent that this evidence was actually adduced, I have found out that it was never produced at trial. I have gone through the supporting affidavit, and save for the empty deposition that the payment voucher could not reasonably be available at the hearing, there is no elaboration as to why the document could not be availed at trial, or where it was throughout the duration of the case. This payment voucher is a document was prepared by the applicant herself and was therefore always in the custody of the applicant throughout the trial. It has in fact been annexed to the supporting affidavit herein and it is not said where it was fetched from for it to be so annexed. Being in her, custody the applicant could have produced the document if she so wished. Besides, it was always the case of the applicant that she deposited this money into the account of the 2nd respondent.



If she (the applicant) is the entity that deposited the money, then you would expect the applicant to have the bank deposit slip or the bank transfer instrument and she could have produced them at the hearing. These are not documents that would be in possession of either 1st or 2nd respondent but would uniquely be in possession of the applicant. The applicant cannot therefore be heard to say that she now wants the bank records of the 2nd respondent. If at all it was the applicant who made the deposit or transfer as she alleges, then she is the one with the evidence of this deposit, and she was at liberty to produce it, assuming that it existed.

23. I am not persuaded that it has been demonstrated to me that the evidence could not be adduced at trial with exercise of reasonable diligence. It is apparent to me that the applicant is now on a fishing expedition after the case has already been decided. She in fact fishing from her own pond yet she could have earlier simply got this evidence from her own backyard. The rule for allowing additional evidence is not meant for such purposes, that is, to open the rear gate for fresh evidence to be produced when this evidence was always available.
24. I should stop it here, but there was mention in the submissions of counsel for the applicant that the respondents are colluding and that the 1st respondent could have taken third party proceedings against the 2nd respondent. It is discernible to me that the applicant is not aware of the nature of third party proceedings. It is a defendant who takes out third party proceedings, to sue a party for indemnity, which party is not in the original pleadings. It was the appellant who was defendant. The 1st respondent, who was plaintiff, in fact sued both the appellant, who alleged to have deposited the money, and the 2nd respondent, who it was alleged is the person who received the 1st respondent's money. The 1st respondent, as plaintiff, therefore sued all concerned parties hoping that they would say where and how the money was deposited. Nothing barred the applicant to file a claim against a co-defendant for indemnity in the event that she was found culpable.
25. I think I have said enough to demonstrate that there is no merit in this application and it is hereby dismissed with costs.
26. Orders accordingly.

DATED AND DELIVERED THIS 20 DAY OF JUNE 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of :

Mr. Lenkidi h/b for Ms. Lumalas for the appellant/applicant

Mr. Marita for the 1st respondent

N/A for the 2nd respondent

Court Assistant : David Ochieng'

