Gachuki & another v Njenga & 2 others (Civil Appeal (Application) 413 of 2019) [2025] KECA 451 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KECA 451 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 413 OF 2019

DK MUSINGA, J MOHAMMED & GV ODUNGA, JJA

MARCH 7, 2025

BETWEEN

NAOMI NJERI GACHUKI ..... 1ST APPLICANT

SALOME NYAMBURA KIMANI ..... 2ND APPLICANT

AND

JAMES KIHUMBA NJENGA ..... 1ST RESPONDENT

WILLIAM P NGUGI MWANGI ..... 2ND RESPONDENT

ZEPHANIA NGUGI ..... 3RD RESPONDENT

(Being an application for adduction of additional evidence in an appeal from the Judgment and Decree of the High Court of Kenya, Family Division at Milimani (R.E. Ougo, J.) dated 30th May, 2019)

RULING

Background

1. Naomi Njeri Gachuki and Salome Nyambura Kimani (the 1st and 2nd applicants), through an application dated 24th September 2019, seek to adduce additional evidence by way of affidavit or as may be found suitable. The documents, which they seek to adduce, are the medical report on Ngondu Mugo alias Ngondu Mugo 'A' (the deceased) dated 6th July 1992 and a letter dated 27th November 2007 from the District Officer, Githunguri.

   James Kihumba Njenga, William P. Ngugi Mwangi, Joseph Kimwaki Nganga and Zephania Ngugi are the 1st to 4th respondents respectively.

2. The motion is premised on grounds, inter alia, that the additional evidence is relevant to clarify doubt on the physical and mental health of the deceased at the time the Will was made; that the additional

evidence is of credible quality and source, and presumably to be believed; that the additional evidence shed light on a scheme to deceive the system of administration of justice as to the true mental status and capacity of the deceased at the time the Will was made; that the existence of the evidence was unknown to the applicants and could not be made available during the hearing, notwithstanding due diligence; that the evidence would probably have an important influence on the result of the appeal; that no prejudice would be occasioned to the respondents if adduction of the additional evidence is allowed; and that the adduction of the additional evidence would help the Court to make a just determination of the appeal.

3. The application is supported by the affidavit of the 1st applicant deposed on even date on her own behalf and that of the 2nd applicant. She deposed that Civil Appeal No. 413 of 2019 arose from the decision rendered by the High Court (R. E. Ougo, J.) on 30th May 2019 dismissing the application by the applicants for the revocation of the grant issued in respect of the deceased's estate. The 1st applicant further deposed that the main issue between the parties relate to the validity of the Will dated 28th April 2008 allegedly authored by the deceased.

4. The 1st applicant further deposed that the documents which the applicants wish to produce in court are a medical report dated 6th July 1992; and a letter dated 27th November 2007 from the then District Officer Githunguri, Mr. R. B. Loyotoman who had handled several disputes between the applicants and the respondents before commencement of the succession proceedings.

5. The 1st applicant further deposed that the two (2) documents, which they seek to introduce, were not available to them at the time when the case was being conducted in the High Court. That the existence of the medical report was unknown to the applicants but it was traced in the documents of Helen Njeri Mugo, the deceased's sister. It was further deposed that the medical report evidence confirms the applicants' contention that the deceased was of unsound mind until his death and therefore he did not make a will.

6. It was urged that it would be in the best interest of justice that the application be allowed, lest there be an inequitable share out of 9.6 acres of the 11.2 acre estate to the deceased's married sisters who are the respondents herein and who were the principal beneficiaries present when the Will was written. The 1st applicant further urged that her husband, Dancan Mwangi Mugo, who was the deceased's stepbrother and who has lived in the deceased's property throughout his life was excluded together with the deceased's widow (the 2nd applicant herein) and her family of eight stand to be evicted and rendered destitute.

7. The 1st applicant further contended that her deceased husband was a brother to the deceased. That her family together with the 2nd applicant's family, are in occupation and use of the estate property even during the deceased's lifetime.

Submissions by Counsel

8. At the hearing of the application, both parties were represented by counsel. Learned counsel Mr. Njoroge Baiya appeared for the applicants while learned counsel Mr. Mwangi represented the respondents. To further support the application, Mr. Baiya reiterated that the additional evidence to be introduced consists of a medical report dated 6th July 1972 on the deceased's mental condition and the correspondence dated 27th November 2007 from the District Officer, Githunguri. To further support the application, reliance was placed in the Supreme Court Case of Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohammad & 3 Others [2018] eKLR where the Supreme Court laid down the guidelines for admission of additional evidence before appellate courts. Counsel further submitted

that the evidence they seek to adduce will assist the Court to make a just determination in this appeal and no party will be prejudiced.

9. We have not seen any response to this application. At the hearing of the instant application learned counsel, Mr. Mwangi appearing on behalf of the respondents, informed us that he had filed grounds of opposition and submissions. However, since we had not seen them we directed that he re-uploads the same in the court system but it seems that the same was not done.

10. Be that as it may, Mr. Mwangi orally submitted and invited us to consider the application for summons for revocation dated 16th September 2014 in the record of appeal. He submitted that the issue of the deceased's illness or incapacitation was not raised in the application. The only complaints that the applicants had were that they were not included in the petition.

11. Mr. Mwangi submitted that the documents, which the applicants seek to introduce, are dated 1992 and 2007, while the deceased died in 2008. Counsel submitted that those documents are irrelevant in the circumstances. It was also submitted that the respondents would be prejudiced since they will not get an opportunity to cross examine the witnesses and test the validity of the documents.

Determination

12. We have considered the application, the oral and written submissions made on behalf of the parties, the authorities cited and the law. The issue for determination is whether the applicants are deserving of the orders sought.

13. The application before us is brought pursuant to the then rule 29(1) of the Court of Appeal Rules which is now rule 31 (1) of the Court of Appeal Rules, 2022 which provides that: -

> " On appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have powers-
>
> (a) .....
>
> b. in its discretion and for sufficient reason, to take additional evidence or direct that additional evidence be taken by the trial court;
>
> c. When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence."

14. The jurisdiction of this Court under Article 164 (1) of *the Constitution* and Section 3 (1) of the *Appellate Jurisdiction Act* is limited to hearing of appeals. Parties are expected to present all the primary evidence before trial courts. Although this is the case, under this Court's Rules, there is an exception created under rule 31 (1) (b) and (c) (supra) which recognises situations which may arise making it imperative for a party to adduce evidence at the appeal stage.

15. However, adducing additional evidence is not a matter of right but an exercise of the Court's discretion. This Court in Dorothy Nelima Wafula vs Hellen Nekesa Nielsen & Paul Fredrick Nelson [2017] KECA 654 (KLR) held that additional evidence will be introduced on appeal at the discretion of the court, "for sufficient reason."

In the same decision, this Court went on to further hold that: -

> ...before the Court can permit additional evidence to be adduced under Rule 29 (now Rule 31), it must be shown, one, that it could not have been obtained by reasonable diligence

before and during the hearing; two, that 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 be incontrovertible. It is agreed that these are only general principles and certainly not the only ones."

16. On the application of Rule 31 (1) (b) and (c) Chesoni, Ag. JA in Mzee Wanje & 93 Others V A.K Saikwa (1982-88) 1KAR 462 held 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 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."

17. On the same vein, the Supreme Court of Kenya in Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohamad & 3 others (supra) set out the relevant guidelines an appellate court should consider before granting orders for admission of new evidence in the following terms:

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. This Court in Safe Cargo Limited v Embakasi Properties Limited & 2 Others [2019] eKLR stated as follows:

> " Following the guidelines as given by the Supreme Court, it is our duty to consider and determine if the instant application fulfils the principles as laid out in the case above. Of significance is whether the additional evidence sought to be introduced by the applicant is directly relevant to the appeal before this Court and if given, it would influence or impact upon the result of the verdict, and whether 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 trial by the applicant."

19. We must add with caution that the bench seized with the hearing and determination of an application of this nature should restrain from delving into the merits and demerits of the main appeal. That will be the preserve of the bench that will be seized of hearing the main appeal.

20. The evidence which the applicants wish to produce include a medical note dated 6th July, 1992 which stated that the deceased suffered from alleged psychosomatic disorder for more than 10 years. The second document is a letter dated 27th November 2007 from the District Officer, Githunguri addressed to the Chief Githiga Location, which declined to lift the ban on some family members visiting the deceased. The applicants argue that these documents will aid in leading the evidence that the deceased was of unsound mind at the time of executing the Will dated 28th April 2008 and therefore, its validity is put in question.

21. In the instant application, we do not have the benefit of perusing the record to appreciate the nature of the case and the pleadings filed before the trial court. However, we have applied industry and accessed the judgment via the online Kenya Law Platform. We note from the judgment and at a glance, that the issue of the mental state of the deceased was not litigated or a point of contention before the trial court. The High Court pronounced itself in the following terms: -

> " The applicant has not alleged that the deceased lacked capacity to make the Will."

22. From the averments of the 1st applicant, she did not depose/demonstrate the difficulties that she encountered and the due diligence that she undertook to access and produce the documents she now wants to produce. We find that the proposed additional evidence could have been discovered with due diligence. Further, the applicants have not demonstrated to our satisfaction that the proposed additional evidence removes any vagueness or doubt on the issues in the appeal pending before this Court.

23. We are not convinced that the threshold to adduce new evidence has been reached. For those reasons, we decline to allow the applicants to adduce the proposed additional evidence.

24. In the circumstances, the Notice of Motion dated 24th September 2019 is found to be devoid of merit and is dismissed. Costs shall abide by the outcome of the appeal.

25. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF MARCH, 2025.

D. K. MUSINGA (PRESIDENT)

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR