



REPUBLIC OF KENYA



KENYA LAW
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**Kamau v Mbete & another (Environment and Land Appeal
E051 of 2020) [2023] KEELC 16470 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16470 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E051 OF 2020**

MD MWANGI, J

MARCH 16, 2023

BETWEEN

AGNES WAHURA KAMAU APPELLANT

AND

PURITY MBETE 1ST RESPONDENT

CHRISTINE IMBOSA MBOGUA 2ND RESPONDENT

*(An Appeal from the Judgement of the Senior Resident Magistrate Court at Nairobi before
Hon. C. Kithinji in CMCC ELC 618 of 2018 delivered on the 4th day of November, 2020)*

RULING

(In respect of the Appellant's application dated 29th July, 2022)

Background

1. The application for determination is the Appellant's application dated July 29, 2022 expressed to be brought under the provisions of Section 1A, 1B, 3A, 63(c) and 78 (1) (d) of the [Civil Procedure Act](#), Order 42 Rule 27 and Order 51 rule 1 of the [Civil Procedure Rules, 2010](#) as well as Article 50, 159 (2), 165(3) of the [Constitution](#).
2. The Appellant/Applicant prays for orders;
 - a. That the Appellant/ Applicant be allowed to adduce a Letter by the 2nd Respondent dated March 11, 2022 Reference Number EOP/NMS/TC/5/70/1645/(Vol.65) as new additional evidence.
 - b. That this Honourable Court issue summons to the 2nd Respondent to avail the Chief Officer Lands (Nairobi Metropolitan Services) or any other officer to confirm the contents and produce the evidence in (1) above.



c. Costs be in the cause

3. The application is supported by the grounds on the face of it as well as the Supporting Affidavit of Agnes Wahura Kamau, the Appellant herein, deponed on the July 29, 2022. The deponent avers that she filed the case being Civil Suit No 618 of 2018 against the Respondents claiming ownership of the properties known as Nairobi/Block/107/1442 and Nairobi/ Block/107/1443 (hereinafter called ‘the suit properties’). The 1st Respondent also claims ownership of the suit properties.
4. The deponent averred that she reported the complaint against the 1st Respondent who had acquired Certificates of Title for the suit properties in the name of James Maina Gathigo. The said James Maina Gathigo had been reported as a missing person in the year 2009 and subsequently declared dead in 2018 and a Certificate of Death duly issued. According to the Plaintiff/Applicant, the deceased is alleged to have been issued with a Certificate of Lease in 2018, long after having been reported as a missing person.
5. The Applicant states that on the hearing day at the Magistrate's court, the 2nd Respondent served her Advocate with a Witness Statement of one Geoffrey Cheruiyot whose contents shocked her as it contradicted the findings of the Report by the Investigation and Information Analysis Department of the 2nd Respondent, which had conducted investigation as to the rightful owner of the suit properties.
6. The Plaintiff's advocate's efforts to seek an adjournment based on the last minute service of the witness statement bore no fruits since the court declined to grant her more time thus occasioning a great injustice. She later wrote a Letter to the 2nd Respondent on the September 20, 2020 seeking a clarification on the contradictions.
7. That Judgement was subsequently entered against her on the November 4, 2020 declaring that the suit properties belonged to the estate of the late James Maina Gathigo.
8. In the said Judgement, the trial court advised her to pursue the ‘allotting authority’ to show her the parcel of land it had intended to be allocated to her. It was then that she wrote to the Survey Department of the 2nd Respondent who in return, through the then Nairobi Metropolitan Service, wrote to her Advocate vide a Letter referenced EOP/NMS/TC/5/70/1645/(Vol 65) clarifying on the issues raised.
9. It is the said letter by the 2nd Respondent that the Plaintiff/Applicant wishes to introduce at this stage.
10. The application was vehemently opposed by the Respondents. The 1st Respondent filed a Replying Affidavit deposed on the October 19, 2022 whereas the 2nd Respondent filed grounds of opposition dated December 2, 2022.
11. The 1st Respondent, Purity Mbete, avers that the orders sought by the Plaintiff/Applicant will preemptively determine matters that are the subject of the appeal pending before this court. Further that the letter dated March 11, 2022 is a duplicate of the contents of the investigative report dated April 2, 2019.
12. The 1st Respondent contends that the Applicant was in possession of the Report dated April 22, 2019 way before the hearing of the suit which was heard on the September 22, 2020 before the Magistrate's court. The Applicant's claim that was seeking to adduce was new evidence was therefore false.
13. Furthermore, that the Applicant should not be allowed to perpetually collect evidence in piecemeal and produce the same ‘anyhowly’ at any stage. This would prejudice the other parties.



2nd Respondent's Grounds of Opposition

14. The 2nd Respondent on the other hand stated that there has been unexplained and unreasonable delay in filing of the application. The letter sought to be introduced is dated March 11, 2022 while the application was filed 4 months later. The delay of four months had not been explained.
15. The 2nd Respondent asserts that the Applicant had not demonstrated that the evidence in question was raised at the trial or that she had diligently taken efforts to obtain this alleged new evidence without success. In any case, the 2nd Respondent averred that the Applicant ought to have sought for review before the trial court under the provisions of Order 45 of the Civil Procedure Rules.
16. Additionally, the 2nd Respondent averred that the Applicant was seeking to adduce alleged evidence from an entity (Nairobi Metropolitan Services) that was no longer in existence in law and which had not been joined in the suit at the Lower Court.

Applicant's Further Affidavit

17. The Applicant filed a Further Affidavit deposed on the November 24, 2022 pursuant to leave granted on the September 20, 2022. The Applicant denied that the evidence she was seeking to adduce was a duplicate of the Report dated April 2, 2019. Her Advocate had sought leave to have the said report produced in court but the court declined without any justifiable reason.
18. She deposes that the Letter dated March 11, 2022 will assist the court in determining the issues at hand. The same being in the hand of the 2nd Respondent, they should be summoned to testify on the actual ownership of the property and to rectify their records if need be.
19. The Applicant asserted that James Maina Gathigo was allotted Plot No 152 and No 151 in 2002, a whole year after the Applicant had already been allotted the suit properties. Her Letter of Allotment could not have lapsed as the 2nd Respondent was aware that she was in possession and actual occupation.
20. The Applicant contended that the Certificate of Title was not indefeasible as the 1st Respondent had acquired the title fraudulently or through a corrupt scheme.

Directions

21. The Court directed that the application be canvassed by way of written submissions. The parties complied and filed their respective submissions. The Appellant/Applicant's submissions are dated the January 16, 2023, whereas the 1st Respondent's submission and the 2nd Respondent's submissions are both dated December 5, 2022. The court has had occasion to read the submissions of all the parties.

Issues for determination

22. I have considered the Applicant's application, and the Affidavits filed in support of the same, the Replying Affidavit of the 1st Respondent and the Grounds of Opposition of the 2nd Respondent. I have considered the submissions and authorities cited by Counsel for all the Parties herein. The only issue for determination in the instant application is whether the Appellant/Applicant has made out a case for leave to be granted to adduce additional evidence on appeal at this stage of the proceedings.



Analysis and determination

23. The applicable law in this regard is Section 78 of the *Civil Procedure Act*, Cap 21 Laws of Kenya which provides for powers of an appellate Court in appeals from the subordinate Court to the High Court. The Section provides that:
- (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.
24. Order 42 Rule 27 of the Civil Procedure Rules on the other hand provides that: -
- ' (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 reasons for its admission.'
25. From my reading of the above provisions, it is clear that the power to call additional evidence on appeal is discretionary.
26. In *Mohamed Abdi Mohamed vs Ahmed Abdullahi Mohamed and 3 others [2018] eKLR*, the Supreme Court laid down the guidelines on admission of additional evidence before Appellate Courts in Kenya. These guidelines were stated as follows:
- ' (79) Taking into account the practice of various jurisdictions outlined above, which are of persuasive value, the elaborate submissions by Counsel, our own experience in electoral litigation disputes and the law, we conclude that we can, 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 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.

[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.'

27. I am not persuaded that the Appellant's application can be allowed at this stage of the proceedings. I will however reserve my reasons at this point in time in view of the fact that the refusal by the Honourable Magistrate to grant the Appellant 'leave to file new documentary evidence that was not in her possession at an adequate time before the hearing emanating from an independent investigation



by the 2nd Respondent's offices of Director, Investigation and Information Analysis,' is one of the grounds of appeal in the memorandum of appeal by the Appellant/Applicant. I have opted to reserve my reasons in order not to prejudice the case of any of the parties in the appeal. I will explain my reasons in the judgement after the hearing of the appeal.

It is so ordered

Dated, Signed and Delivered at Nairobi this 16th day of March 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kalaine for the Applicant.

Mr. Omari for the 1st Respondent.

Mr. Isinta for the 2nd Respondent.

Court Assistant –Yvette.

M.D. MWANGI

JUDGE

