



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT SIAYA**

**CIVIL APPEAL NO. 36 'A' OF 2021**

**KENYA AGRICULTURAL AND**

**LIVESTOCK RESEARCH ORGANIZATION.....APPELLANT**

**VERSUS**

**LEAH OKOKO.....1<sup>ST</sup> RESPONDENT**

**JOSPEH OWUOR GOGO.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion application dated 2.12.2021 and filed on 3.12.2021 brought under the provisions of sections 2A and 3A of the Civil Procedure Act, Order 42, Rules 27, 28 and Order 5, Rule 1 of the Civil Procedure Rules 2010, the respondents who are the applicants in this appeal seek the following orders:

- a) *Spent*
- b) *That the Honourable Court be pleased to allow the respondent herein to produce additional evidence.*
- c) *That upon prayer 2 above, the Honourable Court be pleased to order the applicant to file a supplementary record of appeal*
- d) *That costs of this application be provided for.*

2. The application is predicated on the grounds that the applicant stands to be prejudiced in the appeal if the application is not allowed leading to substantial justice not being done whereas the respondent will not be prejudiced or inconvenienced in any way if the application is allowed.

3. The application is supported by the affidavit of one Phillip Odhiambo who deposes that the appeal herein raises issues of facts that can only be rebutted by adducing additional evidence failure to which the appeal will be determined unjustly.

4. It is the applicants' case that the additional evidence sought to be introduced addresses the respondent's claim in their ground of appeal that they had no notice and were not given an opportunity to respond to a point of law canvassed in the submissions.

5. The application is further supported by a supplementary affidavit dated 17.1.2022 and filed on the 18.1.2022, sworn by the aforementioned Philip Odhiambo in which he avers that the respondent failed to serve their submissions and if they did so the same was not proper as the documents had not been stamped by court to reflect the true record.

6. The applicants assert that they served the respondents via their official email on the 14<sup>th</sup> June 2021 with judgement being rendered on the 25<sup>th</sup> June 2021 and as such, it was evident that the respondent/appellant herein had sufficient time to mount a response to their submissions.

7. It was averred by the applicants that their submissions were properly on record and that non-compliance was by the respondents.

8. In opposition to the Notice of Motion, the respondent filed a replying affidavit dated 11.1.2022 and filed on the 12.1.2022 sworn by Mr. S.J. Saenyi advocate who deposes that the purported filing and service of submissions by the respondent was done out of the time set by the court that is the 11<sup>th</sup> June 2021 and was thus null and void.

9. It is the respondent's /appellant's contention that it stands to suffer serious prejudice if such submissions are admitted on record as the

appellant did not have the chance to respond to the issues raised therein and as such it would be in the best interest of justice to reject the applicant's application.

10. The parties initially agreed to argue the application by way of written submissions but the applicant sought to rely entirely on the affidavits on record whereas the respondent filed submissions through counsel Mr. S.J. Saenyi.

11. It was submitted by the appellant's counsel that the respondent never had an opportunity to exercise its secured right of filing supplementary submissions especially given that the applicant had raised points of law in their submissions which had not been raised in their pleadings or during the trial before the trial court which was prejudicial to the respondent as it had the effect of condemning it unheard.

12. It was submitted that both parties were to file their submissions by the 11<sup>th</sup> June 2021 and that therefore by sneaking in its submissions on the 14<sup>th</sup> June 2021, the applicant failed to obey the court orders and directions issued. Reliance was placed on the case of **Benard Maina Kamau v Sunripe (1976) Limited [2014] eKLR** where the court held inter alia that *parties should not be allowed to disobey court orders as this would create a culture of impunity and further that there must be a penalty for failing to comply with court orders/directions.*

13. The respondent/appellant further submitted that the delay by the applicant in filing and serving its submissions caused the respondent/appellant not to exercise its right to file supplementary submissions addressing the new issue of competence of the suit which led to the dismissal of the respondent's suit and thus it was only logical that this application be rejected.

14. Reliance was placed on the case **Nyongesa & Others v Egerton University College (1990) eKLR** where the court held inter alia that *courts will interfere to quash decisions of any bodies when the courts are moved to do so in cases where such decisions have been made without fairly and justly hearing the person concerned on the other side.*

15. As earlier stated, the applicant relied entirely on the affidavits in support of the application to canvass the application.

#### Analysis

16. I have considered the application by the applicants and the opposition by the respondent/ appellant as well as the submissions filed by the Respondent/appellant and the authorities relied on. The issue for determination herein is ***whether the court should grant leave to the applicant to adduce additional evidence.***

17. Section 78 of the Civil Procedure Act and Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 are the legal basis for this application. Under Section 78 of the Civil Procedure Act:

***(1) Subject to 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.***

18. Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 provides that:

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.*

19. The Supreme Court in **Mohammed Abdi Mohamud vs. Ahmed Abdulahi Mohamad & 3 Others [2018] eKLR** laid down the following principles for allowing additional evidence:

79. “...*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.”*

20. The Court of Appeal added its voice on this subject in **Safe Cargo Limited vs. Embakasi Properties Limited & 2 Others (2019) eKLR** as follows:

*“12. This Court in discussing its power to admit additional evidence under Rule 29 (1) stated as follows in Republic –v- Ali Babitu Kololo (2017) eKLR*

*“ It has been said time and again that the unfettered power of the Court to receive additional evidence should be used sparingly and only where it is shown that the evidence is fresh and would make a significant impact in the determination of the appeal.”*

### **Determination**

21. Having evaluated and considered each of the items of additional evidence sought by the Applicant against the detailed guidelines and criteria laid down by the Supreme Court in the **Mohamed Abdi Mohamud supra** case, and reiterating the holding by the Court of Appeal in the case of **Attorney General v Torino Enterprises Limited [2019] eKLR**, I observe that the clear guidelines issued by the Supreme Court directed at Appellate Courts are not conjunctive. However, an applicant must substantially comply with the guidelines. Whether the additional evidence will impact the result of the case is a matter to be determined on merit upon the evaluation of the additional evidence with all other evidence on record, I note that the main issue for consideration in this appeal is that the trial court considered evidence adduced in submissions which submissions, according to the respondent/appellant, were filed out of time and without leave of court and which submissions raised points of law that were not pleaded or raised during the trial.

22. The additional evidence that the applicant herein seeks to introduce is evidence that the applicant alleges shows that the respondent/appellant was given an opportunity to respond to the point of law canvassed in the submissions.

23. I have examined the said additional evidence sought to be admitted. I find it not voluminous as it comprises a single page of correspondence showing an email sent by the applicants/respondents to the respondent/appellant attaching the submissions in question.

24. I also note that the applicant filed the instant application way back on the 3.12.2021 and since then, the respondent/appellant has had enough time to examine what the applicant claims to be additional evidence and therefore there is nothing strange that would be prejudicial to the appellant.

25. As to whether the additional evidence herein could have been adduced before the trial court, I note that the necessity of adducing the said evidence arises in response to the grounds of appeals raised by the respondent in its memorandum of appeal specifically paragraph 2, 3, 4 and 7. I further observe that the evidence in question was adduced during submissions.

26. In my view, the additional evidence sought to be adduced is directly relevant to the matter before the court and it is in the interest of justice to have the same adduced.

27. Further, the adduction of such evidence will give the appellant the opportunity to rebut or respondent to the same hence no prejudice will be suffered by the appellant if the application herein is allowed. As there is no cross appeal, I do not find that the additional evidence is intended to fill the lacunae in the respondent's case.

28. Finally, this court observes that points of law can be raised at any time of the proceedings in a case before it. Points of law need not be pleaded as parties are only expected to plead facts and submit on points of law. Should this court allow this application, then, as a first appellate court, I will accord the appellant an opportunity to respond to the submissions and address the points of law raised in the submissions which the appellant claims were relied on by the trial court in its determination yet the appellant did not have the opportunity to respond thereto. I reiterate that the appellant will benefit more from the said additional evidence than if it was omitted, just in case this court finds that its counsel was served with the same but did not respond to the same, as the appellant has the opportunity of responding to or rebutting the said evidence during the hearing of this appeal, than if the evidence was omitted altogether. In my view, there is no prejudice and none was demonstrated, to be occasioned to the appellant if the application is allowed.

29. Accordingly, I am satisfied that substantially, the additional evidence sought to be adduced largely meets the criteria and guidelines laid out by the Supreme Court in the *Mohamed Abdi Mohamad supra*. I allow the application as prayed and direct the respondent/ applicant to file and serve a supplementary record of appeal comprising the additional evidence, within seven days of this ruling failure to which the leave granted shall lapse. The appellant shall have the opportunity to respond to the said evidence when filing the submissions for canvassing this appeal, for consideration by this court. The appellant to file and serve written submissions within 14 days of today upon which the respondents shall have 14 days of service to file and serve their written submissions. Mention on 3/5/2022 to fix a judgment date. Each party to bear their own costs of the application dated 2/12/2021.

30. I so Order.

**DATED, SIGNED AND DELIVERED AT SIAYA THIS 5TH DAY OF APRIL, 2022**

**R.E. ABURILI**

**JUDGE**