



REPUBLIC OF KENYA



KENYA LAW
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**Mwinzi & others v Kenya Rural Road Authority & 3 others (Petition
2 of 2021) [2023] KEELC 18789 (KLR) (13 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18789 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
PETITION 2 OF 2021
LG KIMANI, J
JULY 13, 2023**

BETWEEN

DOMINIC MUSYA MWINZI & OTHERS APPELLANT

AND

KENYA RURAL ROAD AUTHORITY 1ST RESPONDENT

THE HON. ATTORNEY GENERAL 2ND RESPONDENT

**PRINCIPAL SECRETARY, MINISTRY OF TRANSPORT, INFRASTRUCTURE,
HOUSING AND URBAN DEVELOPMENT 3RD RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 4TH RESPONDENT**

RULING

1. The Respondents filed the Application dated 15th March 2023 through the office of the Attorney General seeking orders that;
 1. Spent.
 2. Spent.
 3. The Honourable Court be pleased to grant leave for the Respondents to reopen the Respondents' case limited to the production of the cadastral maps and land acquisition plans for Mwingi-Kandwia-Tseikuru road.
 4. That costs of this application be in the cause.
2. The Application is supported by the grounds that the instant petition proceeded for hearing by way of viva voce evidence with the hearing concluding on the 1st of February 2023. The court directed parties to file written submissions and the matter was set down for mention to confirm filing of submissions



on the 22nd of March 2023. The Respondents claim that the Kenya Rural Roads Authority, the 1st Respondent/Applicant furnished the office of the Attorney General with further crucial information and documentation that would aid the court in determination of this matter. It is stated that the further documentation includes the cadastral maps and the land acquisition plans relating to the construction of the Mwingi-Kandwia-Tseikuru road which is the subject matter of the instant petition.

3. It is further stated that the documents became available after the hearing of the petition had closed and there was no undue delay on the part of the Respondents in adducing them in court. They stated that the said documents will go a long way in helping the Court to resolve the issue in dispute between the parties, more specifically, the survey maps will help ascertain the width of the road reserve and the private properties affected by the road construction, which issues form the substratum of the instant petition.
4. It is claimed that none of the documents already filed in court by the parties can help ascertain the above issues hence the necessity to produce the survey documents. Further, that the petitioners are aware of the import and tenor of the said documents having referred to them severally in their pleadings and would therefore not suffer any prejudice to warrant the non-admission.
5. That the Court has jurisdiction and can exercise its discretion as was held in Nakuru ELC Joseph Ndung'u Kamau v John Njihia [2017] eKLR to grant the orders sought and it is in the interests of justice that the documents be produced in evidence. The application is supported by the affidavit of K.Wando Odhiambo who deposed and confirmed the matters summarized above.

The Applicants written submissions

6. It is the Applicant's submission that this Court has the requisite jurisdiction to entertain an application of this nature as they relied in the holding in the case of Nakuru ELC No.392 of 2016 Joseph Ndung'u Kamau v John Njihia where the court held that the application was for the exercise of the Court's discretion for sufficient reason.
7. State Counsel also relied on the case of John Kiplagat Barbaret & 8 others v Isaiah Kiplagat Arap Cheluget[2016] eKLR where the Court of Appeal summarized the criteria for adducing additional evidence in the following terms;

“the relevant rule authorizing the adduction of additional evidence uses a general phrase, namely ‘sufficient reason’.”
8. The Applicant further enumerated the criteria for admitting additional evidence as set out in the Court of Appeal case of the Attorney General v Torino Enterprises Limited [2019] eKLR and in Supreme Court case of Mohammed Abdi Mohamad v Ahmed Mohamad & 3 others [2018] eKLR.
9. It is the Applicant's submission that they have demonstrated sufficient reasons while making reference to the overriding objective of the Court in Sections 1A, 1B and 3A of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya 2010 which prescribes that justice should be administered without undue regard to procedural technicalities. Counsel stated that it will demonstrate that the width of the road reserve is 40 meters according to the maps from the survey of Kenya offices. The Applicant submits that there was no undue delay in bringing the documents and that the Petitioners will not be prejudiced as they will have an opportunity to cross-examine the documents.



The Respondent's submissions

10. Counsel for the Respondents in the present application submitted that there was no plausible explanation as to why the cadastral map that was in custody of the 1st Respondent was not produced during the trial. He pointed out that during the hearing, the Applicants' witness D.K Wando Odhiambo stated that he confirmed having seen the said cadastral maps but did not produce them in Court but stated that they can be obtained from the lands office.
11. Further, the Petitioner submitted that any evidence sought to be introduced to confirm the width of the road or the land acquisition process will amount to filling in gaps in the case. It is their submission that it is highly prejudicial to the Petitioners to adduce additional evidence when they had already established their case and even filed written submissions.
12. The Petitioners relied on the case of *Odoyo Osodo v Rael Obara Ojuok & 4 others* [2017] eKLR where the court held that the evidence that the defendants wish to adduce was always available during the trial and no explanation was tendered as to why it could not be adduced before the close of their case. They also relied on the case of *Samuel Kiti Lewa vs Housing Finance Co. of Kenya Ltd & Another* [2015] eKLR where the court held that the discretion to allow re-opening of a case must be exercised judiciously.
13. It is therefore the Petitioner's position that the instant application lacks merit and there was no plausible explanation as to why the documents were not produced at trial.

Analysis and Determination

14. The Applicants have filed the instant application praying to adduce additional evidence that was not produced during the hearing of the Petition. The petition was heard and parties were directed to file written submissions. The additional documents include cadastral maps for the subject area in Mwingi, the land acquisition plan and the land acquisition schedule.
15. The issues raised in the main Petition are that the Petitioners are proprietors of the parcels of land affected by the upgrading of the Mwingi-Kandwia-Tseikuru road. They claim that the 1st Respondent compulsorily acquired their land but failed to compensate them as per the value of their properties and undervalued them. In response thereof, the 1st Respondent stated that the said compensation was done in conformity with *the Constitution* of Kenya 2010 and that the complainants are people who have illegally encroached on the authentic road reserves.
16. The Applicants now wish to produce documents to show the width of the road reserve which was an issue of contention during the hearing. In the case of *Joseph Ndungu Kamau v John Njihia* [2017] eKLR, which the Applicants have relied upon, the Court held that:

“The principles governing an application such as that before the court are that the court needs to find out why the evidence was not adduced prior to the hearing of the case being closed. Reopening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a similar application in *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR Kasango J. stated:

Uganda High Court, Commercial Division in the case *Simba Telecom v Karuhanga & Anor*[2014] UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case *Smith v New South Wales*[1992] HCA 36; [1992] 176 CLR 256 where it was held:



“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

The Ugandan Court in the case *Simba Telecom (supra)* held thus:

“I agree with the holding in the case of *Smith v South Wales Bar Association* [1992] 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently, even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.”

17. It is the Applicants case that the documents only became available after the hearing of the case and that it will not prejudice the Petitioners to have the documents admitted as they will have an opportunity to cross-examine the witness producing the documents.
18. In *Mohamed Abdi Mahamud v Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR also cited by the Applicants, the Supreme Court laid guidelines for admission of additional evidence before appellate courts in Kenya. The guidelines were set out as follows:

“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 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 wilful 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.

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.”

19. Upon relying on the Mohamed Case (Supra) the Court of Appeal allowed a similar application in the case of Attorney General v Torino Enterprises Limited [2019] eKLR noting that:

“On whether the items of additional evidence could have been tendered before the trial court in exercise of due diligence, we have considered the applicant’s explanation that the documents were with the Department of Defence and were not available to the Hon. Attorney General at the time of trial. This explanation though plausible cannot at all times excuse or justify adduction of additional evidence at the appellate stage. We reluctantly accept the explanation and note that the respondent’s submission of adduction of the new evidence will not prejudice it as such additional evidence is according to the respondent unhelpful even if admitted. We are further satisfied that the additional evidence is credible as it consists of official documents written and received in the course of public duty and the documents originate from a public office having proper custody thereof. We note the authenticity and veracity of the itemized documents has not been impugned. We are satisfied that the additional evidence is not meant to bolster or fill gaps in the applicants pending appeal rather, prima facie, the additional documents are aimed at removing any vagueness or doubt over the suit property and the documents have a direct bearing on the main issue in the pending appeal.”

20. In the case of John Kiplangat Barbaret & 8 others vs. Isaiah Kiplangat Arap Cheluget [2016] eKLR, the Court allowed adduction of additional evidence in the form of a survey map for LR No. Narok/ CIS-Mara/Ilmotio/54 showing a portion of the suit land occupied by the appellants; the Court also admitted additional evidence of the air cartography map of 1971 showing the settlement status in Sagamian area.



21. On the other hand, the courts must exercise this discretion judiciously and have been reluctant to grant an application to adduce additional evidence when the above cited criteria have not been met. In the case of *Odoyo Osodo v Rael Obara Ojuok & 4 others* [2017] eKLR the Court denied an application to re-open the Defence case, rationalizing as follows:

“The defendants counsel has urged the court to allow the reopening of the case to enable the defendants to adduce the evidence in support of the counterclaim which was not adduced owing to what counsel terms as an oversight by counsel. The defendants counsel in effect is owning up that he was less than careful or diligent while prosecuting and/or presenting the defendants case. Counsel urges the court not to visit the mistake of counsel on the litigant and to, in the interest of justice, allow the application and have the case reopened. While I have sympathy for the litigants (defendants in this case) I fail to understand how it could be an oversight to adduce evidence which was always available. The defendants must all along been aware of the case they were facing from the plaintiff and in that regard filed a defence and counterclaim. The defendants had a whole day scheduled for defence hearing and in preparing for the hearing must have determined the evidence that they would require. It defeats logic how the defendants who all along were represented by counsel could overlook evidence that was necessary for their case. There is no case of genuine mistake or error on the part of counsel which perhaps could invite sympathy of the court.”

22. Kasango J in the case of *Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another* [2015] eKLR held that:

“The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also, such prayer for re-opening of the case will be defeated by inordinate and unexplained delay. In this case Plaintiff’s counsel stated that the Plaintiff if allowed to re-testify would show that the charge document, which he did not produce in evidence, was diametrically different to the one produced by 1st Defendant’s witness, in evidence. In my view if the Plaintiff was allowed to re-open his case to so prove it would amount to allowing the Plaintiff to fill the gaps in his evidence. That would be prejudicial to the defendants. But more importantly the Plaintiff did not submit in evidence a charge instrument to be compare to the one produced by 1st Defendant.”

23. The court has considered that the petition herein was filed on 10th April 2018. The Respondents filed Grounds of opposition dated 7th July 2018 and a replying affidavit sworn by K. Wando Odhiambo on 31st December 2018. He stated that he was the Survey Manager at Kenya Rural Roads Authority (KeRRA) the 1st Respondent which is a state corporation under the 3rd Respondent. The deponent to the said affidavit testified in court and adopted the affidavit. He is also the person who has sworn the affidavit in support of the present application. In the relevant part where it relates to the present application the witness stated at paragraph 6 and 12 of the affidavit sworn on 7th July 2018;

“6. That the Mwingi -Kandwia-Tseikuru road (C93/D478) road project was awarded to China Wu Yi Co. Ltd in June 2011 and that construction commenced in August 2011. The Authentic road reserve corridor according to the cadastral maps is 40 meters”



“12. That the complainants herein are people who have illegally encroached on the authentic road reserves. ..”

24. The Respondents clearly knew from the outset that the issue in contention was the size of the road under construction and the road reserve and whether the Petitioners had encroached onto the said road reserve.
25. The Petitioners filed an Amended Petition on 7th October 2021 and a further list of documents filed on the same date. The court record shows that when the matter came up for mention on 2nd December 2021 Counsel for the Petitioner stated that a State Counsel had written to them seeking time to reply to the further documents and the amended petition. No reply was ever filed as envisaged or at all. Subsequently the matter proceeded and parties adduced oral evidence.
26. The Respondent’s only witness was Mr. Kenneth Wando Odhiambo who stated that he had worked for the 1st Respondent since July 2009 and in December 2022 he retired as a Deputy Director, Survey. The court record shows in his testimony that he was involved in the project for construction of Mwing-Kenduiywa-Tseikuru road with a team of surveyors and he testified that part of his job was to establish the authentic road reserve. He further stated that in order to accomplish his assignment he obtained authentic survey maps from the survey of Kenya office in Kitui. He further stated that the authentic cadastral maps show the location of the subject road in relation to the abutting land be it private or public land.
27. From the foregoing and the entire evidence adduced during the trial the contention by the Applicant that the cadastral maps and land acquisition plans were only available to them after the trial had been concluded is clearly not true. Indeed, such contention flies in the face of the position held by the Respondent’s witness as the Deputy Director Survey with the 1st Respondents placing him in such a position that even if he did not have any of the maps or plans he would have known the need to file them in court and he would also have known which the place to find them.
28. It is the courts view that no good reason has been given why the documents were not filed in the course of filing pleading and the reason given is deceptive and not plausible. The court finds that the mere assertion that the documents were made available to the office of the Attorney General after the trial had closed is not enough to avail the Respondents the benefit of the courts discretion.
29. It is the Courts view that the Applicant did not exercise due diligence as it appears the said documents were at all times in the custody of the 1st Respondent and in spite of being given time to file further documents in reply to the petition and the further bundle of documents they did not do so.
30. It is the courts view that the belated request to adduce the further documents is an effort to remove lacunae and fill in the gaps noted during the trial and the same ought not to be countenanced. It is further noted that re-opening the case and filing the new documents at the instance of the Respondents will lead to reopening the case by all parties and filing of further documents leading to unnecessary delay. In the courts view such re-opening will embarrass and/or prejudice the petitioners by causing delay in the conclusion of the case.
31. In the above circumstances the court finds that the application dated 15th March 2023 lacks merit and the same is hereby dismissed with costs to the Petitioners/Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 13TH DAY OF JULY, 2023.

HON. L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT KITUI



Ruling read in open court and online in the presence of-

Musyoki Court Assistant

Mulili for the Applicant

No attendance for the Respondents

