



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC APPEAL NO. 42 OF 2020**

**EUNICE KANANA.....1<sup>ST</sup> APPELLANT**

**JOHN NTEERE.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**ROSEMARY MUGITO.....1<sup>ST</sup> RESPONDENT**

**GRACE KARIMI KWIRIGA.....2<sup>ND</sup> RESPONDENT**

(Being an appeal from the Judgment of Hon. J. Irura (P.M.) delivered on 29<sup>th</sup> July, 2020,

in Nkubu P.M. ELC 110 No. 34 of 2018)

**RULING**

1. By an application dated 16.7.2021, the appellants seek leave to adduce additional evidence in support of their claim. The application is supported by an affidavit sworn on 16.7.2021 by Joseph Nteere Mutea.
2. The grounds in support are, though judgment was entered on 29.7.2020, the appellants had inadvertently left out some evidence which would assist this court to make a fair and just determination of this appeal.
3. The appellants' claim was over land bought from the estate of Kwiriga M'Magiri through Meru Succession No. 113 of 1992 which proceedings allegedly were unavailable at the trial.
4. It is contended by the appellants that had the trial court looked at the said evidence it would have reached a different decision.
5. Further the appellants state they were not in possession of that evidence and hence the basis of the application herein.
6. The 1<sup>st</sup> respondent opposes the motion through a replying affidavit sworn on 13.8.2021.
7. It is stated this appeal was filed on 26.8.2020, the appellants filed an application for review and re-opening of the judgment in lower court on 17.9.2020 out of which they filed a notice of withdrawal of the appeal. They later on withdrew the notice of withdrawal of the appeal.
8. The trial court dismissed the said application on 20.1.2021 which order has not been appealed against hence the 1<sup>st</sup> respondent is of the view the appellants are estopped from filing the instant application on the very same grounds and reasons in the name of additional evidence during the appeal.
9. Further the respondents take the view the evidence sought to be introduced are matters for a different cause of action and that **Article 159 of the Constitution** is inapplicable.
10. With leave of the court parties agreed to canvass the application through written submissions dated 18.10.2021 and 29/10/2021 respectively.
11. The appellants submit the court should not look at the merits of the appeal at this stage but the merits of the application based on the credibility, relevance and legality of the additional evidence on the basis of substantive justice as opposed to technicalities.

12. Secondly, it is submitted the trial court for unknown reasons ignored and or overlooked the evidence yet it was crucial for the just determination of the suit and once allowed, the respondent shall have an opportunity to interrogate the same during the hearing of the appeal.

13. Thirdly, it is submitted the intended evidence relates to public documents which if overlooked would lead to injustice.

14. The respondents submit the so called additional evidence was already produced as **P exh 3** at page 49.

15. Additionally it is submitted the appellants are engaged in forum shopping by raising matters already determined to finality hence are estopped and or barred by the doctrine of res-judicata.

16. Under **Order 42 rule 27** the appellate court has powers to allow for the production of additional evidence at the hearing of the appeal in two instances:-

**a. Where the trial court refused to admit evidence which ought to have been admitted and secondly where**

**b. The appellate court requires any document to be produced or a witness to be examined or for other substantial cause.**

17. The principles to be applied were laid down by Supreme Court of Kenya in **Mohamed Abdi Mahamud -vs- Ahmed Abdullahi Mohamad & 3 others [2018] eKLR.**

**a. The additional evidence must be directly relevant to the matter 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.**

**d. It will remove any vagueness or doubt over the case and has direct bearing on the main issue of the suit.**

**e. Must be credible in the sense that it is capable of belief.**

**f. Must not be voluminous making it difficult or impossible for the other party to respond effectively.**

**g. Must be utilized for the purpose of removing lacunae and filing gaps in evidence.**

**h. Must not be aimed at making a fresh case in appeal, fill up omissions or patch up the weak points.**

**i. The court has to consider the proportionality, prejudice swift conduct of litigation by balancing the interests of justice.**

18. In line with the above principles, the court shall proceed to establish if the appellants deserve the exercise of the court's discretion in their favour.

19. At the lower court the appellants sought for eviction and permanent orders of injunction over **L.R No. Abogeta/L-Kiungone/473**. The appellants relied on a title deed issued on 8.1.1999. They claimed to have been sold the land by one Caxton Mbae Mutumwari who had bought it from in 1996 from Stephen Kithinji Kwiriga and John Peter Gikunda alleged administrators of the estate of the late Kwiriga Magiri.

20. The respondents denied the claim, stated the land initially belonged to their deceased father but had been fraudulently sold and transferred to the appellants by persons lacking capacity to deal with the land or who had purported to take letters of administration without their consent. They denied being trespassers.

21. The appellants refuted any fraud through a reply to defence and claimed the property was sold to them by the respondents' own brother.

22. By a supplementary list of documents dated 18.1.2018, the appellants attached a grant in **Meru HCC 113 of 1992** and a **gazette notice No. 4274 of 1992**. The respondents filed a list of documents dated 3.10.2019 including a death certificate, limited grant No. 87 of 2014, chief's letter dated 2.7.2013 and a copy of the green card for **L.R No. Abogeta/L. Kiungone/493**.

23. At the hearing only the 2<sup>nd</sup> appellant testified, called one Caxton Mbae and produced a copy of their **title deed, a demand letter and copy of grant and a gazette notice** as **P exh 1, 2 and 3** respectively. The grant produced had page No. 1 with properties listed at its face as **L.R No. L. Kiungone/478, 576 and 481**.

24. From the records, it appears the grant was made long before the appellants bought the land. So it was known to them that there was in existence such a grant before purchasing the land and eventually at the time of filing the suit. If they were able to get the extract of the grant it was still within their reach to obtain the entire court file. Consequently, this information was within their knowledge and hence this application can only amount to an afterthought.

25. Thirdly, the issue before the court was the manner the appellants got transferred the land by persons who allegedly sold them the land.

The vagueness and the doubt was the lack of a sale agreement, land control board consent and transfer forms between the purported legal administrators of the estate of the deceased with PW2 and thereafter the appellants. None of witnesses produced any such documents to the court.

26. Similarly and regarding the credibility of the intended additional evidence, if indeed the source of the documents was the court registry, there is no evidence that the appellants sought for witness summons to call the Deputy Registrar to avail the succession file.

27. Strangely, the appellants are not seeking for such summons for the said evidence to be availed by the Deputy Registrar who may very well be in a position to produce a more clearer and credible document.

28. Lastly, the appellants filed an application dated 17.9.2020 seeking for the review and or re-opening of the suit based on the same grounds as in the instant application while the appeal filed on 26.8.2020 was pending. The appellants filed a notice of withdrawal of the appeal dated 26.10.2020 so as to allow the lower court to handle the aforesaid application. The court determined the said application by a ruling delivered on 20.1.2021.

29. That notwithstanding the court had already admitted the appeal for hearing and ordered the record of appeal to be filed by 5.3.2021. The record of appeal was also filed outside the given timeframe, leading to leave to file by 26.5.2021. This application was filed on 19.7.2021 instead of within 30 days from 6.5.2021.

30. Given the foregoing circumstances and reasons, my finding is the appellants have failed to fulfil nearly all the principles as laid out by the Supreme Court of Kenya to make a case for leave to avail additional evidence.

31. I therefore dismiss the application with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19<sup>TH</sup> DAY OF**

**JANUARY, 2022**

**In presence of:**

Thangicia for appellants

Mukanguru for respondents

Court assistant - Kananu

**HON. C.K. NZILI**

**ELC JUDGE**