



REPUBLIC OF KENYA



**KENYA LAW**  
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**Nguli v Matheka (Environment and Land Appeal 14 of 2019)  
[2022] KEELC 12657 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12657 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL 14 OF 2019  
CG MBOGO, J  
SEPTEMBER 30, 2022**

**BETWEEN**

**STEPHEN MUTUA NGULI ..... APPLICANT**

**AND**

**SAMSON MATHEKA ..... RESPONDENT**

**RULING**

1. Before this court for determination is a notice of motion application dated June 23, 2020 expressed to be brought under section 78 1 (d) and sections 1A,1B and 3A of the Civil Procedure Act and order 42 rule 27, order 50 rule 1 of the Civil Procedure Rules seeking the following orders: -
  1. That the appellant be allowed to produce additional evidence in this court or any subordinate court as may be directed.
  2. That this honourable court be pleased to give any such other and/or further order (s) as it may deem fit.
  3. That the costs of this application be in the cause.
2. The application is premised on the grounds *inter alia* that this court may require a surveyor report dated November 20, 2017 and the title deed for property known as Makueni/Masongaleni/328 to enable it to make a judgment or for any other substantial cause, the said title deed being new evidence that was not available during the hearing of SPMCC No 387 of 2009.
3. The application is supported by the affidavit of the applicant sworn on even date. The applicant deposed that judgment was delivered in SPMCC No 387 of 2009 on May 17, 2019 and while he had instructed several advocates to act for him in the matter at the trial court, he acted in person and the court issued orders to file a surveyor's report which is dated November 20, 2017 which he forwarded to the court but the same is missing in the court documents.



4. The applicant further deposed that he was also issued with a title deed on February 2, 2018 which serves to authenticate the letter of offer he had used to file the case at the Makindu Law courts. Further, that he risks to suffer substantial loss and irreparable injury if the orders sought are not granted.
5. The application is opposed by the affidavit of the respondent sworn on January 7, 2021. The respondent deposed that the applicant has had the documents he seeks to introduce and relied on the same at the trial court and which documents will not help the court at all in determining the matter as they are not credible. Further, that the matter involves a boundary dispute which the applicant never followed before filing of the suit and, therefore, the applicant is attempting to delay the finalisation of the appeal.
6. The respondent filed grounds of opposition dated January 12, 2021 challenging the application on the following grounds: -
  1. That the applicant will not amount to much given that the substratum of the suit is a boundary issue between the parties, and the suit as instituted violates section 18 of the [Land Registration Act](#).
  2. That the documents sought to be admitted are not helpful to the court in determining the issue at hand at all.
  3. That the documents were at all material times in the possession of the applicant and he previously relied upon them and thus the applicant can't meet the duty established principles of the court hearing the appeal to admit them.
7. The applicant filed written submissions dated May 7, 2021. The applicant raised one issue for determination which is whether the applicant has made out a case for leave to be granted to adduce additional evidence on appeal. The applicant submitted that the duty of this court is to determine whether there is additional new evidence, whether that evidence could have been obtained by the applicant after reasonable diligence before and during the hearing, if there is a probability that the additional evidence would have an important influence on the result of the case and whether there is sufficient reason to admit the additional evidence.
8. The applicant submitted that he was acting in person at the trial court and while he submitted the surveyor's report during trial, it appears that the same was not properly filed. Further, that he obtained a title deed after judgment was delivered and wishes to introduce the same to prove that he owns the land in question and that there is encroachment by the respondent. The applicant relied on the case of [Attorney General versus Torino Enterprises Limited](#) [2019] eKLR and [John Kiplangat Barbaret & 8 others versus Isaiah Kiplangat Arap Chelogot](#) [2016] eKLR and [Mohamed Abdi Mohamed versus Ahmed Abdullabi Mohamed & 3 others](#) [2018] eKLR.
9. The applicant buttressed on the submission that he was acting in person and therefore being a layman, he did not have the benefit of appreciating the kind of documentary evidence necessary to back up his claim of trespass and the fact that he needed to file the documents at the registry and not bring it to open court.
10. The applicant further submitted that he will be prejudiced if the evidence sought to be adduced is locked out and that the said evidence is not voluminous as it comprises a letter from the surveyor and a title deed which documents were filed in court and served upon the respondents on July 15, 2020. The applicant submitted that there is no prejudice to the respondent in admitting the evidence sought to be adduced as the respondent can challenge such evidence. Further that the additional evidence is



intended to remove any vagueness or doubt over ownership and encroachment on the suit property and which evidence has direct bearing on the main issue in the pending appeal.

11. The respondent filed written submissions dated May 12, 2021. The respondent submitted that the documents sought to be introduced were available at all times and in the possession of the applicant. Further that on page 33 of the proceedings, the surveyor's report was filed and was in possession of the parties. The respondent submitted that the surveyor's report will not add any value as it was filed by an unqualified person and it would be the height of the imprudence to be urged to allow an invalid, incompetent report for use as additional evidence.
12. While relying on the case of *Mohammed Abdi Mohamed versus Ahmed Abdullahi Mohammed & 3 others* [2018] eKLR, the respondent submitted that the documents are irrelevant and of no interest to the justice of the case as the surveyor's report is not credible and cannot be used in court, further that the title deed is of no use as the issue is not about ownership but trespass. Further that the documents were with the applicant save for the report which was already in the court file but was incompetent, also, the documents cannot remove any vagueness or doubt as such it is not needful.
13. I have considered the application, reply thereof and the written submissions filed by both parties and the issue for determination is whether the application dated June 23, 2020 has merit.
14. Section 78 of the *Civil Procedure Act* and order 42 rules 27, 28 and 29 of the Civil Procedure Rules form the legal basis for this application. Section 78 of the *Civil Procedure Act* provides thus:
  - (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;(emphasis mine)
    - 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.
15. Order 42 rules 27, 28 and 29 of the *Civil Procedure Rules*, 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.”

16. The Supreme Court in *Mohammed Abdi Mohamud vs Ahmed Abdulabi 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 proportionally 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.”

17. 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.”

18. In this case, the applicant deposed that having acted in person during the trial, he presented the surveyor’s report dated November 20, 2017 during the hearing and owing to the fact that he is not knowledgeable with legal matters, he presented the same to court and did not file at the registry. It is his position that the surveyor’s report is missing in the court file and this court may require the same to enable it make a judgment. The applicant further averred that he obtained title to the suit property known as Makueni/Masongaleni/328 on February 2, 2018 and he would wish to introduce the same as new additional evidence to prove that he is indeed the owner.
19. In considering the averments by the application, I perused the record of appeal and more so the court proceedings during the hearing. The court proceedings dated November 20, 2018 indicate that the plaintiff while acting in person testified that he has a title deed which was at home and that the respondent entered into his land where he went to the surveyor and the boundary was established. It was the applicant’s position that the report was presented before court but the same is not in the court file. On the other hand, the respondent submitted that the surveyor’s report was filed in the lower court file and the court had the opportunity to examine and thus it shall not in any way add value to the appeal.
20. Both parties indeed have admitted that the surveyor’s report was filed. The only issue is that it was not in the court file. This in my humble view could be a case of misfiling on the part of the court’s registry. The evidence was therefore not new to the trial court. I have perused the record of appeal dated December 6, 2019, and I do note that the surveyor’s report dated November 20, 2017 is on page 58 and the title deed is on pages 61-64. The said documents intended to be relied upon are not voluminous and therefore not difficult for the other party to respond effectively. The said documents also sought to be relied in my view remove doubt over the case and I am satisfied that it has a direct bearing on the main issue.



21. Arising from the above, I do find that the notice of motion application dated June 23, 2020 has merit. I hereby direct as follows:-
- i. That the applicant be and is hereby allowed to file the surveyor's report dated November 20, 2017 and the title deed to property known as Makueni/Masongaleni/328 in court within seven days from the date of this orders.
  - ii. Each party shall bear its own costs.
  - iii. Mention on October 19, 2022 before the Deputy Registrar for further directions. It is so ordered.

**DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

**HON. C.G. MBOGO**

**JUDGE**

**30/09/2022**

