



REPUBLIC OF KENYA



**Tsango & 2 others v Mwachangoma & another (Civil Appeal
42 of 2020) [2022] KEELC 13823 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13823 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL APPEAL 42 OF 2020**

**M SILA, J
SEPTEMBER 28, 2022**

BETWEEN

KTIUMBUA NJIRA TSANGO 1ST APPELLANT

MOHAMED KALOLWA BEKALOLWA 2ND APPELLANT

MWACHUPA DZIMBA BEKALOLWA 3RD APPELLANT

AND

HUSSEIN KANENO MWACHANGOMA 1ST RESPONDENT

MBWANA JUMAA MWACHANGOMA 2ND RESPONDENT

RULING

1. The application before me is that dated 31 January 2022 filed by the respondents to this appeal. From what I can discern, the principle prayers are two, being :-
 - a. That this appeal does proceed by way of taking new evidence *viva voce* and that the parties be directed to file witness statements and copies of documents within such time as the court may direct.
 - b. Without prejudice to the above, the respondent be granted leave to file a supplementary record of appeal within 14 days of the order.
2. To put matters into perspective, this is an appeal arising out of a decision of the National Land Commission, Task Force on Historical Land Injustices, delivered on 7 February 2019 in NLC/HLI/099/2017. From what I can discern, the family of the appellants (family of Bemokosi Tsango) complained to the National Land Commission (NLC) regarding the ownership of the land parcels Kwale/Kirazini A/365, Kwale/Kirazini A/244 and Kwale/Kirazini A/155. They claimed that this was their land and that it was adjudicated to an undeserving family, that of the respondents. That claim was heard and dismissed on 7 February 2019 with the appellants being advised to seek assistance



from the Digo elders. Aggrieved, the appellants filed this appeal seeking to quash that determination. On 22 January 2022, I admitted the appeal and directed counsel for the parties to file their written submissions. This application was then filed.

3. The application is based on the grounds *inter alia* that the record of appeal does not include crucial documents presented before the National Land Commission during the hearing, including postal searches of vast parcels of land belong to the appellants, and that the parties should be allowed to present their witnesses and evidence of ownership *viva voce*.
4. There are two supporting affidavits, one sworn by Abdulkader Mohamed Bhagha, counsel for the applicants, and the other sworn by the 1st respondent, Mbwana Juma Mwachangoma. In his affidavit, Mr Bhagha has *inter alia* deposed that when the court gave directions for filing submissions, the court did not address itself to order 42 rule 15. He has also referred to section 78 of the [Civil Procedure Act](#), regarding taking of evidence of appeal. He has referred to the record of the NLC and deposed that evidence was taken haphazardly without exhibits being identified or marked and that the parties were denied opportunity to call evidence and witnesses in support of the ownership of their parcels of land thus need to rehear the evidence. In his affidavit, Mr Mwachangoma had referred to copies of titles and adjudication records captured in the record of appeal and has averred that their family owns the parcels of land having been adjudicated in the late 1970s. He avers that the copies of certificates of search are exempted from the record of appeal yet he presented them to the NLC as evidence that the appellants own large parcels of land. The other issues deposed, as far as I can see, merely justify their ownership of the land, and a stress on the need to rehear the suit through *viva voce* evidence.
5. The application is opposed through grounds of opposition. It is averred that the record of appeal was served on 12 January 2021 and the respondents had time to file this application. They aver that this application is a delaying tactic. It is further stated that at no point within the hearing of the suit were the parcels of land displayed by the applicants as being owned by the appellants referred to in the proceedings of the NLC.
6. I invited counsel to file their written submissions which was done and I have considered the same before arriving at my decision.
7. On the first issue, it is said that the record of appeal is missing some documents which were presented to the NLC. I have been asked to look at the record from pages 5 to 23. I have looked at the record. What is there from page 5 to 23 is the oral proceedings before the NLC. I have not been pointed to any page or paragraph which shows that the applicants presented any of the documents that they now want to introduce. It was the onus of the applicants to point out the exact page and paragraph where this was done which they have not done so. Even the submissions of counsel for the applicants do not point me to any page or paragraph that refers to production of the documents sought to be added in the record of appeal. I am thus unable to say that the documents they now seek to introduce were actually presented and are not included in the record of appeal.
8. There is mention of order 42 rule 15 which provides as follows
 15. Notice to be given where decree appealed from
 - (1) When a memorandum of appeal is lodged the court to which such appeal is preferred shall send notice of the appeal to the court from whose decree the appeal is preferred.
 - (2) The court receiving such notice shall send with all practicable despatch all material papers in the suit, or such papers as may be specially called for by the court to which such appeal is preferred.



- (3) Either party may on application and upon payment of the requisite charges obtain copies of any such papers as aforesaid.
9. It should be recalled that this was not a proceeding before an ordinary court but before the NLC. The hearing was in fact rather informal. This court already has the minutes of the proceedings and there is a record of appeal filed revealing the manner of proceeding. Insisting on compliance with order 42 rule 15 is merely raising a technicality that serves no purpose. Given that position I cannot fault the record of appeal as filed.
10. The second issue is regarding taking of new evidence on appeal. I have been referred section 78 of the [Civil Procedure Act](#), cap 21, laws of Kenya. It states:-
78. Powers of appellate court
- (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 conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.
11. It will be seen from the above that under section 78 (1) (d), the appellate court has power to take additional evidence. The principles upon which the court exercises this power are not set out in the Act, but have been the subject of judicial determination. Counsel for the applicants referred me to the case of [Joginder Auto Service Limited vs Mohammed Shaffique & another](#), Court of Appeal, Civil Appeal (Application) No Nai 210 of 2000, wherein it was stated that in exercise of its discretion to take additional evidence, the court considers three broad principles, that is :-
- i. The applicant must show that the evidence sought to be adduced could not have been obtained with reasonable diligence for use at the trial.
 - ii. The evidence must be such that, if given, it would probably have an important influence in the result of the case, although it need not be decisive; and
 - iii. The evidence must be apparently credible, although it need not be incontrovertible.
12. First, it is not clear to me what new evidence is wished to be adduced. Other than the general statement that the parties should be allowed to adduce *viva voce* evidence, and be allowed to file documents and statements, the nature of these is not disclosed. Importantly, it is not shown that this evidence was not available and could not be obtained and produced within the trial. If it is the searches showing that the appellants own other land, these surely could have been produced at the trial before the NLC. I am also not sure whether evidence that the appellants own other land, would affect a claim by the appellants, that the title of the applicants ought to have been adjudicated to them, since one may be entitled to own multiple parcels of land.



13. For the above reasons, this application is dismissed and the applicants will pay the costs thereof.

14. Orders accordingly.

DATED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

