



REPUBLIC OF KENYA



KENYA LAW
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**Hapu v Parkike & another (Environment and Land Appeal 19 of 2019)
[2022] KEELC 13401 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL 19 OF 2019
CG MBOGO, J
SEPTEMBER 22, 2022**

BETWEEN

GEORGE LATON HAPU APPELLANT

AND

IKOTE OLE PARKIKE 1ST RESPONDENT

AGRICULTURAL FINANCE CORPORATION 2ND RESPONDENT

RULING

1. What is before this court for determination is a notice of motion application dated June 8, 2022 expressed to be brought under rule 18 (c) of the *Practice Directions on Standardization of Practice & Procedures in the High Court 2021* and article 159 (2) of the *Constitution* seeking the following orders: -
 1. That the appellant herein be and is hereby granted leave to file a supplementary record of appeal.
 2. That costs of this application be in the cause.
3. The application is premised on the grounds on the face of it and more particularly in the supporting affidavit of Stanley N Kinyanjui sworn on June 8, 2022. Stanley N Kinyanjui Advocate, deposed that his law firm filed a record of appeal on June 14, 2021 and while going through the proceedings, he noted that proceedings in Civil Suit No 54 of 2013 had been captured in the record of appeal but could not trace the pleadings in their office and presumed it had been filed away. Further that it was sometime in the month of May 2022 that the appellant while refurbishing his registry that the file was found with all the pleadings intact and it is their belief that the pleadings will assist the court better and further that the appellant shall be able to ventilate his case and assist the court arrive at a just conclusion.



4. The appellant further deposed that they have not delayed in filing this application and neither do they intend to delay justice and that despite the matter being certified ready for hearing, there will be no prejudice suffered by either of them.
5. The 1st respondent filed a replying affidavit in opposition to the same sworn on June 23, 2022. The 1st respondent deposed that by May 23, 2022 when the matter had been listed for highlighting of submissions, counsel on record had already filed written submissions on his behalf whereas the appellant had not filed written submissions. Further that the appellant had failed to annex the material intended to constitute the supplementary record of appeal thereby concealing material facts and that without disclosure of the material made reference to, he stands to be prejudiced. Further, the appeal is against Narok CMC ELC Case No 39 of 016 and has no nexus with Civil Suit No 54 of 2013.
6. The 1st respondent further deposed that the appellant has failed to annex a letter written to court requesting proceedings or showing the relevance of the said court file or the proceedings to the instant appeal and as such the appellant has lost interest in the appeal.
7. The 2nd respondent did not file a response or written submissions. Parties agreed to dispose off the application by way of written submissions. The applicant filed written submissions dated July 4, 2022. The applicant raised two issues for determination as follows:-
 1. Whether the record of appeal is relevant.
 2. Whether the respondent shall suffer prejudice.
8. On the first issue, the applicant submitted that ground 5 of his memorandum of appeal raises a legally substantive argument against an order of a court of equal status as made in CMCC 54 of 2013 and that this argument cannot be complete without placing the pleadings culminating in the decision of the lower court and that it would only make logical sense that the pleadings filed be added to the record of appeal. The appellant submitted that the 1st respondent has failed to disclose that the dispute between the parties did not begin through the institution of ELC 39 of 2018 but they had been engulfed in over 8 years of litigation with all files being placed in the last file before the trial court.
9. On the second issue, the applicant submitted that there is no single provision in law that demands annexing of a supplementary record of appeal for it to be deemed proper for the benefit of the court. The applicant relied on the case of *Allen A Lelekuti v Samuel Thumbi* [2022] eKLR. The applicant further submitted that despite making allegations that the 1st respondent has filed submissions, the same was not served upon the applicant and no evidence of service has been tendered and the 1st respondent cannot therefore claim prejudice. The applicant relied on the case of *Surestep Systems and Solutions Limited v Ataka Kimori & Okoth Advocates* [2021] eKLR.
10. The 1st respondent filed written submissions dated 4th July, 2022. The 1st respondent submitted that the applicant has not annexed the intended supplementary record of appeal to the application to demonstrate the documents it wishes to include which omission is a fundamental error since it denies the respondents and this court an opportunity to know what new documents the applicant intends to introduce. The 1st respondent relied on the case of *Kenya Agricultural and Livestock Research Organisation v Leah Okoko & Another* [2022] eKLR. The 1st respondent submitted that the applicant has deliberately concealed the materials intended to constitute the supplementary record of appeal and that the court ought to be aware of the intended new additional material in order to determine their authenticity and relevance to the appeal.
11. The 1st respondent further submitted that the inordinate delay in filing the instant application has not been sufficiently explained by the applicant. The 1st respondent relied on the case of *Azim Jiwa*



Rajwani v Fidelity Commercial Bank (Now SBM Bank Limited) [2021] eKLR. The 1st respondent submitted that this is a clear indication that the intended supplementary record of appeal was an afterthought.

12. I have considered the application, replying affidavit and the written submissions filed by the applicant and the 1st respondent and the issue for determination is whether this court should grant leave to the applicant to file a supplementary record of appeal.
13. 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.
14. Order 42 rules 27, 28 and 29 of the *Civil Procedure Rules*, provides that:
 - “(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.”



15. The Supreme Court in *Mohammed Abdi Mohamud v 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 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.”

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

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- “ 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.”

17. The applicant in this case has averred that pleadings in Civil Suit No 54 of 2013 were filed away and it was while refurbishing the office that he came across the file in the archives and it his belief that the same would assist the court have a proper context of the issue at hand. I have perused the file and I note that the applicant wrote a letter to the Deputy Registrar dated July 14, 2020 and in paragraph 3 confirmed that they are in possession of all the documents having acquired them on June 30, 2020.If at all the applicant was keen on relying on the pleadings in Civil Suit No 54 of 2013,he would have requested for copies of the same from the court file in their hand written letter dated July 21, 2020 when requesting for copies of the proceedings.
18. The applicant submitted that the 1st respondent is not prejudiced in any way since they have not filed written submissions. I have perused the file and there is the 1st respondent’s written submissions to the appeal dated May 20, 2022 and filed in court on even date. In my view, the 1st respondent seems keener to dispose off this appeal as compared to the applicant and the 1st respondent will be indeed prejudiced. In any case, it the applicant’s appeal and as a matter of fact, he should have been the first to file and serve written submissions.
19. More importantly and while placing reliance on the above two cited authorities, this court is not persuaded by the reasons of the office organisation of the applicant’s counsel. The reasons tendered by counsel are not satisfactory to allow this court give room for filing a supplementary record of appeal. The instant application is dated June 8, 2022 close to a year of filing the record of appeal being the June 14, 2021.Most notable, the applicant has not tendered the supposed pleadings in Civil Suit No 54 of 2013.How would the court even make a finding of what is intended to be filed as a supplementary record of appeal when the same has not been presented before it? The applicant is not only unfair to the 1st respondent but also to the court. This court will not therefore engage in a fishing expedition to determine whether the intended supplementary record of appeal would be of assistance.
20. Arising from the above, I find the notice of motion application dated June 8, 2022 with no merit and the same is dismissed. Costs to be in the cause. It is so ordered.

DATED, SIGNED & DELIVERED VIRTUALLY AT NAROK ON THIS 22ND DAY OF SEPTEMBER, 2022.

HON. C.G. MBOGO

JUDGE

22/9/2022

In the presence of: -

CA:Chuma

Mr Stanley Kinyanjui for the appellants.

Ms Mungai holding brief for Mr. Orege for the 1st respondent

