



**Waweru v Waweru (Environment and Land Appeal 44 of 2018)
[2022] KEELC 15503 (KLR) (19 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15503 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 44 OF 2018**

JG KEMEI, J

DECEMBER 19, 2022

BETWEEN

JOSEPH WAWERU APPELLANT

AND

TABBY WAMBUI WAWERU RESPONDENT

RULING

1. Before court is an application dated April 14, 2022 by the appellant principally seeking leave to adduce additional evidence on appeal.
2. The application is based on the grounds thereat that are reiterated in the supporting affidavit of even date of Rev Joseph Waweru the appellant. He averred that in the year 2020 long after the conclusion of the trial court case, Thika CMCC 1259 of 2005, the Ministry of Lands, Housing and Urban Development made a finding that the map for RUIRU/KIU BLOCK 6 did not correspond with the ground situation. That the subject of the trial Court and indeed the instant appeal, RUIRU/KIU BLOCK 6/273 was among those affected and a copy of letter dated March 11, 2020 was annexed as JW1 to that end. That by a further letter dated July 7, 2020 – JW2 by the Ministry of Lands recommended a resurvey of RUIRU/KIU BLOCK 6 so that the registry index map can be amended and fresh title deeds be issued. That the resurvey was done and issuance of fresh title deed is pending. That the finding by the Ministry of Lands was done in 2020 and therefore such information could not be available during the trial hearing hence the application.
3. The respondent, Tabby Wambui Waweru swore her replying affidavit on June 2, 2022. She contended that there has been inordinate delay in prosecuting the instant appeal which was filed way back in 2018. That indeed the evidence alluded to was made available in the year 2020 but this application has been filed two years later. That once new title deeds are issued then parties will be litigating over a new subject matter. She beseeched the court to dismiss the application with costs.



4. On June 15, 2022 directions were taken and parties agreed to canvass the application by way of written submissions.
5. The firm of JK Ngaruiya & Co Advocates filed submissions dated June 16, 2022 whilst the respondent's submissions dated July 10, 2022 were filed by Mbiyu Kamau & Co Advocates.
6. The appellant submitted that this court is empowered under Section 78 Civil Procedure Act to take additional evidence on appeal within the parameters set out by judicial pronouncements by the Court of Appeal in Mzee Wanjia & 93 Others v AK Saikwa and Others (1988) 1 KAR 462 and the Supreme Court in Hon Mohamed Abdi Mahamud vs Ahmed Abdullahi Mohammed and 3 others Petition No 7 of 2018. That the evidence sought to be adduced could not be availed in the trial court but the appellant had raised the issue of mismatch in numbering of the plots based on the limited communication received from the Directors of Githurai Tinganga Co Ltd to the Director of Survey. That the trial court judgement is assailed because it was in favour of the respondent despite the said mismatch hence the application.
7. Conversely the respondent reiterated the principles for the court's consideration in such an application as laid out in the Supreme Court case of Mohammed supra. That the appellant had not satisfied the stated threshold and what he seeks to adduce is new evidence altogether as the issue of new titles is pending. That JW2 refers to a mismatch for some parcels of land and the appellant has not adduced evidence to demonstrate that the subject parcel of land herein is one of the affected plots.
8. The singular issue falling for determination is whether the application is merited.
9. The power to take additional evidence on appeal is founded on section 78 of the Civil Procedure Act that;
 - (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 charged conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein."
10. Additionally Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 provides that:
 - "27. The parties to an appeal shall not be entitled to produce additional evidence,
 - (1) 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.”

11. The Supreme Court in the case of *Mohamed Abdi Mahamud v Ahmed Abdullabi Mohamad & 3 Others* [2018] eKLR, laid guidelines for admission of additional evidence. The guidelines were set out as follows:

- “(79) 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 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.

(80) 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.”

12. The appellant contended that the resurvey communicated in the letter marked JW1 could not be availed during trial because it was conducted after the suit was already determined. The respondent does not refute the survey exercise but avers that allowing such evidence in view of the pending new title deeds would amount to relitigating on fresh issues altogether. If at all that be the case then in my opinion there will be no difficulty than for this court to invoke section 78 (e) *Civil Procedure Act* above and order a fresh trial.
13. I rely on the Court of Appeal decision in *Attorney General v Torino Enterprises Limited* [2019] eKLR that allowed production of additional documentary evidence on appeal upon being satisfied that the applicant had met the threshold set out in the case of Mahamud supra. The court directed the additional evidence be adduced by means of affidavit and be filed as supplementary record of appeal with the respondents being at liberty to file a replying affidavit, if any, to the supplementary record of appeal.
14. The Court of Appeal added its voice on this subject in *Safe Cargo Limited v 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.”
15. Applying the above principles set out in the above case the court appreciates that the issue of the RIM and the location of the plots on the ground was an issue that was raised throughout the trial of the suit in the lower court necessitating the court to order the Government surveyor to prepare a report which was tabled before the court. It is the appellants case that there is now a new RIM that has been prepared for Block 6 to produce an amended RIM that corresponds with the ground. It is unfortunate



that the applicant did not find it necessary to attach the said RIM and explain to the court how the said document will affect the position of the suit land in question vis a vis the position of the parties herein. Be that as it may I am of the view that the RIM has been prepared after the Judgement, I am satisfied that the interest of justice shall be served by allowing the adduction of the document.

16. In the end I allow the application in the following terms;
- a. The appellant shall file and serve within 14 days from today, a supplementary record of appeal annexing the additional evidence set out in the notice of motion being the letter dated March 11, 2020 ; letter dated the July 7, 2020 and evidence of amended RIM in default the orders shall lapse.
 - b. The respondent shall file and serve a replying affidavit within 14 days of service of the supplementary record of appeal in response to the additional evidence.
 - c. Thereafter parties to take directions on the hearing and disposal of the appeal.
 - d. The costs shall be in favour of the respondent.

DELIVERED, DATED AND SIGNED AT THIKA THIS 19TH DAY OF DECEMBER, 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Njoka HB Ngaruiya for Appellant

Respondent - Absent

Court Assistant – Phyllis / Kevin

