



Aono & another v Gaywa & 2 others (Environment and Land Appeal E034 of 2021) [2025] KEELC 473 (KLR) (10 February 2025) (Ruling)

Neutral citation: [2025] KEELC 473 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E034 OF 2021
SO OKONG'O, J
FEBRUARY 10, 2025**

BETWEEN

LEONIDA SANGONDA AONO 1ST APPELLANT

GEORGE ODHIAMBO AONO 2ND APPELLANT

AND

BERTRAND LUBANGA GAYWA 1ST RESPONDENT

ELISHA OTIENO OCHOLA 2ND RESPONDENT

KENGA KALUME NURU 3RD RESPONDENT

RULING

Background

1. The full facts giving rise to this appeal are set out in the ruling delivered herein on 9th February 2023. In summary, the appellants filed a suit against the respondents herein before this court on 6th September 2016 namely, Kisumu ELCC No. 237 of 2016. The suit was transferred to the lower court sometime in 2018 and was given a new case number namely, Kisumu CMC ELC No. 28 of 2018. In their plaint, the appellants averred that all that parcel of land known as Kisumu/Chiga/2 (hereinafter referred to as “the suit property”) was at all material times registered in the name of Henry Aono Onyuro, deceased (hereinafter referred to only as “the deceased”). The appellants averred that the 1st appellant was the widow of the deceased while the 2nd appellant was his son. The appellants averred that they were the legal representatives of the estate of the deceased.
2. The appellants averred that the deceased died on 25th October 1984 and that before and after the death of the deceased, they were using the suit property for cultivation. The appellants averred that on 31st August 2016, they discovered that the 1st respondent had caused the suit property to be registered in his name on 5th March 1992 and that the property was subsequently transferred to the 2nd and 3rd



- respondents on 27th April 2004 and 16th October 2013 respectively. The appellants averred that the respondents caused the suit property to be transferred to their names after the death of the deceased before a Grant of Letters of Administration in respect of his estate was issued.
3. The appellants sought judgment against the respondents for a declaration that the suit property was illegally and fraudulently transferred to the respondents and an order for the rectification of the register of the property by the cancellation of the entries thereon relating to the respondents and the restoration of the property to the name of the deceased as the proprietor thereof.
 4. The suit was defended by the 3rd respondent only. The 3rd respondent averred that he purchased the suit property from the 2nd respondent in good faith and was given a title and possession thereof. The 3rd respondent averred that the suit against him was malicious and did not disclose any reasonable cause of action. The 3rd respondent averred that he was a bona fide purchaser of the suit property without notice of any defect in the title that was held by the 2nd respondent. The 3rd respondent averred that he had been in possession of the suit property since he acquired the same and that at no time was it used for agricultural purposes as claimed by the appellants. The 3rd respondent denied that he acquired the suit property fraudulently.
 5. Following the transfer of the suit to the lower court, the lower court heard the matter and delivered a judgment on 12th May 2021. The lower court made a finding that the appellants had not proved their case to the required standard and dismissed the suit with costs to the 3rd respondent. The court held that the appellants had failed to prove that the 3rd respondent acquired the suit property fraudulently. The court found that the 3rd respondent had demonstrated that he was a bona fide purchaser of the suit property for value without notice of any defect in its title and that if there was any fraud, he was not a party to the same.
 6. The appellants were aggrieved by the said decision and filed the present appeal on 31st May 2021. The appellants have challenged the decision of the lower court on several grounds set out in their memorandum of appeal. The appellants have contended among others that the lower court misapprehended and/or ignored their prayer for a declaration that the suit property was illegally and fraudulently transferred to the 1st, 2nd and 3rd respondents despite having before it evidence showing that the 1st respondent purportedly acquired the suit property from a deceased person before a Grant of Letters of Administration had been issued in respect of his estate. The appellants have also contended that the lower court failed to appreciate that the 1st respondent lacked the capacity to sell the suit property as he did not have a valid title to the property that he could pass to the 2nd respondent and subsequently to the 3rd respondent. The appellants have contended further that the lower court failed to appreciate that the title that was held by the 1st respondent was tainted with illegality the same having been acquired through an unprocedural process. The appellants have contended also that the lower court failed to appreciate that the 1st and 2nd respondents having failed to defend the suit, the allegations that were made against them by the appellants were uncontroverted and vitiated the 3rd respondent's title. The appellants have asked the court to set aside the decision of the lower court and to substitute the same with an order granting the prayers that the appellants had sought in the lower court. The appellants have already filed a record of appeal and the court has given directions on the hearing of the appeal.

The application before the court

7. What is now before me is a Notice of Motion application dated 25th January 2024 brought by the appellants under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, and Order 42 Rules 27 and 28 of the Civil Procedure Rules. In the application, the appellants are seeking leave of the court to



produce additional evidence namely; typed proceedings in Kisumu CMC CR. No. E1034 of 2021, R. v. Kenga Kalume Nuru, judgment in the same case delivered on 9th October 2023, court order for the rectification of the register made in that case on 9th October 2023 and a notice of intention to rectify the register dated 11th December 2023. The application which is supported by the affidavit, supplementary affidavit and further supplementary affidavit of the 1st appellant was brought on the grounds that the appellants wished to produce further evidence in support of their appeal. The appellants averred that at the time of filing the appeal, the evidence sought to be produced namely; the proceedings, judgment and orders made in Kisumu CMC CR. No. E103 of 2021, R. v. Kenga Kalume Nuru (hereinafter referred to only as “the Criminal Case”) were not available. The appellants averred that the documentary evidence they wish to produce will assist the court in arriving at a fair and just decision of the appeal.

8. The application was opposed by the 3rd respondent through a replying affidavit sworn on 30th September 2024. The 3rd respondent averred that he did not participate in the Criminal Case and that the case was instituted, proceedings undertaken and judgment made after the conclusion of the lower court case whose decision is the subject of the appeal herein. The 3rd respondent averred that the orders made in the Criminal Case on 9th October 2023 were illegal and void in that they were made against a person who was not a party to the proceedings. The 3rd respondent averred that orders made against the 2nd respondent herein in the said Criminal Case could not defeat his title since the 2nd respondent was not the registered owner of the suit property when the orders were made. The 3rd respondent averred that the appellants had not demonstrated that the new evidence they intended to produce was relevant and would assist the court in arriving at a just determination of the appeal. The 3rd respondent averred that the new evidence was intended to fill up the gaps in the evidence that was adduced by the appellants in the lower court. The 3rd respondent averred that the appellants commenced the Criminal Case after the determination of the lower court suit the subject of this appeal in which their failure to institute such proceedings was questioned. The 3rd respondent averred that it would not be fair to him to admit the new evidence sought to be produced by the appellants.
9. The application was heard by way of written submissions. The appellants filed submissions dated 16th September 2024 while the 3rd respondent filed submissions dated 10th December 2024. I have considered the appellants’ application and the response thereto by the 3rd respondent. I have also considered the submissions by the advocates for the parties. The only issue arising for determination in the application before the court is whether the appellants should be granted leave to adduce additional evidence at this stage. In *Mohamed Abdi Mahamud v. Ahmed Abdullahi Mohamad & 3 others* [2018] eKLR cited by the 3rd respondent, the Supreme Court stated as follows on an application to adduce additional evidence:

“(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...

[90] We are convinced that disallowing the additional evidence would deny the Appellant a fair trial, which is a non-derogable right under our Constitution. In addition, we are satisfied that allowing the additional evidence is not prejudicial to any party and will be in the interests of justice as the evidence is necessary and crucial in making of a proper judicial finding as to whether the Appellant had the requisite academic credentials to vie for governor of Wajir County which are core issues before the Court.”



10. In *Wanjie & others v. Sakwa & others* [1984] KLR 275 also cited by the 3rd respondent, Chesoni Ag.JA. stated as follows:

“...the principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of *Ladd v Marshall* [1954] 1 WLR 1489 at 1491 and those principles are:

- (a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
- (b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
- (c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.”

11. The lower court suit as mentioned earlier was brought on 6th September 2016. The suit was heard and concluded on 3rd February 2021. The lower court delivered its judgment which is the subject of this appeal on 12th May 2021. I am of the view that when we talk of additional evidence at the appellate stage, it must be evidence that could have been produced at the trial of the lower court suit but was not so produced because either, it could not be obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not be produced at the time of the suit by the party seeking to adduce the additional evidence. In the case before me, what the appellants wish to produce as additional evidence are proceedings, judgment and orders issued in Kisumu CMC CR. No. E1034 of 2021, *R. v. Kenga Kalume Nuru* (the Criminal Case). From the material placed before the court by the appellants, the Criminal Case was commenced on 2nd September 2021 after the conclusion of the lower court civil case which is the subject of this appeal on 12th May 2021. The judgment in the Criminal Case was delivered on 9th October 2023, more than 2 years after this appeal was filed on 31st May 2021. It is clear from the foregoing that the evidence sought to be produced by the appellants could not have been produced at the trial of the lower court suit because it was not in existence. The evidence relates to what I would refer to in the absence of a better word as facts that came into existence after the hearing and determination of the lower court suit. I do not think that an appellate court can admit as evidence facts that were not in existence when the suit the subject of the appeal was heard and determined. As I have pointed out, the judgment that the appellants wish to adduce as additional evidence was delivered while this appeal was pending. It is my finding that the type of evidence that the appellants wish to adduce is not admissible. The evidence is not one that could not have been obtained with reasonable diligence for use at the trial or was not within the knowledge of the appellants, or could not have been produced at the time of the hearing of the suit by the appellants. The evidence was not in existence and could not have been used at the trial of the suit. Since the evidence was not in existence, the court cannot say whether it would have had any influence or impact on the decision of the lower court.
12. I have also noted from the proceedings sought to be produced as additional evidence that the prosecution called a total of 11 witnesses while in the lower court suit which is the subject of this appeal, the appellants herein were the only witnesses. I find the 3rd respondent’s claim that the appellants may be trying to fill the gaps or patch up the weak points in their case not far-fetched.



Conclusion

13. In the final analysis and for the foregoing reasons, I find no merit in the application dated 25th January 2024. The application is dismissed with costs to be in the cause.

DATED AND DELIVERED AT KISUMU ON THIS 10TH DAY OF FEBRUARY 2025

S. OKONG'O

JUDGE

PARA 19.

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Munuang'o for the Appellants

Mr. Wesonga for the 3rd Respondent

Ms. J. Omondi-Court Assistant

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