



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 40 OF 2018

M'MBIJIWE M'MUTUOTA.....APPLICANT

VERSUS

JANE KATHANGA.....RESPONDENT

RULING

1. Before me is a notice of motion dated 20/05/2020 brought pursuant to provisions of Section 1A and 3A of the Civil Procedure Act, Order 42 Rule 27, 28, & 29 and Order 51 rule 1 of the Civil Procedure Rules, where the applicant is seeking the following orders

a) Spent

b) That the Court be pleased to allow the applicant to file a supplementary record of Appeal which shall include the following

(i) Proceedings and judgment of the Meru District Lands Tribunal in case No. 76 of 2000.

c) That this Honorable Court be pleased to allow the applicant to adduce and file additional evidence through a supplementary record of Appeal which shall include the following

(i) Judgment of the Meru High Court in HCA No. 91 of 2007 which quashed the decisions in Land Dispute Tribunal and Provincial Appeals Committee.

d) That the cost of this application be in the appeal.

2. The application is based on the grounds on the face of it and on the supporting affidavit of the applicant dated 20/05/2020, who avers that he has always been the registered owner of parcel No. Ntima/Igoki/222 having inherited the same from his father. That the respondent claimed entitlement to the parcel of land in Meru District Lands Tribunal vide case No. 76 of 2000 where the tribunal ordered that the land be divided equally amongst them. Being dissatisfied with the decision, the applicant appealed to the Provincial Lands Appeals Committee Embu which upheld the Meru District Lands Tribunal decision.

3. The applicant appealed against the two decisions at the Meru High Court in HCA No. 91 of 2007 where the respective decisions were quashed and it is the Proceedings and judgment of the Meru District Lands Tribunal in case No. 76 of 2000 and the Judgment of the Meru High Court in HCA No. 91 of 2007 that he seeks to adduce as additional evidence.

4. He avers that the additional evidence is directly relevant to issues for determination in the appeal that the same is credible and if admitted, it shall have significant impact on the determination of the appeal. He further states that the application was brought in a timely manner and the respondent will not suffer any prejudice as the additional evidence is already within her knowledge.

5. The application is not opposed, though the applicant in their submissions dated 29/06/2020 make reference to the respondents replying affidavit dated 3/06/2020 opposing the application. However the said replying affidavit is not in the court file.

6. The applicant submits that the tribunal proceeding were heavily relied on by the respondent yet the same was quashed in Meru High Court in HCA No. 91 of 2007. The additional evidence discloses a strong prima facie case, and it is directly relevant to issues of determination in this court. He relied on the case of **Mohamed Abdi Mahamud V Ahmed Abdullahi Mahamud & 3 other [2018]eKLR** and **Attorney General V Torino Enterprises Limited [2019]eKLR**.

Analysis and determination

7. I have carefully perused the application, and the supporting affidavit and the issue for determination is; **Whether to allow the applicant**

leave to file a supplementary record of Appeal in order to introduce additional evidence.

8. I will start by briefly stating the progress of the file this far. The applicant filed his memorandum of appeal on 12/10/2018 and his record of appeal on 20/01/2020, while this application was filed on 20/05/2020. The matter came up for directions on 23/01/2020 where by, the parties' advocates agreed by consent to have the appeal heard by way of submissions and the court directed that the applicant do file his submissions within 30 days and the respondent to have corresponding 30 days to file hers thereafter. When the matter came up on 21/05/2020, the court noted that the applicant had not filed his submissions whereas the respondent had complied. The filing of the current application has therefore halted the hearing of the appeal.

9. No explanation has been given by the Applicant as to why it took him 5 months to realize that they needed to lodge the current application. Further, the applicant has not given a plausible explanation as to why the documents in question are being introduced at this particular time.

10. The applicant has however urged the Court to exercise its discretion in his favour. I do hold that the same should be exercised cautiously. In the case of **Geoffrey Muriungi & another v John Rukunga M'Imonyo [2017] eKLR**, Gikonyo J held that;

“Doubtless, the appellate court has power to call for and admit additional evidence on appeal, but that power should be utilized sparingly only in apt cases where exceptional circumstances exist.”

11. In **Attorney General vs Torino Enterprises Limited (2019) eKLR** the Court of Appeal allowed an application to adduce additional evidence holding that:

“.....We are further satisfied that the additional evidence is credible as it consists of official documents written and received in the course of public duty and the document originate from a public office having proper custody thereof. We note the authenticity and veracity of the itemized documents has not been impugned. We are satisfied that the additional evidence is not meant to bolster or fill gaps in the applicants pending appeal rather, prima facie, the additional documents are aimed at removing any vagueness or doubt over the suit property and the documents have a direct bearing on the main issue in the pending appeal...”

12. Since the documents which the applicant intends to introduce are not only official, but are related to court proceedings, then I am of the view that the same may assist the court to arrive at a just determination.

13. In conclusion, I allow the application dated 20.5.2020 on the following terms;

1) The applicant is to file and serve a supplementary Record of Appeal which shall only include the documents mentioned in the application within 14 days from the date of delivery of this ruling otherwise the orders shall lapse.

2) The applicant is to bear the costs of this application.

3) Mention on 28.4.2021.

DATED, SIGNED AND DELIVERED AT MERU THIS 17TH DAY OF MARCH, 2021

HON. LUCY. N. MBUGUA

ELC JUDGE

ORDER

The date of delivery of this Ruling was given to the advocates for the parties through a virtual session via Microsoft teams on 26.1.2021. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17th March, 2020 and published in the Kenya Gazette of 17th April 2020 as Gazette Notice no.3137, this Ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the ***Civil Procedure Rules*** which requires that all judgments and rulings be pronounced in open court.

HON. LUCY N. MBUGUA

ELC JUDGE