



Gerad v Njenga (Civil Appeal 2 of 2022) [2024] KEELC 5173 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5173 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
CIVIL APPEAL 2 OF 2022
LC KOMINGOI, J
JULY 4, 2024**

BETWEEN

SULDANA HABAT GERAD APPELLANT

AND

MONICAH NDUTA NJENGA RESPONDENT

RULING

1. This is the Notice of Motion dated 12th September 2023 brought under;

(Section 78 (1) (d) of the *Civil Procedure Act*, Order 42, 51 of the *Civil Procedure Act*, rule 41 of the *Environment & Land Court Practice Directions* 2011, rule 29(1) (b) of the *Court of Appeals Rules* and all enabling provisions of the law.)

2. It seek orders;

1. Spent.

2. That the Applicant be granted leave to file and adduce New Evidence in support of her case as espoused in the Appellant/Applicant's Supporting Affidavit.

3. This Honourable Court be pleased to grant leave that the New Documentary Evidence be adduced by way of an Affidavit and filed as a supplementary Record of Appeal.

4. In the alternative;

This Honourable Court be pleased to order the County Director of Survey – Kajiado County Government to present a final a comprehensive, detailed and conclusive survey report in respect to the Suit Property herein 725 Business Olekasasi Trading Centre and that of 413 Residential – Olekasasi Trading Centre;

5. Costs to be in cause.



3. The grounds are on the face of the application and are set out in paragraphs 1 to 22.
4. The application is supported by the Affidavit of Suldana Habat Gerad, the Appellant herein, sworn on the 12th September 2023 and a further affidavit sworn on 31st October 2023.
5. The Application is opposed. There is a Replying Affidavit dated 23rd October 2023 by the Respondent.
6. On the 25th October 2023 the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.

The Appellant's Submissions.

7. They are dated 7th February 2024. Counsel submitted that the Learned Trial Magistrate made a finding on 4th February 2021 that the issue for determination was a boundary dispute but that the County Surveyor failed to determine the boundary dispute. It is also submitted that instead the County Surveyor reported an ambiguous finding that the parties were using the allotment letters to claim ownership of one plot and were therefore disputing ownership not boundaries. He has put forward the cases of *Republic v. Kenya School of Law & 2 Others Ex parte Juliet Wanjiru Njoroge & 5 others* (2015) eKLR, *Woburn Estate Limited v. Margaret Bashforth* (2016) eKLR where the Court of Appeal cited with Approval the case of *Refrigeration and Kitchen utensils Ltd v. Gulabachand Popattal Shah & Another*; Miscellaneous Application No. 39 of 1990; *Sam Nyamweya & 3 Others v. Kenya Premier League Limited & 2 Others*; *Charles Mutuku v. Christopher Nzioki & Another* (2019) eKLR.
8. Counsel further submitted that the undated and vague survey Report failed to ascertain the effect of validation of the allotment letter for Plot No. 725 on 25/10/2016 and the effect of non-validation of the allotment letter for Plot No.413.
He has put forward the cases of *Azzuri Limited v. Pink Properties Ltd* (2018) eKLR ; *Joseph Mburugu v. Silas Mwiti Mwigika* (2022) eKLR which cited with approval *Elizabeth Wambui Githinji & 29 Others v. KURA & 4 Others* (2019) eKLR .
9. It is also submitted that the undated survey was never produced according to the rules of production of evidence as the County Surveyor was not called to produce it. He has put forward the case of *Lwangu v. Ndote* (2021) KEELC 2 KLR; *Mary Wairimu Musindi v. Linet Amuli & 4 Others* (2022) eKLR .
10. Counsel also submitted that the Learned Trial Magistrate erred in relying on the letter dated 20th September 2007 and the undated Survey Report as it resulted in manifest errors apparent on the face amounting to grave injustice. He has put forward the case of *Equity Bank Ltd v. West Link Mbo Limited* (2013) eKLR.
11. It is further submitted that new evidence will assist this court to determine the case to finality. Reliance is placed on Section 78 of the *Civil Procedure Act* and Order 42 Rule 27 of the *Civil Procedure Rule* 2010.
He has also put forward the cases of *Timau Flour Limited v. Elijah Ndungu Kamau* (2021) eKLR; *Florence Akinyi Odula v. Akamba Public Road Services Ltd & Another* (2014) eKLR.
12. It is also submitted that new evidence is directly relevant to the matter before court as it relates to the actual history and alienation of the suit property. He has put forward the case of *Mohammed Abdi Mobamed v. Ahmed Abdullahi Mohammed & 3 Others* (2018) eKLR.
13. It is finally submitted that this application be found to be merited and the new Survey Report dated 20th April 2023 be admitted as a new evidence.



The Respondent's Submissions

14. The Respondent's submissions are dated 14th March 2024 counsel raised one issue for determination; whether the Appellant should be allowed to adduce new evidence at this stage.
15. It is submitted that the Appellant has not demonstrated that the evidence she wants to introduce could not have been obtained with reasonable diligence at the trial.
16. It is also submitted that the respondent has been denied an opportunity to develop the suit property since 2007 hence it is in the interest of justice that this appeal is disposed of as early as possible.
Further that the Respondent ought to be left to enjoy the fruits of her Judgement.
17. I have considered the Notice of Motion, the Affidavits in support, the response thereto and the written submissions. The issue for determination is whether this application is merited.
18. One of the grounds of appeal is
“that the learned trial magistrate erred in law and infact in misinforming herself on the contents of the report presented to the court by the County Surveyor.”
19. It is the Appellant's contention that the undated Survey Report was not produced according to the rules of evidence as per Section 35 (1) *Evidence Act*.
20. Section 78 of the *Civil Procedure Act* provides that;
“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.”
21. Order 42 Rules 27, 28 and 29 of the *Civil Procedure Rules* provide:
“27.
 - (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 judgement, 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.”
22. The Supreme Court in the Case of *Mohammed Abdi Mohamud v. Ahmed Abdullabi Mohammed & 3 Others* (2018) eKLR laid down the following principles;
- “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.”

23. I am persuaded that the new evidence will assist the court to determine the dispute herein to finality.

In the case of *Florence Akinyi Odula v. Akamba Public Road Services Ltd & Another* (2014) eKLR it was held;

“The basis of the Motion is said to be Order 42 rule 27 (1) (b) of the *Civil Procedure Rules* which provides as follows:

- (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-
 - (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.”

The aforesaid provision allows the parties to the appeal to adduce additional evidence if the document to be produced or any witness to be examined to enable the court pronounces judgment or for any other substantial cause. The Court of Appeal has a near similar provision which gives the Court of Appeal the discretion to permit a party to adduce additional evidence vide rule 29 of the *Court of Appeal Rules*. The Court of Appeal in *Wanja v Saikwa* (1984) 275 restated the principles to be considered before granting leave to adduce additional evidence *inter alia* as follows:

- 2. The principles upon which an appellate court in civil case, will exercise its discretion in deciding whether or not to receive further evidence are:
 - a. It must be shown that the evidence could not be 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.
 - c. The evidence is on the face of it credible.



3. The rule governing the admission of additional evidence does not entitle a party applying to bring in contradictory, as opposed to additional evidence, for to do so would mean the case would in effect be re-heard and retried as to the existing facts which cannot have been the intention of the rule.”

I will apply the above principles to this Motion. It is clear in my mind that the discovery of spine injury needed specialized medical personnel and facilitates. I am convinced that the Applicant had applied due diligence to obtain the relevant medical document but the later document could not be obtained for the above reason. If the above medical evidence is adduced it will obviously assist this court pronounce the appropriate award.”

24. In conclusion I find merit in this application and I grant the orders sought namely;
 - a. That the County Director of Survey Kajiado County Government is hereby directed to present a final comprehensive, detailed and conclusive Survey Report in respect to the suit property herein 725 Business Ole Kasasi Trading Centre and that of 413 Residential Ole Kasasi Trading Centre within 45 days from the date of this Ruling.

Each party shall be at liberty to cross-examine on the same if need be.
 - b. That costs of this application be borne by the Appellant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 4TH DAY OF JULY 2024.

L. KOMINGOI

JUDGE.

In the presence of:-

Ms. I. Odhiambo for the Appellant.

N/A for the Respondent.

Court Assistant – Mutisya.

